Union Calendar No. 395

104TH CONGRESS
2nd Session

HOUSE OF REPRESENTATIVES

REPORT
104–749

INVESTIGATION INTO THE ACTIVITIES OF FEDERAL LAW ENFORCEMENT AGENCIES TOWARD THE BRANCH DAVIDIANS

THIRTEENTH REPORT

BY THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

PREPARED IN CONJUNCTION WITH THE

COMMITTEE ON THE JUDICIARY

together with

ADDITIONAL AND DISSENTING VIEWS

AUGUST 2, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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(III)

LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, DC, August 2, 1996.

HON. NEWT GINGRICH,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: By direction of the Committee on Government Reform and Oversight and on behalf of Mr. Hyde and Mr. McCollum of the Committee on the Judiciary, I herewith submit the committee's thirteenth report to the 104th Congress. The report is based on a joint investigation conducted by the Judiciary's Subcommittee on Crime, and the Government Reform and Oversight Committee's Subcommittee on National Security, International Affairs, and Criminal Justice.

Sincerely,

WILLIAM F. CLINGER, Jr.,
Chairman.

(v)

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AUGUST 2, 1996.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CLINGER, from the Committee on Government Reform and Oversight, submitted the following

THIRTEENTH REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

BASED ON A JOINT INVESTIGATION BY THE SUBCOMMITTEE ON NATIONAL SECURITY, INTERNATIONAL AFFAIRS, AND CRIMINAL JUSTICE OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, AND THE SUBCOMMITTEE ON CRIME OF THE COMMITTEE OF THE JUDICIARY

On July 25, 1996, the Committee on Government Reform and Oversight approved and adopted a report entitled "Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians." The report was prepared jointly with the Committee on the Judiciary. The chairman was directed to transmit a copy to the Speaker of the House.

EXECUTIVE SUMMARY

From April 1995 to May 1996, the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on National Security, International Affairs, and Criminal Justice of the House Committee on Government Reform and Oversight jointly conducted an investigation into the actions of the Federal agencies involved in law enforcement activities near Waco, TX in late 1992 and early 1993 toward a group known as the Branch Davidians. As part of that investigation, the subcommittees held 10 days of public hearings. During the course of those hearings, more than 100 witnesses appeared and gave testimony concerning all aspects of the government's actions. The subcommittees also reviewed thousands of documents requested from and provided by the agencies involved in these actions. Additionally, the subcommittees met with others who were involved in these actions or who offered additional information or opinions concerning them.

This report is the final product of that investigation. It summarizes the most important facts about the key issues of these activities considered by the subcommittees. The report also sets forth the subcommittees' findings with respect to many disputed issues and to new facts uncovered during the investigation. Finally, the report makes recommendations in order to prevent the mistakes that occurred at Waco from reoccurring in future law enforcement operations.

A. A BRIEF SUMMARY OF THE GOVERNMENT'S ACTIONS TOWARD THE BRANCH DAVIDIANS

In June 1992, the Austin, TX Office of the Bureau of Alcohol, Tobacco and Firearms (ATF) opened a formal investigation into allegations that members of a Waco, TX religious group, known as the Branch Davidians, and in particular their leader, Vernon Howell, also known as David Koresh, were in possession of illegal firearms and explosive devices. In January 1993, ATF agents commenced an undercover operation in a small house directly across from the property on which the Branch Davidians lived. The ATF agents posed as students attending classes at a local technical college to monitor the activities of the Davidians. Part of the undercover operation involved one of the agents meeting with Koresh and other Davidians several times by expressing an interest in their religious beliefs. As a result of the evi-

dence gathered by the ATF, and in particular during the undercover operation, the ATF sought and received from a Federal judge an arrest warrant for Koresh and a warrant to search the Branch Davidian residence.

Shortly before the ATF planned to serve the search and arrest warrants, it contacted Operation Alliance, a government office which coordinated military counter drug operations along the southwest border. Through that office, the ATF requested that military personnel provide training to the ATF agents who would be involved in the raid to serve the warrants. The ATF's request for military assistance also would have involved the military personnel as participants in the raid itself. After military legal advisors cautioned that such activity might violate Federal law, the ATF's request was modified so that military personnel only provided training to the ATF agents and did not participate in the raid. Because the ATF alleged that the Davidians were also involved in illegal drug manufacturing, the assistance provided by these counter drug military forces was provided to the ATF without reimbursement.

On February 28, 1993, a force of 76 ATF agents stormed the Davidian residence to serve the arrest and search warrants. Prior to the commencement of the raid, however, the Davidians had learned of the ATF's plans. As the agents arrived at the Davidians' residence, the Davidians engaged the ATF agents in a gun battle which continued for almost 90 minutes. Four ATF agents were killed in the battle and more than 20 agents wounded. At least two Davidians were killed by ATF agents and several others, including Koresh, were wounded.

After a cease-fire was arranged, the Federal Bureau of Investigation (FBI) dispatched members of its Hostage Rescue Team (HRT) to Waco to take control of the situation at the request of the ATF. At 6 a.m. the next morning, the FBI formally took control of the situation and commenced a 51 day standoff with the Davidians. During this time, FBI officials engaged in daily negotiations with the Davidians in an effort to end the standoff peaceably. Between February 18 and March 23, 35 persons, including 21 children, left the residence and surrendered to the FBI. From March 23 to April 18, however, none of the remaining Branch Davidians left the residence.

In addition to the continual negotiations with the Davidians, FBI officials took other steps to induce the Davidians to surrender. These tactics included tightening the perimeter around the Davidian residence, cutting off electricity to the residence, and at one point, shining bright lights at the residence and playing loud music and irritating sounds over loudspeakers. During the course of the standoff, FBI negotiators consulted with several experts routinely retained by the FBI. In some cases, the advice of these experts was followed while in other cases it was not. Many other persons offered advice to the FBI. While a few of these individuals offered credible assistance, the FBI chose to ignore the offers of assistance from all of these persons.

During the week of April 12, senior Justice Department officials began considering a plan developed by the FBI to end the standoff. Attorney General Janet Reno, other senior Justice Department officials, and FBI officials held several meetings concerning the plan. The FBI also requested the input of Department of Defense employees and military personnel concerning the plan to end the standoff. During these deliberations Associate Attorney General Webster Hubbell personally discussed the status of the negotiations with the FBI's chief day-to-day negotiator in Waco. The proposed plan centered around the use of a chemical riot control agent which would be injected through the walls of the Davidian residence in order to induce the residents to leave the structure. It provided for the methodical insertion of the riot control agent into different parts of the building over a 48 hour period. The plan also contained a contingency provision to be used if the Davidians fired on the FBI agents who were implementing the plan. In that event, the FBI proposed to insert the riot control agent into all portions of the residence simultaneously. As a result of these deliberations, the Attorney General approved the implementation of the plan for April 19, 1993.

At approximately 6 a.m. on April 19, the FBI's chief negotiator, Byron Sage, telephoned the Davidians and informed them that the FBI was inserting the riot control agent into the residence. Sage also began broadcasting a prepared statement over loudspeakers that the FBI was "placing tear gas in the building" and that all residents should leave. As the announcement was being made, FBI agents using unarmed military vehicles with booms mounted on them began to insert the riot control agent into the compound by ramming holes into the sides of the structure and then using devices mounted on the booms to spray the riot control agent into the holes in the walls. Almost immediately the Davidians began to fire on the vehicles being used by the FBI. At 6:07 a.m., the commander of the Hostage Rescue Team ordered that the contingency provision of the operations plan be implemented and that the riot control agent be inserted in all portions of the residence at once. During 6 hours of insertion of the riot control agent no residents exited the compound.

At approximately 12:07 p.m., a fire was observed in one portion of the residence. Within 2 minutes, two other fires developed. Within a period of 8 minutes, the three fires had engulfed the entire structure, ultimately destroying it completely.

During the fire, sounds of gunfire from within the structure were heard. Some of these sounds were live rounds exploding in the flames inside the compound. However, other sounds were methodical and evenly-spaced, indicating the deliberate firing

of weapons. Nine persons escaped from the structure during the course of the fire but more than 70 other residents remained inside. All of these persons died. Of this number, autopsies indicated that 19 died from gunshots at close range. Most of the other residents who remained inside the structure died as a result of smoke inhalation from the fire or from burns from the fire.

B. FINDINGS OF THE SUBCOMMITTEES

As a result of its investigation, the subcommittees make the following findings:

The Branch Davidians

1. But for the criminal conduct and aberrational behavior of David Koresh and other Branch Davidians, the tragedies that occurred in Waco would not have occurred. The ultimate responsibility for the deaths of the Davidians and the four Federal law enforcement agents lies with Koresh.

2. While not dispositive, the evidence presented to the subcommittees indicates that some of the Davidians intentionally set the fires inside the Davidian residence.

3. The Davidians could have escaped the residence for a significant period of time after the start of the fire. Most of the Davidians either did not attempt to escape from the residence or were prevented from escaping by other Davidians.

4. The gunshot wounds which were the cause of death of 19 of the Davidians on April 19 were either self-inflicted, inflicted by other Davidians, or the result of the remote possibility of accidental discharge from rounds exploding in the fire.

The Department of the Treasury

1. Treasury Secretary Lloyd Bentsen and Deputy Secretary Roger Altman acted highly irresponsibly and were derelict in their duties in failing to even meet with the Director of the ATF in the month or so they were in office prior to the February 28 raid on the Davidians residence, in failing to request any briefing on ATF operations during this time, and in wholly failing to involve themselves with the activities of the ATF.

2. Senior Treasury Department officials routinely failed in their duty to monitor the actions of ATF officials, and as a result were uninvolved in the planning of the February 28 raid. This failure eliminated a layer of scrutiny of the plan during which flaws in it might have been uncovered and corrected.

3. After the raid failed, Assistant Treasury Secretary Ronald Noble attempted to lay the blame entirely on the ATF despite the fact that Treasury Department officials, including Noble, failed to properly supervise ATF activities leading to the raid. Moreover, Treasury Department officials, having approved the raid, failed to clearly and concisely communicate the conditions under which it was to be aborted.

The Bureau of Alcohol, Tobacco and Firearms

1. The ATF's investigation of the Branch Davidians was grossly incompetent. It lacked the minimum professionalism expected of a major Federal law enforcement agency.

2. While the ATF had probable cause to obtain the arrest warrant for David Koresh and the search warrant for the Branch Davidian residence, the affidavit filed in support of the warrants contained an incredible number of false statements. The ATF agents responsible for preparing the affidavits knew or should have known that many of the statements were false.

3. David Koresh could have been arrested outside the Davidian compound. The ATF chose not to arrest Koresh outside the Davidian residence and instead were determined to use a dynamic entry approach. In making this decision ATF agents exercised extremely poor judgment, made erroneous assumptions, and ignored the foreseeable perils of their course of action.

4. ATF agents misrepresented to Defense Department officials that the Branch Davidians were involved in illegal drug manufacturing. As a result of this deception, the ATF was able to obtain some training from forces which would not have otherwise provided it, and likely obtained other training within a shorter period of time than might otherwise have been available. Because of its deception, the ATF was able to obtain the training without having to reimburse the Defense Department, as otherwise would have been required had no drug nexus been alleged.

5. The decision to pursue a military style raid was made more than 2 months before surveillance, undercover, and infiltration efforts were begun. The ATF undercover and surveillance operation lacked the minimum professionalism expected of a Federal law enforcement agency. Supervisors failed to properly monitor this operation.

6. The ATF's raid plan for February 28 was significantly flawed. The plan was poorly conceived, utilized a high risk tactical approach when other tactics could have been successfully used, was drafted and commanded by ATF agents who were less qualified than other available agents, and used agents who were not sufficiently trained for the operation. Additionally, ATF commanders did not take precautions to ensure that the plan would not be discovered.

7. The senior ATF raid commanders, Phillip Chojnacki and Chuck Sarabyn, either knew or should have known that the Davidians had become aware of the impending raid and were likely to resist with deadly force. Nevertheless, they recklessly proceeded with the raid, thereby endangering the lives of the ATF agents under their command and the lives of those residing in the compound. This, more than any other factor, led to the deaths of the four ATF agents killed on February 28.

8. Former ATF Director Stephen Higgins and former ATF Deputy Director Daniel Hartnett bear a portion of the responsibility for the failure of the raid. They failed to become significantly involved in the planning for the raid and also failed to instill in the senior raid commanders an understanding of the need to ensure that secrecy was maintained in an operation of this type.

9. There was no justification for the rehiring of the two senior ATF raid commanders after they were fired. The fact that senior Clinton administration officials approved their rehiring indicates a lack of sound judgment on their part.

The Department of Justice

1. The decision by Attorney General Janet Reno to approve the FBI's plan to end the standoff on April 19 was premature, wrong, and highly irresponsible. In authorizing the assault to proceed Attorney General Reno was seriously negligent. The Attorney General knew or should have known that the plan to end the stand-off would endanger the lives of the Davidians inside the residence, including the children. The Attorney General knew or should have known that there was little risk to the FBI agents, society as a whole, or to the Davidians from continuing this standoff and that the possibility of a peaceful resolution continued to exist.

2. The Attorney General knew or should have known that the reasons cited for ending the standoff on April 19 lacked merit. The negotiations had not reached an impasse. There was no threat of a Davidian breakout. The FBI Hostage Rescue Team did not need to stand down for rest and retraining for at least 2 more weeks after April 19, and if and when it did stand down FBI and local law enforcement SWAT teams could have been brought in to maintain the perimeter. Sanitary and other living conditions inside the Davidian residence had not deteriorated during the standoff and there was no evidence that they were likely to deteriorate in the near future. And while physical and sexual abuse of minors had occurred, there was no basis to conclude that minors were being subjected to any greater risk of physical or sexual abuse during the stand-off than prior to February 28. The final assault put the children at the greatest risk.

3. The CS riot control agent insertion and assault plan was fatally flawed. The Attorney General believed that it was highly likely that the Davidians would open fire, and she knew or should have known that the rapid insertion contingency would be activated, that the Davidians would not react in the manner suggested by the FBI, and that there was a possibility that a violent and perhaps suicidal reaction would occur within the residence. The planning to end the stand-off was further flawed in that no provision had been made for alternative action to be taken in the event the plan was not successful.

4. Following the FBI's April 19 assault on the Branch Davidian compound, Attorney General Reno offered her resignation. In light of her ultimate responsibility for the disastrous assault and its resulting deaths the President should have accepted it.

The Federal Bureau of Investigation

1. The CS riot control agent assault of April 19 should not have taken place. The possibility of a negotiated end to the standoff presented by Koresh should have been pursued even if it had taken several more weeks.

2. After Koresh and the Davidians broke a promise to come out on March 2 FBI tactical commander Jeffrey Jamar viewed all statements of Koresh with extreme skepticism and thought the chances of a negotiated surrender remote. While chief negotiator Byron Sage may have held out hope longer, FBI officials on the ground had effectively ruled out a negotiated end long before April 19 and had closed minds when presented with evidence of a possible negotiated end following completion of Koresh's work on interpreting the Seven Seals of the Bible.

3. The FBI should have sought and accepted more expert advice on the Branch Davidians and their religious views and been more open-minded to the advice of the FBI's own experts.

4. FBI tactical commander Jeffrey Jamar and senior FBI and Justice Department officials advising the Attorney General knew or should have known that none of the reasons given to end negotiations and go forward with the plan to end the stand-off on April 19 had merit. To urge these as an excuse to act was wrong and highly irresponsible.

5. CS riot control agent is capable of causing immediate, acute and severe physical distress to exposed individuals, especially young children, pregnant women, the elderly, and those with respiratory conditions. In some cases, severe or extended exposure can lead to incapacitation. Evidence presented to the subcommittees show that use of CS riot control agent in enclosed spaces, such as the bunker, significantly increases the possibility that lethal levels will be reached, and the possibility of harm significantly increases. In view of the risks posed by insertion of CS into enclosed spaces, particularly the bunker, the FBI failed to demonstrate sufficient concern for the presence of young children, pregnant women, the elderly, and those with respiratory conditions. While it cannot be concluded with certainty, it is unlikely that the CS riot control agent, in the quantities used by the FBI, reached lethal toxic levels. However, the presented evidence does indicate that CS insertion into the enclosed bunker, at a time when women and children were assembled inside that enclosed space, could have been a proximate cause of or directly resulted in some or all of the deaths attributed to asphyxiation in the autopsy reports.

6. There is no evidence that the FBI discharged firearms on April 19.

7. There is no evidence that the FBI intentionally or inadvertently set the fires on April 19.

8. The FBI's refusal to ask for or accept the assistance of other law enforcement agencies during the stand-off demonstrated an institutional bias at the FBI against accepting and utilizing such assistance.

The Department of Defense

1. The activities of active duty military personnel in training the ATF and in supporting the FBI's activities during the standoff did not violate the Posse Comitatus Act because their actions did not constitute direct participation in the government's law enforcement activities.

2. The activities of National Guard personnel in training the ATF, in participating in the ATF raid on the Davidian residence, and in supporting the FBI's activities during the standoff did not violate the Posse Comitatus Act because the personnel were not subject to the prohibitions in the act.

3. No foreign military personnel or other foreign persons took part in any of the government's actions toward the Branch Davidians. Some foreign military personnel were present near the Davidian residence as observers at the invitation of the FBI.

C. RECOMMENDATIONS

In order to prevent the errors in judgment and consequent tragic results that occurred at Waco from occurring in the future, the subcommittees' make the following recommendations:

1. **Congress should conduct further oversight of the Bureau of Alcohol, Tobacco and Firearms, the oversight of the agency provided by the Treasury Department, and whether jurisdiction over the agency should be transferred to the Department of Justice**. Congress should consider whether the lack of Treasury Department oversight of ATF activities in connection with the investigation of the Davidians, and the failures by ATF leadership during that investigation, indicate that jurisdiction over the ATF should be transferred to the Department of Justice.

2. **If the false statement in the affidavits filed in support of the search and arrest warrants were made with knowledge of their falsity, criminal charges should be brought against the persons making the statements**.

3. **Federal law enforcement agencies should verify the credibility and the timeliness of the information on which it relies in obtaining warrants to arrest or search the property of an American citizen.** The affidavits on which the arrest and search warrants of Koresh were ordered contained information provided to the ATF by informants with obvious bias toward Koresh and the Davidians and information that was stale in that it was based on experiences years before the investigation. The ATF should obtain fresh and unbiased information when relying on that information to arrest or search the premises of the subjects of investigations.

4. **The ATF should revise its National Response Plan to ensure that its best qualified agents are placed in command and control positions in all operations.** Doing so will help to avoid situations like that which occurred at Waco where lesser qualified agents were placed in positions for which they were, at best, only partially qualified while other, more experienced agents were available whose involvement might have prevented the failure of the raid.

5. **Senior officials at ATF headquarters should assert greater command and control over significant operations.** The ATF's most senior officials should be directly involved in the planning and oversight of every significant operation.

6. **The ATF should be constrained from independently investigating drug-related crimes.** Given that the ATF based part of its investigation of the Branch Davidians on unfounded allegations that the Davidians were manufacturing illegal drugs, and as a result improperly obtained military support at no cost, the subcommittees recommend that Congress restrict the jurisdiction of the ATF to investigate cases involving illegal drugs unless such investigations are conducted jointly with the Drug Enforcement Administration as the lead agency.

7. **Congress should consider applying the Posse Comitatus Act to the National Guard with respect to situations where a Federal law enforcement entity serves as the lead agency.** The fact that National Guard troops were legally allowed to be involved directly in Federal law enforcement actions against the Davidians, while active duty forces were not, is inconsistent with the spirit of the Posse Comitatus Act.

8. **The Department of Defense should streamline the approval process for military support so that Posse Comitatus Act conflicts and drug nexus controversies are avoided in the future.** The process should make clear to law enforcement agencies requesting Defense Department support the grounds upon which support will be given. Such requests should be assigned to a single office to ensure that support will be provided only in legitimate circumstances and in a manner consistent with the Posse Comitatus Act.

9. **The General Accounting Office should audit the military assistance provided to the ATF and to the FBI in connection with their law enforcement activities toward the Branch Davidians**. Given that the subcommittees have been unable to obtain detailed information concerning the value of the military support provided to the ATF and the FBI, the subcommittees recommend that the General Accounting Office conduct an audit of these agencies to ascertain the value of the military support provided to them

and to ensure that complete reimbursement has been made by both agencies.

10. **The General Accounting Office should investigate the activities of Operation Alliance in light of the Waco incident**. The subcommittees conclude that Operation Alliance personnel knew or should have known that ATF did not have a sufficient drug nexus to warrant the military support provided on a non-reimbursable basis. Furthermore, given that the provision of assistance under such dubious circumstances appears to not have been an anomaly and the expansion of Operation Alliance's jurisdiction since Waco, the subcommittees recommend that the General Accounting Office conduct an investigation of Operation Alliance.

11. **Federal law enforcement agencies should redesign their negotiation policies and training to avoid the influence of physical and emotional fatigue on the course of future negotiations.** In anticipation of future negotiations involving unusually emotional subjects or those which may involve prolonged periods of time during which negotiators may become physically or emotionally fatigued, Federal law enforcement agencies should implement procedures to ensure that these factors do not influence the recommendations of negotiators to senior commanders.

12. **Federal law enforcement agencies should take steps to foster greater understanding of the target under investigation.** The subcommittees believe that had the government officials involved at Waco taken steps to understand better the philosophy of the Davidians, they might have been able to negotiate more effectively with them, perhaps accomplishing a peaceful end to the standoff. The subcommittees believe that had the ATF and FBI been better informed about the religious philosophy of the Davidians and the Davidians' likely response to the government's actions against them, these agencies could have made better choices in planning to deal with the Branch Davidians.

13. **Federal law enforcement agencies should implement changes in operational procedures and training to provide better leadership in future negotiations.** The subcommittees believe that placing greater emphasis on leadership in critical situations will not only protect the targets of government action, but also will help to protect the safety of the law enforcement officers.

14. **Federal law enforcement agencies should revise policies and training to increase the willingness of their agents to consider the advice of outside experts.** The subcommittees note that the expertise of recognized negotiation experts, particularly those experienced with religiously-motivated groups, might have proved invaluable in assisting FBI negotiations with the Branch Davidians. Accordingly, the subcommittees recommend that Federal law enforcement agencies revise their policies and training so that their agents are open to the advice such experts might provide.

15. **Federal law enforcement agencies should revise policies and training to encourage the acceptance of outside law enforcement assistance, where possible.** The unwillingness of the FBI to accept support from State, local, or other Federal law enforcement agencies in connection with the standoff increased the pressure on the Attorney General to end the standoff precipitously. To avoid this type of pressure in the future, Federal law enforcement agencies should be open to the assistance that State and local law enforcement agencies may be able to provide.

16. **The FBI should expand the size of the Hostage Rescue Team.** The FBI should increase the size of the Hostage Rescue Team so that there are sufficient numbers of team members to participate in an operation and to relieve those involved when necessary. The FBI should also develop plans to utilize FBI and local law enforcement SWAT teams when extenuating circumstances exist.

17. **The government should further study and analyze the effects of CS riot control agent on children, persons with respiratory problems, pregnant women, and the elderly.** The subcommittees note that only limited scientific literature exists concerning the effects of CS riot control agent, especially with regard to the effects of long-term exposure in a closed area. Until such time as more is known about the actual effects of exposure to this agent, the subcommittees recommend that CS not be used when children, persons with respiratory problems, pregnant women, and the elderly are present. Federal law enforcement agencies should develop guidelines for the use of riot control agents in light of this further study and analysis.

I. Introduction

A. The need for the Waco inquiry

On February 28, 1993, four special agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) were tragically killed near Waco, TX, in a shootout with a religious sect known as the Branch Davidians. The group's leader, Vernon Howell, also known as David Koresh, was wounded in the violent confrontation, and several of its members were killed. Then on April 19, 1993, after a 51 day standoff with the Federal Bureau of Investigation (FBI), the episode came to a fiery conclusion when more than 70 Davidians, including 22 children, died inside the group's residence.

From any perspective, Waco ranks among the most significant events in U.S. law enforcement history. For ATF, it was the largest and most deadly raid ever conducted. For the FBI, it was an unprecedented failure to achieve a critical objec-

tive—the rescue of dozens of innocent women and children.

The television coverage and news accounts generated by the media at the scene near Waco presented a troubling picture to Americans. On the one hand, it seemed clear enough that a Jonestown-like religious cult led by an irrational leader had brought disaster on itself. On the other hand, images of the tanks and other military vehicles gave the impression that the FBI was using excessive force together with military weapons and tactics against U.S. citizens, contrary to our civilian law enforcement tradition. In the aftermath of the April 19th fire, government officials, Members of Congress, and assorted observers called for a thorough review of the matter. Outside the corridors of power, a mixture of fact, rumor, and suspicion produced a wide variety of lasting impressions and conspiracy theories.

Both the Justice and Treasury Departments issued detailed written reports many months later. The Treasury Department Report criticized ATF personnel, but it exonerated all Department officials. The Justice Department Report found no fault with any actions of the FBI or any Justice Department official.

Several congressional committees conducted hearings in the weeks following the disaster. Unfortunately, little information was available from administration officials at the time. Representative Jack Brooks, chairman of the House Judiciary Committee, promised additional hearings to resolve remaining questions, but none were held.

Several developments in 1994 contributed to the pervasive view that serious questions about Waco remained unanswered. The criminal trial of the surviving Branch Davidians resulted in acquittals on murder charges. The self-defense arguments raised at trial and their obvious effect on the jury encouraged the public's outcry and desire for accountability. Journalists, investigators, and attorneys involved in the case decried the absence of candor and independence in the administration's reports and demanded a more comprehensive and detailed inquiry. In addition, widely distributed video tapes entitled "Waco: The Big Lie" and "Waco: The Big Lie Continues" had a significant impact on public opinion. Also, many policymakers read an article published in *First Things*, written by Dean Kelly of the National Council of Churches,[1] which stirred up considerable speculation about the ATF's conduct and the FBI's use of CS chemical agent. In short, by the start of the 104th Congress, the need for a sufficient and thorough congressional examination of the Waco tragedy was indisputable.

At the outset of the 104th Congress, both the Committee on the Judiciary and the Committee on Government Reform and Oversight indicated in their formal oversight plans, filed in February 1995, the intention to conduct hearings on the Waco matter. Representative Bill McCollum, chairman of the Subcommittee on Crime of the Committee on the Judiciary and Representative Bill Zeliff, chairman of the Subcommittee on National Security, International Affairs, and Criminal Justice of the Committee on Government Reform and Oversight stated on several occasions that such hearings were a necessary response to the widespread dissatisfaction with the Federal Government's follow-up to what happened at the Branch Davidian residence. The deplorable bombing in Oklahoma City 2 months later revealed the extent to which Waco continued to served as a source of controversy for some Americans. With the concurrence of the Speaker of the House and the chairmen of the Committees on the Judiciary and Government Reform and Oversight, the subcommittee chairmen began to organize comprehensive joint hearings on the Waco matter. As the July timetable was set for the hearings, both chairmen hoped a comprehensive investigation, primarily involving testimony from a wide variety of witnesses presented in public hearings, would lay to rest questions which persisted, assess responsibility for any misconduct, and ultimately restore full confidence in Federal law enforcement.

B. OPPOSITION TO THE INQUIRY

Opposition to the Waco hearings was to be expected. The Departments of Justice and Treasury believed that their respective reports were forthright and complete and that additional scrutiny would only result in more negative publicity. Clinton administration officials were concerned that the hearings would cause further political damage.

What was not expected was the extent to which the administration tried to control potential damage from the hearings. The White House staff assembled a damage control team and retained the services of John Podesta, a public relations specialist and former White House official who had worked for Handgun Control, Inc.[2] Treasury Secretary Rubin contacted at least one member of the joint subcommittees, Representative Bill Brewster of Oklahoma, and requested that he not ask any questions that might embarrass the administration.[3] Also, the Treasury Department flew to Washington two Texas Rangers who were scheduled to testify before the subcommittees in order to help them prepare their testimony. The Justice Department, in concert with the subcommittees' Democrats, brought firearms recovered from the charred Davidian compound to Washington to be used as props.

Perhaps the most disturbing counter-measure was the charge, made by the President himself,

[1] Dean M. Kelley, *Waco: A Massacre and Its Aftermath*, First Things, May 1995, at 22.

[2] Ann Devroy, *Clinton Team Focuses Damage Control on Waco*, Wash. Post, July 19, 1995, at A12.

[3] Sue Ann Pressley, *Witnesses Say Waco Warnings Went Unheeded*, Wash. Post, July 22, 1995, at A11.

that the hearings were an attack on law enforcement. Quite the opposite was the case. All involved in the planning and carrying out of the hearings and the investigation were strong supporters of Federal law enforcement. All believed that through airing and analysis of the Waco events by congressional oversight committees were necessary to the long term credibility and viability of the Federal law enforcement agencies. The assertion that the hearings were anti-law enforcement was contrary to the unambiguous views of Federal law enforcement leaders. Finally, and perhaps the strongest response to the subcommittees' critics, is that the Waco hearings did in fact serve to strengthen public confidence in Federal law enforcement. The public was clearly reminded that we live in a Nation of laws and no power sits above those laws. Americans are far more likely to support law enforcement authorities when they know that such authorities will be held accountable for their actions.

A final issue that arose at the start of the hearings was the extent to which the subcommittees would consider the character of David Koresh. In the minds of some, evidence of Koresh's despicable behavior would provide sufficient justification for not scrutinizing the conduct of Federal law enforcement officials. The subcommittees were prepared to stipulate then and now that Koresh was, on one level, responsible for the death and destruction that occurred at Waco. His actions inside the Davidian's religious community were of the vilest sort. Nevertheless, Koresh was not accountable to the people's elected Representatives in Congress as are Federal law enforcement authorities. Hence the subcommittees' inquiry concerned executive branch conduct, and not that of David Koresh.

C. THE NATURE OF THE INQUIRY

Given the extensive and expanding public concern about the Federal Government's actions against the Branch Davidians, and the effect such concerns were having on the credibility of Federal law enforcement, the subcommittees determined, in early 1995, that it would be advisable to hold hearings as soon as practicable. As a result, rather than using the hearings as a forum for presenting the results of a lengthy and completed investigation, it was decided that the hearings would consist of an exhaustive public airing of the issues associated with Waco. These "discovery hearings," rather than "presentation hearings," would afford members of the joint subcommittees, interested attendees, the media, and C–SPAN audiences an opportunity to hear from the people who were directly involved in the Waco matter.

The structure of the inquiry consisted of requests for and review of documents before and during the hearings; a pre-hearing investigation phase, including numerous interviews with many of the persons involved; the hearings themselves; and a post-hearing investigation.

1. Document requests and review

On June 8, 1995, subcommittee Chairmen McCollum and Zeliff delivered document production requests to the Federal agencies involved at Waco. The agencies contacted were the Departments of Defense, Justice, and the Treasury. The White House also received a document request. The subcommittees took the position that virtually every Federal agency document associated with the Waco incident required some level of review. To review the matter any less thoroughly would leave lingering doubt as to whether a complete and comprehensive job had been done.

Despite public commitments and private assurances of cooperation by the relevant departments, the subcommittees experienced a lack of cooperation which clearly frustrated hearing preparations. Throughout the month of June and early July, representatives of the White House, and Departments of Treasury and Justice attempted to narrow the scope of the subcommittees' requests and restrict access to a wide array of information. The first significant documents were delivered only 3 weeks prior to the hearings, some just days before, and tens of thousands of others were received after the hearings had already begun. This "wait-and-dump" strategy rendered meaningful staff review of many key documents virtually impossible prior to commencement of the hearings.

Moreover, the task of reviewing these documents was made more difficult by the manner in which they were presented. The Treasury Department's documents were in no apparent order, making the retrieval of a particular document nearly impossible. In what became symbolic of the administration's uncooperative attitude experienced by the subcommittees, it was discovered that the minority, but not the majority, had been provided an index for locating Treasury documents.

It should be noted that cooperation, particularly from the Department of Justice, improved considerably shortly before the hearings began and continued throughout the course of the public inquiry.

2. Investigation and interviews

The subcommittees engaged in investigative interviews, an examination of physical evidence, and an on-site inspection of the former Branch Davidian residence as a part of the preliminary inquiries. Both majority and minority staff traveled to Austin and Waco, TX for a fact-finding trip. Interviews were conducted with several Branch Davidians both at the former residence and at the home of Sheila Martin, widow of Wayne Martin, who died in the April 19 fire. Former Davidian Clive Doyle provided a tour of the ruins of the Davidian residence. Staff also met with members of the local county sheriff's office and with FBI personnel who, among other things, also took them on a visit to the Davidian residence site.

The staff also had an opportunity to inspect the physical evidence taken from the ruins of the resi-

dence after the fire, much of which had been used in the criminal trial of surviving Davidians. By prior agreement with the Justice Department, a potential witness at the hearings, Failure Analysis Associates Inc., was to inspect some of the physical evidence in order to respond to tampering allegations. It was believed that the views of scientists from Failure Analysis, who had often performed scientific evaluations for the Federal Government, including the Justice Department and NASA after the Challenger explosion, would be beneficial given public suspicions about the firearms recovered from the site of the Davidian residence. The inspection would not have damaged the weapons and was to have been conducted in the presence of all parties. It was hoped that the inspection would determine whether the Davidians had attempted to alter legal, semi-automatic weapons by converting them into illegal, automatic weapons as the ATF had alleged, and whether any of this evidence had been altered after it was gathered from the destroyed Davidian residence. When the scientists arrived in Austin, the Department declined to make the firearms available to them. The Department agreed instead to conduct the tests itself and present its findings to the subcommittees. A short time later, the Department urged, for cost considerations, that the tests not be performed. As a result, no tests were performed on the firearms.

Pre-hearing interviews were held with senior officers of the Texas Rangers, authors of books about the Waco disaster, personnel in the McLennan County Sheriff's office, and officials from the Departments of the Treasury, Justice, and Defense, ATF, Drug Enforcement Administration, and the FBI. Also, thousands of pages of materials submitted by outside groups and individuals interested in Waco were reviewed. Regrettably, the Treasury Department balked at making ATF agents available for interviews. The Department steadfastly refused to allow the subcommittee staff to meet with ATF agents who participated in the raid. Only the threat of subpoenas secured the appearance of ATF agents at the hearings. The inability to interview these individuals before public hearings was a significant investigative roadblock.

Finally, the subcommittees' staff traveled to Fort Bragg, NC to interview the Army personnel involved with the training of ATF agents in preparation for the raid. Several of the military personnel involved with the training were not available prior to the hearings due to duty assignments, however, other military personnel whom the staff sought to interview, and who were stationed at Fort Bragg, were not made available to the subcommittees' staff for interviews. Disturbingly, all of the military personnel interviewed by the subcommittees' staff were counseled about the interviews prior to them by senior commanders, despite requests to the contrary.

3. Hearings

The plan for the Waco hearings was to receive testimony under oath from as many persons material to the matter as possible. Thus, nearly 100 witnesses appeared before the joint subcommittees over a period of 10 days. The hearings included individuals from ATF and the Treasury Department who played critical roles in the investigation of David Koresh, and the planning, approval and execution of the February 28 raid. They also included the key participants from the FBI and the Justice Department with regard to the 51 day standoff and the planning, approval, and execution on April 19 of the plan to end the standoff. More than a dozen experts on issues associated with Waco, such as fire, riot control agents, and tactical operations testified. The attorneys who represented Koresh, Davidian Steve Schneider, and several Davidian survivors of Waco also were among the witnesses.

The minority was afforded an opportunity to add witnesses to the panels. Every effort was made to accommodate the requests received; more than 90 percent of the names submitted by the minority were added to the witness lists. The administration also requested witnesses to be included. On a few occasions, these requests conflicted with the minority's requests. Again, these desires were accommodated to the greatest extent practicable.

The transcripts of these hearings will serve as a valuable tool for years to come. Many of the most significant documents were incorporated into the record. Many others are gathered in the appendix to this report. Additionally, the appendix contains a complete listing of hearing witnesses.

4. Post-hearing investigation

Additional document requests were made after the hearings to the Departments of the Treasury, Justice, and Defense. Unfortunately, the lack of cooperation from the Treasury and Defense Departments which existed prior to the hearings continued, delaying release of the subcommittees' report.

Other investigative activities which occurred after the hearings included inspection of photographs at the FBI laboratories and interviews with munitions experts, experts on riot control agents, and National Guard officials. Numerous written questions were posed to the Justice, Treasury, and Defense Departments. For the most part, they were answered. Legal experts on the Posse Comitatus Act were consulted. Subcommittee staff also met with the FBI agent who drove one of the armored vehicles involved in the destruction of the backside of the Davidian residence and other FBI officials involved at Waco. Finally, several investigative reporters shared information they have gathered regarding the Waco matter.

D. THE STRUCTURE AND SCOPE OF THE REPORT

The report does not attempt to restate a chronological summary of what happened at Waco. The

administration's reports, supplemented by several commercial publications, tell the story fairly well. Instead, to avoid duplication the report consists of review, analysis, and, where appropriate, recommendations concerning the major issues raised. It is structured in the same chronological pattern as the hearings.

E. ADDITIONAL COMMENTS

If Federal law enforcement actions since the Waco hearings are a fair indication, then the inquiry has already had a considerably positive effect. The apparently increasing presence of separatist religious or anti-government groups had created a significant new challenge for Federal law enforcement agencies. Finding the proper balance between the need to enforce Federal law with the responsibility to avoid violent confrontations will continue to be difficult. It is complicated by the fact that innocent people, especially children, are so often in harm's way. Yet, over the past several months, Federal law enforcement, and the FBI in particular, has demonstrated an increased level of tactical patience. This change in policy, combined with other important reforms instituted by Director Louis Freeh at the FBI and Director John Magaw at ATF, is to be commended.

II. THE ATF INVESTIGATION

In May 1992, the Austin, TX Office of the Bureau of Alcohol, Tobacco and Firearms was called by Chief Deputy Daniel Weyenberg of the McLennan County Sheriff's Department. Weyenberg notified the ATF that his office had been contacted by the local United Parcel Service regarding a package it was to deliver to the Branch Davidian residence. The package had broken open and contained firearms, inert grenade casings, and black powder.[4]

On June 9, 1992, Special Agent Davey Aguilera of the Austin ATF office opened a formal investigation. Within a week, Philip Chojnacki, the Special Agent in Charge of the Houston ATF Office classified the case "sensitive," thereby calling for a high degree of oversight from both Houston and Headquarters in Washington, DC.[5] Notwithstanding the priority given to the case, numerous and serious missteps occurred throughout the investigation that followed. The most troubling aspects of the case were the ATF's overall lack of thoroughness in its investigation, the ineffectiveness of the undercover operation, and an affidavit in support of the search and arrest warrants that was replete with deficiencies.

[4] U.S. Dept. of the Treasury, Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell also known as David Koresh 17 (1993) [hereinafter Treasury Department Report].

[5] Treasury Department Report at 24.

A. THE MCMAHON COMPLIANCE VISIT

On July 30, Aguilera joined ATF compliance officer Jimmy Ray Skinner to conduct a compliance inspection of the premises of Henry McMahon, proprietor of Hewitt Hand Guns. The inspection revealed that certain AR–15 lower receivers supposedly in McMahon's inventory were neither on the premises nor listed in his records as sold.[6] McMahon indicated that they were in the possession of David Koresh. McMahon then called Koresh, who offered to allow the agents to inspect for possible firearms violations. The agents declined the invitation.[7] Shortly thereafter, McMahon told Koresh that he was suspicious that an investigation of Koresh and his followers was underway.[8]

It is unclear why the ATF did not accept the offer to do a compliance inspection of Koresh's firearms. Importantly, the Treasury Report fails to mention that Aguilera had an opportunity at the time of the compliance inspection to inspect Koresh's firearms. Wade Ishimoto, a reviewer of the Treasury Department Report, indicated to the subcommittees that he had not been made aware of the McMahon compliance visit by the Department of Treasury during his review.[9] Mr. Ishimoto maintained that Koresh's offer should have been accepted, presenting an invaluable opportunity to gather critical intelligence.[10] The agents' decline of the Koresh offer was a serious mistake.

B. THE INVESTIGATION CONTINUED

Tracing UPS invoices, Aguilera learned that more than $43,000 worth of firearms (including AR–15 semiautomatics), firearms parts (including AR–15 lower receivers), grenade hulls, and black powder had been shipped to the Davidians' storage facility.[11] One of Koresh's neighbors, who had served in an Army artillery unit, told Aguilera that he had frequently heard the sound of automatic weapons fire—including .50-caliber fire—coming from the Davidian residence.[12] Aguilera also learned that in November, a deputy sheriff had heard a loud explosion at the Davidian residence which produced a cloud of grey smoke.[13] Through interviews with former cult members, Aguilera learned of numerous allegations that Koresh had had sexual relations with girls younger than 16 years of age.[14] These allegations would

[6] *Id.* at 26.

[7] *Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians (Part 1): Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on National Security, International Affairs, and Criminal Justice of the House Committee on Government Reform and Oversight*, 104th Cong., 1st Sess. 163 (1995) [hereinafter Hearings Part 1].

[8] *Id.*

[9] Hearings Part 1 at 332.

[10] *Id.*

[11] Treasury Department Report at 21, B–182.

[12] *Id.* at 26.

[13] *Id.* at 27.

[14] *Id.* at 27–29.

later feature prominently in Aguilera's affidavit in support of the search and arrest warrants.

In December 1992, after reviewing all of the available evidence associated with the Koresh investigation in ATF headquarters in Washington, ATF decided they did not yet have probable cause to support a warrant. Director Higgins stated: "[W]e went out and got more information and came back in February . . . . We didn't have it [probable cause] until mid-February."[15] As part of its effort to develop probable cause and to gather additional intelligence, on January 10, 1993 the ATF set up surveillance cameras in an undercover house across from the Davidian residence. The surveillance produced no additional evidence of criminal activity. Former Davidians were interviewed in December 1992 and January 1993. Among those interviewed were three members of the Bunds family, all of whom had left the compound before 1992. The events that were described by the Bunds occurred prior to 1992,[16] and the information they provided was so stale as to be of little or no value.

Importantly, the only activity mentioned in the affidavit involving the Branch Davidians that occurred between December 1992 and February 1993 was Agent Rodriguez's undercover visits to the Davidian residence. The visits consisted of Koresh speaking to Rodriguez about Second Amendment rights, Koresh showing a tape of alleged ATF abuses, and the two men shooting legal firearms at the compound's range. It appears that Rodriguez discovered no evidence during his visits that would have contributed to a finding of probable cause, or that would have provided valuable information to guide subsequent ATF action. Nevertheless, in a case of such potential danger that it was designated "sensitive" and "significant," the ATF proceeded with its February raid.

Throughout the ATF's investigation decisions were made and actions were taken which demonstrated a reckless disregard for the value of well-developed intelligence. Furthermore, the haphazard manner in which the investigation was pursued repeatedly exposed the lack of adequate command, control and communications processes to support such an operation.

C. UNDERCOVER OPERATION

On January 11, 1993, eight ATF agents moved into a small house directly across from the front drive of the Davidian residence, posing as college students attending the nearby Texas State Technical College. Through a series of mistakes, the ATF appeared to lose the security of its undercover operation. At least some of the breaches of security were so serious, and obvious, that they should have been recognized as such by ATF, and become the basis for modifying the nature and timing of any subsequent action against Koresh.

There is substantial evidence to suggest that Koresh and the Davidians knew that the undercover house established by the ATF across the street from the compound was occupied by law enforcement officials. Koresh told his next door neighbor that he believed that the self-identified "college students" were too old to be actual college students, with cars too new and expensive to be owned by college students. He commented that they were probably Federal agents.[17] The agents were also informed by one of Koresh's neighbors shortly after they began surveillance that Koresh suspected they were not what they claimed to be.[18] On one occasion, the Davidians visited their new neighbors in the undercover house to deliver a six pack of beer, but the occupants of the house would not let them in.[19] Finally, Koresh complained to the local sheriff that the UPS delivery man was an undercover police officer.[20] Koresh commented that he did not appreciate being investigated. At the hearing, Agent Rodriguez testified that "all of [the undercover ATF agents], or myself knew we were going to have problems. It was just too—too obvious."[21]

The undercover operation was also undermined by its limited nature: The 24-hour-a-day surveillance was only sustained from January 11 through January 19, at which time Agent Chuck Sarabyn, the ATF tactical commander, ended the constant surveillance and redirected the mission toward infiltration of the compound.[22] It was later determined at trial that during the period of constant surveillance the agents within the house did not know what Koresh looked like. Rodriguez testified at trial that the only picture identification that the agents possessed was "a driver's license picture of him, which was not that good. That was one reason we [later] needed to make contact with the people inside the compound, so we could identify him. I myself did not know what he looked like [at the time of surveillance]."[23] Significantly, the surveillance log cites two occasions when a white male jogged up and down the road on which the undercover house was located.[24] If this jogger had been Koresh, according to Rodriguez's trial testimony, the agents would not have known it. The lack of an effective surveillance operation was further demonstrated through the ATF's failure to develop nearly 900 photographs taken from the undercover house or to review videotapes of the movements of the Davidians.[25] This evidence represented an opportunity to develop critical intel-

[15] *Events Surrounding the Branch Davidians Cult Standoff in Waco, Texas: Hearings Before the House Committee on the Judiciary*, 103d Cong., 1st sess. (1993).
[16] Treasury Department Report at 27–28.
[17] *Id.* at 187.
[18] *Id.*
[19] Dick J. Reavis, The Ashes of Waco 67 (1995).
[20] *Id.* at 69.
[21] Hearings Part 1 at 796.
[22] Treasury Department Report at 52.
[23] *United States* v. *Branch,* et al., Case No. W–93–CR–046 (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) & (12) (W.D. Tex. 1994).
[24] ATF Surveillance Log.
[25] Hearings Part 1 at 807.

ligence regarding the habits and movements of compound residents, including Koresh.

The lack of such basic and critical intelligence clearly undermined the ability of the undercover operation to fulfill its mission. The operation's failure to develop useful intelligence after 8 days of continuous surveillance should not have led to the termination of the surveillance, but rather to its modification and prolongation. Given the potential for danger to agents and those within the compound and the dearth of intelligence, the decision to end around-the-clock surveillance was seriously flawed. Significantly, all of the ATF supervisory agents involved in the planning of the operation believed the continuous surveillance continued beyond the date it was actually ended. This mistaken belief both confirms that the termination of the surveillance was ill-advised, and highlights the wholly inadequate command, control and communications processes utilized by ATF throughout the operation. The eyes and ears were poorly utilized, and what intelligence they did supply was poorly used.

D. FAILURE TO COMPLY WITH "SENSITIVE-SIGNIFICANT" PROCEDURES

As noted in the Treasury Report, the Koresh investigation was classified as "sensitive" and "significant" within a week of its formal initiation on June 9, 1992. Such a classification is intended to ensure a higher degree of involvement and oversight from both the ATF Special Agent in charge and ATF headquarters. Yet, in spite of this designation, the agents in charge of the investigation received minimal oversight in developing the investigation and raid, with important elements of the plan, such as whether or not to abort the raid if the element of surprise was lost, apparently not being understood by the agents in charge. In view of this designation, the lack of knowledge on the part of the Special Agent in Charge, and Headquarters, throughout the investigation—including the undercover operation—is striking. The "sensitive/significant" designation makes ATF's failure to have implemented a process for continually reviewing intelligence and modifying plans accordingly a glaring omission.

E. THE AFFIDAVIT IN SUPPORT OF THE WARRANTS

The subcommittees examined the constitutionality of the search and arrest warrants, carefully reviewing the information contained in the supporting affidavit.

The fourth amendment to the Constitution provides: "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[26] The Supreme Court has ruled that, in order for this protection to be enforced, a warrant may issue only upon the determination of a neutral and detached magistrate that probable cause exists to believe that the search will yield evidence of criminality.[27] The standard articulated in *Illinois* v. *Gates,* which guides a magistrate's probable cause determinations, is whether "there is a fair probability that contraband or evidence of a crime will be found in a particular place."[28] Such a determination is, in the Supreme Court's words, a "practical, commonsense decision whether, given all the circumstances set forth in the affidavit before the magistrate . . . there is a fair probability that the contraband or evidence of a crime will be found in a particular place."[29]

When applying this common sense standard to the circumstances of the ATF investigation, the affidavit appears to have contained sufficient evidence of violations of Federal firearms law to support the magistrate's decision to issue the warrants.[30] There were substantial purchases of AR–15 semiautomatics and AR–15 lower receivers, grenade hulls, and black powder. A neighbor, who had served in an Army artillery unit, testified that he had frequently heard the sound of automatic weapons fire. A deputy sheriff testified that he had heard a loud explosion at the Davidian residence which produced a cloud of grey smoke. Taken together, this information provided a sufficient basis for finding probable cause to issue the warrants.

While the warrants may have met the minimal standard of constitutional sufficiency, the affidavit supporting the warrants contained numerous misstatements of the facts, misstatements of the law, and misapplication of the law to the facts, and serves as a de facto record of a poorly developed and mismanaged investigation. The affidavit included misleading and factually inaccurate statements, contained substantial irrelevant and confusing information, and failed to properly qualify witnesses' testimony when obviously called for based on their backgrounds. Consequently, the affidavit gave the appearance that the ATF was not going to let questionable facts or evidence stand in the way of moving forward on their timetable.

The affidavit provided and sworn to by Aguilera contained numerous errors and misrepresentations, which, taken together, create a seriously flawed affidavit. The affidavit misstated that Koresh possessed a British Boys anti-tank .52 caliber rifle, when in fact Koresh owned a Barret light .50 firearm.[31] Possession of the British Boys would

[26] U.S. Const. amend IV.

[27] *United States* v. *Leon,* 468 U.S. 897 (1984).

[28] *Illinois* v. *Gates,* 462 U.S. 213, 238 (1983).

[29] *Id.*

[30] All of the constitutional scholars contacted by the subcommittees agreed with the conclusion that there was probable cause in support of the warrants. *See* Hearings Part 1 at 818 (Letter from Albert W. Altschuler, Wilson-Dickinson Professor of Law, University of Chicago to Rep. John Conyers, Jr. (July 13, 1995)).

[31] Affidavit of Davey Aguilera in support of arrest warrant, at 14 [hereinafter Aguilera Affidavit]. [*See* documents produced to the subcommittees by the Department of the Treasury T004700–T004714 at Appendix [hereinafter Treasury Documents]. The Appendix is published separately.]

have been a felony[32] while possession of the Barret was completely legal. The affidavit misstated that the M16 parts kits from Nesard company were two CAR and two EZ kits which contained all the parts of an M16 machine gun except for the lower receiver unit, when, in fact, the Nesard parts kits do not contain the auto sear and pin which are absolutely necessary to convert semi automatic weapons to machine guns.[33] The affidavit failed to mention that grenade hulls like those cited in the affidavit to help establish probable cause had been sold by the Davidians in the past at gun shows as paper weights and mounted on plaques. Finally, the affidavit was misleading by reporting that Deputy Sheriff Terry Fuller was in the vicinity of the compound when he heard a loud explosion, but then failed to report that Fuller investigated and learned that the Davidians were using dynamite for construction.

Former Davidian Marc Breault provided much of the information contained in the ATF's affidavit. Yet, nowhere in the affidavit is it mentioned that Breault left the compound as an opponent of Koresh, a fact certain to call into question Breault's motives. Nor does the affidavit mention that he is blind. On the contrary, the affidavit implies that he was a compound bodyguard. It states that Breault "participated in physical training and firearm shooting exercises conducted by Howell. He stood guard armed with a loaded weapon."[34]

The affidavit also contained misapplications of firearms law. The affidavit alleged the violation of one statute: 26 U.S.C. § 5845(f). This statute, however, merely defines "destructive device." It does not establish any crime. It is 26 U.S.C. § 5861 which establishes crimes related to destructive devices. The affidavit also confused the term "explosive" with the term "explosive device," a term which does not appear in Federal law.

In the affidavit, Aguilera misstated that a "machinegun conversion kit" was a combination of parts "either designed or intended" to convert a semiautomatic into an automatic firearm. In fact, Federal law defines a conversion kit to be a combination of parts "designed *and* intended" to convert a semiautomatic into an automatic.[35]

In the affidavit, Aguilera also misstated that Koresh had ordered M–16 "EZ kits." The kits to which Aguilera was referring are called "E2" kits. Furthermore, the E2 kit is a spare parts kit, not a conversion kit. It contains spare parts which fit either a semiautomatic Colt AR–15 Sporter or an automatic Colt M–16 automatic. Because it is not a conversion kit, the E2 kit is not regulated by Federal law. Yet the affidavit implies that the kit's purpose is for converting semiautomatics into automatics. On this point, the Treasury Department Report is mistaken as well. While it correctly named the E2 kit, it wrongly asserted that "the parts in the kit can be used with an AR–15 rifle or lower receiver to assemble a machinegun . . . The parts in the E2 kit also can be used to convert an AR–15 into a machinegun."[36] These assertions are false. The Treasury Department regulates genuine conversion kits as if they were themselves machineguns. It does not regulate E2 kits.

Intimating that Koresh was converting AR–15 Sporters and semiautomatic copies of AK–47's into automatics, Aguilera included evidence of purchases made by Koresh from a South Carolina Company which was known to sell parts needed to convert semiautomatics of the type that Koresh possessed into automatics. Aguilera failed even to allege that Koresh purchased parts from this company which would have allowed the conversion of semiautomatics into automatics. Nowhere in the affidavit is there evidence that Davidians were manufacturing their own automatic sears, or modifying the lower receivers of semiautomatics, both of which would have been violations of firearms laws.

The affidavit was misleading in that it falsely referred to "clandestine" publications. The affidavit reported that in June 1992, a witness had "observed at the compound published magazines such as, the *Shotgun News* and other related clandestine magazines."[37] Far from clandestine, *Shotgun News* has a circulation of about 165,000. Subscriptions are available by mail or telephone. The Austin, TX ATF office—Aguilera's home office—was a subscriber.

F. FINDINGS CONCERNING THE ATF INVESTIGATION

1. The ATF's investigation of the Branch Davidians was grossly incompetent. It lacked the minimum professionalism expected of a Federal law enforcement agency. Among the failures of the investigation were:

- The failure to accept Koresh's offer to inspect the firearms held at the Branch Davidian residence. It is unclear why the ATF did not accept the offer to conduct a compliance inspection of Koresh's firearms. What is clear is that the agents' refusal of Koresh's invitation was the first of a series of instances in which the ATF rejected opportunities to proceed in a non-confrontational manner. The agents' decision to decline Koresh's offer was a serious mistake.
- The failure to recognize obvious breaches of surveillance security. Some of these breaches were so serious and obvious that they should have been recognized by the ATF agents and commanders involved, and should have become the basis for modifying the nature of the surveillance.

[32] 26 U.S.C., Ch. 53.
[33] Aguilera Affidavit at 5.
[34] Aguilera Affidavit at 12.
[35] *See* 26 U.S.C. § 5845.
[36] Treasury Department Report at 23–24.
[37] Aguilera Affidavit at 14.

• The failure to analyze intelligence gathered during the undercover operation, including more than 900 photographs of activities around the Branch Davidian residence. These photographs could have led to the development of critical intelligence regarding the habits and movements of the Davidians, and Koresh in particular.

• The premature termination of the undercover operation. The operation's failure to develop useful intelligence after 8 days of continuous surveillance should not have led to the termination of the surveillance, but rather to its prolongation. Given the potential for danger to agents and those within the residence, and the dearth of intelligence, the decision to end around-the-clock surveillance was seriously flawed.

2. While the ATF had probable cause to obtain the arrest warrant for David Koresh and the search warrant for the Branch Davidian residence, the affidavit filed in support of the warrants contained numerous false statements. The ATF agents responsible for preparing the affidavits knew or should have known that many of the statements were false.

3. David Koresh could have been arrested outside the Davidian compound. The ATF deliberately chose not to arrest Koresh outside the Davidian residence and instead determined to use a dynamic entry approach. In making this decision ATF agents exercised extremely poor judgment, made erroneous assumptions, and ignored the perils of this course of action which they should have foreseen.

G. RECOMMENDATIONS

1. Whenever it is feasible to achieve its objectives, the ATF should use less confrontational tactics. The ATF had an opportunity to search the Davidian residence at the invitation of Koresh. Koresh was off the property and subject to the capture of law enforcement on numerous occasions before the raid. The ATF should have taken advantage of these less confrontational opportunities. The ATF should pursue such alternatives in the future.

2. Federal law enforcement agencies should verify the credibility and the timeliness of the information on which they rely in obtaining warrants to arrest or search the property of an American citizen. The affidavits on which the arrest and search warrants of Koresh were ordered contained information provided to the ATF by informants with obvious bias toward Koresh and the Davidians. In addition, much of the information was stale, based on experiences years before the investigation. The ATF should obtain fresh and unbiased information when relying on that information to arrest or search the premises of the subjects of investigations.

3. The ATF should make every effort to obtain continuous and substantial intelligence and should ensure that the efforts to obtain such intelligence are not hindered by breaches of security. The ATF had a broken and insecure intelligence operation. Gaps in the surveillance and breaches of the security of undercover operations jeopardized the investigation and the raid. The ATF should take precautions to ensure that these breaches do not occur in the future.

4. If the false statement in the affidavits filed in support of the search and arrest warrants were made with knowledge of their falsity, criminal charges should be brought against the persons making the statements.

III. PLANNING AND APPROVAL OF THE RAID

The ATF had a variety of options in the manner in which it could have served the arrest and search warrants on Koresh. These options included luring Koresh off the Davidian residence, arresting Koresh while he was off the Davidian property, surrounding the Davidian residence and waiting for Koresh to surrender himself and consent to the search, and executing a "dynamic entry" style raid into the residence. The ATF chose the dynamic entry raid, the most hazardous of the options, despite its recognition that a violent confrontation was predictable. The decisions regarding the raid were made without the participation of either Secretary of the Treasury Lloyd Bentsen or the Deputy Secretary of the Treasury Roger Altman.

A. WAS "SHOW TIME" EVEN NECESSARY?

The subcommittees received evidence of numerous opportunities to arrest Koresh away from the residence, thereby reducing the likelihood of violence. The failure to make use of these opportunities raises the question of the dynamic entry's necessity. ATF officials offered at least three different reasons for this critical decision.

ATF Special Agent Phillip Chojnacki, the overall commander of the raid, testified that Koresh could not be arrested outside the residence because the intelligence from the undercover house was that he rarely left the residence.[38] ATF did not want the tactical problem of having agents on standby indefinitely while they waited for the rare occurrence of Koresh going into town.

Yet the testimony before the subcommittees revealed that Koresh left the Davidian residence at least once a week during January and February.[39] David Thibodeau, who lived at the Branch Davidian residence but did not consider himself to be a member of the Branch Davidian religious community, testified that Koresh was a regular jogger.[40] It was also revealed during the trial that Koresh had left the residence on January 29, 1993,

[38] Hearings Part 1 at 416.
[39] *Id.* at 123.
[40] *Id.*

to conduct business at a machine shop.[41] Finally, the manager at the Chelsea Bar and Grill in Waco stated that they served Koresh about once a week through February.[42]

ATF agents next explained that it did not make practical sense to arrest Koresh outside because he would immediately be released and would be back at the residence. The window was simply too narrow.[43] This answer also lacked credibility since Federal law provides that the arrestee can be held for 3 days upon motion of the government.[44]

Finally, ATF officials testified at the hearings that they abandoned the idea of trying to arrest Koresh outside the residence because their primary goal was to get inside to conduct a search. These officials maintained that it was preferable to attack the residence by surprise and get Koresh and the guns at the same time.[45] However, the ATF had developed its own scheme to lure Koresh off the complex. The ruse was proposed to Joyce Sparks, the social worker who had conducted an earlier child protection investigation at the Branch Davidian residence. Sparks was to contact Koresh, who she had come to know relatively well, and make an appointment with him to be held in her office. While Sparks agreed to cooperate with the ATF, Sparks' supervisor refused to approve the ruse tactic.[46]

B. WAS THE VIOLENT OUTBURST PREDICTABLE?

The record of the subcommittees' investigation shows that persons who through contact and experience became familiar with the belief system and the authoritarian structure of the Branch Davidians could have predicted a violent resistance by the Davidians to a mass law enforcement action. The Branch Davidians predicted a violent apocalypse, a vision that followers believed be necessary to go to heaven.[47]

The ATF investigative agents interviewed Sparks, who had kept lines of communication open between Koresh and herself even after the end of her Child Protective Services investigation. During their conversations, Koresh would often provide lengthy presentations of his religious beliefs. Sparks developed an understanding of how Koresh thought and how he was viewed within the Branch Davidian group at the residence. When ATF sought her opinion about the raid, she stated that the Branch Davidians believed that Koresh was the Lamb of God and that they would protect him to the death. "They will get their guns and kill you," Sparks recalls saying.[48]

The ATF also received information from Marc Breault, a former Branch Davidian and resident at Mount Carmel, the Davidians' home.[49] Contact between ATF and Breault was made during December 1992. During that time and up to the time of the raid, the former Branch Davidian provided information about the Davidians and Koresh in particular, including his past correspondence. In a paper prepared by Breault and provided to the ATF, a recent history of the Branch Davidians recounts the group's views that the world will end in a final violent battle.

C. THE PREDISPOSITION TO DYNAMIC ENTRY

An examination of ATF's timeline in the Waco investigation and raid planning activities reveals that planning for a military style raid began more than 2 months before undercover and infiltration efforts even began.

1. The source of the predisposition

a. The culture within the ATF

Management initiatives, promotional criteria, training, and a broad range of other cultural factors point to ATF's propensity to engage in aggressive law enforcement. Senior officials from other law enforcement agencies have commented on the ATF raid. Several have informed the subcommittees that their organizations would not have handled the execution of the Branch Davidian search warrants in the aggressive way chosen by ATF.[50] For example, Jeffrey Jamar, the FBI Special Agent-in-Charge of the Waco standoff, was asked about the FBI's approach to such a circumstance. He stated that he "would not have gone near the place with 100 assault weapons."[51]

b. The Waco Tribune-Herald's "Sinful Messiah"

One factor affecting ATF's decision to employ a dynamic entry was the impending release of a newspaper story about Koresh and the Davidians which revealed the Federal law enforcement investigation then underway. The Waco Tribune-Herald had planned to release a series of articles on David Koresh in early 1993.[52] Fearing publication of the article, ATF hastened its plans to serve the arrest and search warrant. It was unclear, however, how Koresh would react to the story. In fact, ATF Special Agent Robert Rodriguez suggested that the newspaper article did not upset Koresh.[53]

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[41] *Id.* at 124.
[42] *Id.*
[43] *Id.* at 309–312.
[44] 18 U.S.C. § 3142(f).
[45] Hearings Part 1 at 221–222.
[46] *Id.* at 595.
[47] James D. Tabor & Eugene V. Gallagher, Why Waco? 7–10 (1995).
[48] Hearings Part 1.
[49] U.S. Dept. of the Treasury, Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell also known as David Koresh 29 (1993) [hereinafter Treasury Department Report].
[50] *Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians (Part 3): Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on National Security, International Affairs, and Criminal Justice of the House Committee on Government Reform and Oversight*, 104th Cong., 1st Sess. 300 (1995) [hereinafter Hearings Part 3].
[51] *Id.*
[52] Treasury Department Report at 67–68.
[53] Hearings Part 1 at 757, 805.

2. Raid approval and lack of Treasury Department oversight of ATF

Testimony received during the hearings established that there was no process through which Treasury Department officials were able to review pending ATF matters prior to their reaching a crisis stage. In the investigation of Koresh, there was no oversight by Treasury over the ATF's planning and execution of the raid until approximately 48 hours before the raid occurred.[54] Testimony revealed that, even though Bentsen had been Treasury Secretary for approximately 1 month at the time of the ATF raid, and Altman had been serving as Deputy Secretary for the same time period, ATF Director Steven Higgins had never met either of them, let alone briefed them regarding the investigation and planned raid. This point was established at the hearings during the questioning of Higgins by Representative Ed Bryant.

> Mr. BRYANT: When did you first meet with the Secretary to discuss anything about your agency, the ATF?
>
> Mr. HIGGINS: I don't remember any briefings with the Secretary. I haven't gone back to look at my documents. Probably in that first month, month and a half, I don't remember any meetings with him. The only interaction we really had during the transition would have been with Mr. Simpson.
>
> Mr. BRYANT: Are you saying that you never had met with Secretary Bentsen prior to this point?
>
> Mr. HIGGINS: I can't remember having gone to a staff meeting while he was there . . . I don't remember specifically today having been at one with him.
>
> Mr. BRYANT: Had you ever met with his deputy, Mr. Altman, before this raid?
>
> Mr. HIGGINS: I don't believe I knew Mr. Altman until then. I knew who he was, obviously.
>
> Mr. BRYANT: Well, I am a little confused here. You are saying that you were the director of the ATF, which we all know is very significant, powerful element of the Department of Treasury, and you had not met with your ultimate boss, the Secretary, for 30 days or so?
>
> Mr. HIGGINS: I don't believe so, other than maybe to shake hands, and I don't even remember doing that. It is interesting that those who think there is some giant conspiracy in the government don't realize how little we knew each other.[55]

Under Congressman Bryant's further questioning, Higgins testified that there was no procedure in place for the director of the ATF to apprise the Secretary or Deputy Secretary of the ATF's plans.

> Mr. BRYANT: Was there any process or procedure available to you as the Director of the ATF to brief either the Deputy or the Secretary?
>
> Mr. HIGGINS: I could have called them and said, yes, I would like to brief you on something. I think they were accessible, yes.
>
> Mr. BRYANT: But there was no routine process? This was no regularly done at that point?
>
> Mr. HIGGINS: No routine process, although most secretaries at some point set up a system where there is a regular, either every week or every 2 weeks, meeting with bureau heads.[56]

The testimony before the subcommittees consistently depicted a Treasury Department that treated ATF as its lowest priority. Department officials repeatedly demonstrated a lack of interest in even major ATF actions, such as that of February 28, 1993. The Department maintained a culture that perceived law enforcement as, at best, a peripheral part of its mission, according the ATF correspondingly little attention. This point was brought out during the hearings through questioning by Representative Bill McCollum, co-chairman of the subcommittees, of former Treasury Secretary Bentsen about his knowledge of the raid prior to February 28, 1993.

> Mr. MCCOLLUM: When did you first learn of the raid or any plan for that raid?
>
> Mr. BENTSEN: I was in London at my first meeting with G–7 with the Ministers of Finance and was very much involved in that one. I came back, to the best I can recall, some time early Sunday morning on a night flight from London, and in turn I did not find out about the raid, to the best of my memory, until early Sunday evening and that is the first knowledge I had of it at all.
>
> Mr. MCCOLLUM: In other words, there was no discussion with you, no information passed to you prior to the time of the raid that it was anticipated or that it might exist or any nature——
>
> Mr. BENTSEN: That is correct.
>
> Mr. MCCOLLUM: Isn't it a little surprising one of the largest or one of the largest raids in the BATF's history was taking place, and the Secretary of the Treasury, the chief of all of the law enforcement of the ATF was not notified?
>
> Mr. BENTSEN: I can well understand when I was abroad attending an international meeting involving questions of

[54] *Id.* at 519–520.
[55] *Id.* at 566.
[56] *Id.* at 566–567.

monetary exchange rates and some very serious subjects at that point, that others within the Department were handling the situation.

Mr. MCCOLLUM: But didn't you keep in contact with your office during the time you were over there? Weren't there telephone calls?

Mr. BENTSEN: Of course.

Mr. MCCOLLUM: Nobody in the law enforcement division thought you ought to be disturbed about this incident and asked about it. I understand.[57]

Bentsen's responses reveal that throughout the planning of the raid, including the critical days just prior to its initiation, the Treasury Secretary knew nothing about it. Neither he nor his deputy knew anything about an imminent law enforcement raid—one of the largest ever conducted in U.S. history—being managed by his Department, which would endanger the lives of dozens of law enforcement agents, women, and children.

Other testimony from the hearings further demonstrated insufficient oversight by Treasury Department officials of ATF planning. At the hearings before the subcommittees, Representative McCollum questioned Christopher Cuyler, who in February 1993 was the ATF's liaison to the Treasury Department. Cuyler testified that no Treasury officials had knowledge about the potential for the raid until February 26—2 days before the raid was initiated.[58]

The inadequate oversight of the ATF by Treasury Department officials was further evidenced in the final communications between Treasury and ATF in the day before the raid. The Department maintains that it conditioned the raid on ensuring the element of surprise was preserved. As stated in the Treasury Department Report, Department officials assured that those directing the raid were under express orders "to cancel the operation if they learned that its secrecy had been compromised. . . ."[59] Yet, ATF officials, including Higgins, Cuyler, and the agents in charge of the raid testified that it was not at all clear to them that Treasury wanted the raid canceled if the element of surprise was lost.[60]

D. FAILURE TO COMPLY WITH "SENSITIVE-SIGNIFICANT" PROCEDURES

As noted in the Treasury Department Report, the Koresh investigation was classified as "sensitive" and "significant" within a week of its formal initiation on June 9, 1992.[61] Such a classification is designed to ensure a higher degree of involvement and oversight from both the ATF Special Agent in charge and ATF headquarters, yet this designation was ignored in practice. In view of this designation, the lack of knowledge on the part of the Special Agent in Charge and ATF Headquarters throughout the investigation, including the undercover operation, is striking. The "sensitive/ significant" designation makes ATF's failure to have implemented a process for continually reviewing intelligence and modifying plans accordingly a glaring omission.

E. FINDINGS CONCERNING THE PLANNING AND APPROVAL OF THE RAID

1. The subcommittees conclude that the ATF was predisposed to using aggressive, military tactics in an attempt to serve the arrest and search warrant. The ATF deliberately choose not to arrest Koresh outside the Davidian residence and instead determined to use a dynamic entry approach. The bias toward the use of force may in large part be explained by a culture within ATF.

2. The ATF did not attempt to fully understand the subjects of the raid. The experience of Joyce Sparks, Marc Breault, and ATF undercover agent Robert Rodriguez demonstrate that persons who spent a reasonable amount of time with Koresh, even without professional training specific to persons such as Koresh, understood with some predictability the range of behaviors that might result from a military style assault on the Branch Davidians.

3. Treasury Secretary Lloyd Bentsen and Deputy Secretary Roger Altman acted highly irresponsibly and were derelict in their duties in failing to even meet with the Director of the ATF in the month or so they were in office prior to the February 28 raid on the Davidians residence, in failing to request any briefing on ATF operations during this time, and in wholly failing to involve themselves with the activities of the ATF.

4. Senior Treasury Department officials routinely failed in their duty to monitor the actions of ATF officials, and as a result were uninvolved in the planning of the February 28 raid. This failure eliminated a layer of scrutiny of the plan during which flaws might have been uncovered and corrected.

IV. RAID EXECUTION

There is no question that the ATF raid executed on February 28, 1993, went fatally wrong. While many factors played a role in this, one stands apart as the principal reason why four ATF agents were killed and many others wounded. Simply put, the Davidians knew that the ATF agents were coming. And while the ATF expected to serve a search warrant for Koresh and search the residence, the Davidians apparently feared the worst that law enforcement agents or military troops were coming to arrest all of them or, perhaps kill them. In any event, some of the Davidians armed

[57] *Id.* at 515–516.
[58] *Id.* at 516.
[59] Treasury Department Report at 179.
[60] Hearings Part 1 at 562, 563.
[61] Treasury Department Report at 24.

themselves and lay in ambush, waiting for the arrival of the ATF agents.

A. RODRIGUEZ AND THE "ELEMENT OF SURPRISE"

1. How the Davidians knew the ATF was coming

The Davidians learned of the ATF plan to raid their residence when a local television cameraman happened to get lost on his way to the Branch Davidian residence.[62] The cameraman had been dispatched to the residence by the local television station because the news director of the station expected the ATF raid would occur on that day. He suspected this because an employee of the local ambulance service had informed him that a Fort Worth-based trauma flight company had been put on standby along with the local ambulance company.[63]

While the cameraman was sitting by the side of the road attempting to locate the Davidian residence, David Jones, a Branch Davidian and a letter carrier with the U.S. Postal Service, pulled up behind the cameraman and asked whether he was lost. The cameraman introduced himself and asked for directions to "Rodenville," the name by which many local residents referred to the Branch Davidian residence. After Jones pointed to the residence, which was in sight of where the two men were stopped, Jones stated that he had read about the group in the paper and "thought that they were weird." The cameraman, believing that Jones was not affiliated with the Davidians, warned him that some type of law enforcement action was going to take place at the residence, that it was likely to be a raid of some type, and that there may be shooting.[64] After the cameraman departed, Jones drove directly to the residence and informed the Davidians.

2. The undercover agent

On the morning of February 28, 1993, at approximately 8 a.m., Robert Rodriguez, the ATF agent who had gone undercover into the Branch Davidian residence on several prior occasions, went to meet with David Koresh one final time. While Koresh and Rodriguez were engaged in a Bible study session, David Jones arrived at the residence and told his father, Perry Jones, what had happened. The elder Jones then informed Koresh that he had a telephone call. Koresh, at first, ignored the statement but, when Perry Jones mentioned that it was long distance from England, Koresh left the room to speak with Jones.[65] At this point, David Jones relayed to Koresh his discussion with the television station cameraman.

a. The Treasury Department Report version of events

The Treasury Department Report summarizes the subsequent events as follows:

> Upon Koresh's return, Rodriguez could see that he was extremely agitated, and though he tried to resume the Bible session, he could not talk and had trouble holding his Bible. Rodriguez grabbed the Bible from Koresh and asked him what was wrong. Rodriguez recalls that Koresh said something about, "the Kingdom of God," and proclaimed, "neither the ATF nor the National Guard will ever get me. They got me once and they'll never get me again." Koresh then walked to the window and looked out, saying, "They're coming, Robert, the time has come." He turned, looked at Rodriguez and repeated, "They're coming Robert, they're coming."[66]

According to the Treasury Department Report, Rodriguez went first to the undercover house announcing to the agents there and to James Cavanaugh, deputy tactical coordinator of the ATF operation, that Koresh was agitated and had said the "ATF and the National Guard were coming."[67] The report states that Cavanaugh asked Rodriguez whether he had seen any guns, had heard anyone talking about guns, or had seen anyone hurrying around. Rodriguez responded in the negative to all three questions. Cavanaugh then told Rodriguez to report his observations to Chuck Sarabyn, the tactical coordinator for the raid.[68]

The Treasury Department Report states that Rodriguez called Sarabyn at the command post telling him that Koresh was upset, that Koresh had said the ATF and the National Guard were coming, and that as Rodriguez left Koresh was shaking and reading the Bible. The report continues that Sarabyn then asked Rodriguez a series of questions from a prepared list provided by the tactical planners concerning the presence of weapons, whether there had been a call to arms, and other preparations the Davidians were making, to which Rodriguez responded in the negative to each question.

The Treasury Department Report then notes that Sarabyn left the command post at the Texas State Technical College (TSTC) and went to the tarmac area nearby to confer with Phillip Chojnacki, the overall ATF incident commander, and that Sarabyn told Chojnacki what Rodriguez had said as well as the answers to the questions

[62] U.S. Dept. of the Treasury, Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell also known as David Koresh 85 (1993) [hereinafter Treasury Department Report].

[63] Lewis Gene Barber, a retired lieutenant with the Waco Sheriff's Department, informed the subcommittees during its pre-hearing investigation into these events that local police suspected that there was an "informant" at the ambulance company who had been tipping off the local television station. He stated that on several prior occasions, when police had placed the ambulance company on standby, the station sent a camera crew to the site of the police activity, even though the police had not disclosed it to the station.

[64] Treasury Department Report at 85.

[65] *Id.* at 84–89.

[66] *Id.* at 89.

[67] *Id.* at 89.

[68] *Id.*

Sarabyn asked of Rodriguez. The Treasury Department Report states that Chojnacki asked Sarabyn what he thought should be done and that Sarabyn expressed his belief that the raid could still be executed successfully "if they hurried." [69]

According to the Treasury Department Report, Sarabyn then went to the staging area, at the Bellmead Civic Center near the TSTC. When he arrived he was excited, "obviously in a hurry," and telling agents "get ready to go, they know we are coming" and "they know ATF and the National Guard are coming. We are going to hit them now." [70]

b. Testimony before the subcommittees

At the hearings before the subcommittees, these individuals testified in a manner that was similar to, but not entirely consistent with the summary of these events in the Treasury Department Report. When he testified before the subcommittees, agent Rodriguez expanded upon the Treasury Department's description of the events on the morning of February 28th.

> Mr. SCOTT: Mr. Rodriguez, is there—was there any question in your mind, having been inside the residence, that Koresh knew that the agents were coming that day?
>
> Mr. RODRIGUEZ: Sir, there's no question in my mind that Koresh knew—there's no question in my mind that Koresh knew that we were coming, yes, sir.
>
> Mr. SCOTT: And can you describe briefly his emotion when he got the word?
>
> Mr. RODRIGUEZ: Yes, sir. We were—I was inside the compound, on that day, that morning. I had asked him some questions regarding a newspaper clipping. He sat down and started to explain to me the difference between his preachings and another subject's preachings.
>
> As we were discussing the Bible, one of his subjects, Mr. Jones, came in and advised him that he had a telephone call. He ignored the call and continued to talk to me.
>
> At that point, everything was normal. There was only three people in that living room at that point. Everything was calm. He was normal. He was talking to me as he always spoke to me during all our sessions. Nothing—nothing was wrong.
>
> Mr.—Mr. Jones again came to the living room and advised him that he had an emergency call from England. At that time, he quickly got up and left the room. At that time it was still just Mr. Schneider and Sherri Jewell were in that room with me, at that time. He came back approximately 3 or 4 minutes later, and when he came back, I mean it was like day and night.
>
> As he approached me, he was—he was shaking real bad. He was breathing real hard. At one time he put his hands in his pocket, in his jacket pocket, to probably keep his hands from shaking. He sat down next to me, probably about this far, and he continued to try to finish what he was talking to me about.
>
> When he grabbed the Bible, he was shaking so bad that he could not actually read it. I grabbed the Bible and asked him what is wrong. At that time he stopped, and as I sit here I can remember, clearly, he took a deep breath, he turned and looked at me and said, "Robert, neither the ATF or the National Guard will ever get me. They got me once, and they'll never get me again." [71]

Later, Rodriguez continued his testimony:

> Mr. EHRLICH: And what did you do next?
>
> Mr. RODRIGUEZ: I quickly—I felt—I felt very threatened and I stood up, I felt I had to—I had to leave the compound. By that time, there was more—more people that had come into the living room. At first there was only three when we first started.
>
> Mr. EHRLICH: All right, sir. Now, why did you feel you needed to leave the compound?
>
> Mr. RODRIGUEZ: I was threatened because I didn't know—I was afraid that I would be exposed as to who I was. And as I stood there, I looked and I noticed that the door—there's people in front of the door, people behind me, there was no place for me to go. As I was—as I stood there, Koresh went from one window, did the same thing, looked outside, and came back to the other window and again looked outside and said, they're coming, Robert, they're coming.[72]
>
> * * * * *
>
> Mr. EHRLICH: All right, sir. And there came a point in time around 9:15, 9:20 where you left the house, correct?
>
> Mr. RODRIGUEZ: Yes, sir. He finally—he motioned, he gave a head signal, they opened the door for me. I walked out. I got into my vehicle. It took me a while to get it started because I was—by then I was—I was pretty shaken. I quickly went back to the undercover house.[73]

[69] *Id.* at 91.
[70] *Id.*
[71] Hearings Part 1 at 757.
[72] *Id.* at 776.
[73] *Id.*

* * * * *

Mr. RODRIGUEZ: Well, what I did, I went into the—to the room where Mr. Cavanaugh was because that is where the STU phone was. I was supposed to use that telephone to call Mr. Sarabyn. When I got there, we all huddled up and I told Mr. Cavanaugh exactly what had happened in the residence, advised him.

Mr. EHRLICH: And what was his reaction?

Mr. RODRIGUEZ: His reaction was we better call Chuck right now.

Mr. EHRLICH: All right, sir. You got on the phone and did just that, correct?

Mr. RODRIGUEZ: Yes, sir, I did.

Mr. EHRLICH: And please detail the nature of that conversation.

Mr. RODRIGUEZ: I got the phone, I called. He came to the phone. The only thing I can't remember was if somebody else answered. I think somebody else answered and he came to the phone.

Mr. EHRLICH: Who is he? Mr. Sarabyn?

Mr. RODRIGUEZ: Mr. Sarabyn.

Mr. EHRLICH: OK.

Mr. RODRIGUEZ: And the first thing that came out of my mouth was, Chuck, they know, Chuck, they know, they know we're coming. He says, well, what happened? And I explained to him what happened.

I explained to him all the events that took place inside the compound, and his questions were, well, did you see any guns? I said no.

What was he wearing? And I—I advised him of what he was wearing. At that time, he said OK, and that was about the extent of the phone call.

Mr. EHRLICH: All right, sir. Did you request that the raid be called off because the element of surprise had been lost?

Mr. RODRIGUEZ: No, sir. At that time I really didn't have the chance. It was a real quick question and answer thing. He asked me what he was wearing, said OK and he hung up. That's why—that's why I quickly left the undercover house to go talk to him at the command post because I wanted to have a more—more of a lengthy conversation with him about the events.[74]

Rodriguez then testified that he drove to the command post, looking for Sarabyn, in order to further discuss with him in person the events of that morning. As Rodriguez testified:

> Mr. RODRIGUEZ: I—I arrived at the command post and the first thing I asked was, where's Chuck? Where's Chuck? And they advised me that he had left.
>
> At that time, I started yelling and I said, "Why, why, why? They know we're coming, they know we're coming."
>
> Mr. EHRLICH: And what reaction did you get, what response?
>
> Mr. RODRIGUEZ: Sir, everything was very quiet, very quiet, and if I remember right, everybody was really concerned. I went outside and I sat down and I remember starting to cry—starting to cry until Sharon Wheeler came to me and told me what was going on.[75]

While the Treasury Department Report maintains that "all key participants now agree that Rodriguez communicated, and they understood, that Koresh had said the ATF and National Guard were coming,"[76] Sarabyn maintained at the hearings before the subcommittees that while he understood the words Rodriguez had spoken, he did not feel that Koresh actually believed that law enforcement personnel were on their way to the residence. As Sarabyn testified:

> I did not feel he knew that we were coming at that time. When I talked with Robert, like I testified before, I took notes while we were talking over the thing and I have read all of Robert's statements. Robert did—did a great job, but I think everything that you heard as far as testimony was not passed on to me.
>
> In fact, Robert told the shooting review team, or commanders, he didn't go into detail or should have said more. When I went through the questions I asked him, you know, he had said specifically Koresh said, you know, ATF and the Guard are coming, but when I asked, trying to determine what he was doing from those questions, he wasn't doing anything, he was shaking, reading the Bible. He was preaching. I determined that, you know, in my opinion, his actions spoke louder that his words, so I didn't feel that anything was happening then.[77]

At another point in the hearings, Chojnacki testified:

> When I received the information from Mr. Sarabyn . . . [he] pointed out that he had finished talking with Agent Rodriguez and that Robert says he knows we are coming. He said, "The ATF and the National Guard were coming to get me," those kinds of comments that I took to be a repetition of the same comments that we had heard from his other preaching

[74] *Id.* at 777.

[75] *Id.* at 777–778.

[76] Treasury Department Report at 90.

[77] Hearings Part 1 at 786.

> episodes where he preached that the ATF will be coming to get us. "The ATF is coming to get us."[78]

Chojnacki was then questioned directly as to whether he believed at the time that Koresh did, in fact, know that the ATF was going to the Branch Davidian residence. He stated, "Not at that time, I didn't, no sir."[79]

Later, during the hearings, however, Rodriguez questioned the truthfulness of the testimony given by Chojnacki and Sarabyn before the subcommittees. Mr. Rodriguez testified,

> [T]hose two men know—know what I told them and they knew exactly what I meant. And instead of coming up and admitting to the American people right after the raid that they had made a mistake . . . they lied to the public and in doing so they just about destroyed a very great agency.[80]

Several other agents also testified that Sarabyn had informed them that the Davidians knew the ATF was coming. Agent Roger Ballesteros, who was present at the staging area when Sarabyn arrived testified:

> I was in an auditorium along with a large party . . . and Mr. Sarabyn rushed into the room and made it clear to us that we needed to hurry up because, in fact, Mr. Rodriguez had come out and identified the fact that Koresh had been tipped off and that they knew we were coming.[81]

c. What the ATF commanders knew

It is difficult to reconcile Sarabyn's testimony that while he heard agent Rodriguez's words, he believed that Koresh's actions spoke louder than his words and that, as a result, he believed that the Davidians did not really think the ATF agents were on their way. In light of the testimony of Rodriguez and the other agents before the subcommittees, the subcommittees conclude that Sarabyn understood that the Davidians were tipped off and would have been lying in wait for the ATF agents to arrive.

The fact that Sarabyn felt it necessary to tell other agents of what Rodriguez had told him, regardless of how he understood it, indicates that he found the information to be important. Unfortunately, when Sarabyn told Chojnacki this information, Chojnacki did not believe it to be important enough to call off the raid. And, inexplicably, Sarabyn apparently did not believe it important enough to urge Chojnacki to delay the raid. Compounding these failures was the fact that the ATF line agents who heard Sarabyn's comments apparently were not confident enough to question their superiors' judgment in going forward with the raid, even given their concerns about the information relayed by Rodriguez.

B. WHO BEARS THE RESPONSIBILITY FOR THE FAILURE OF THE RAID?

The Treasury Department Report attempts to lay the blame for the failure of the raid squarely on the shoulders of Chojnacki and Sarabyn. Much has been made of what has come to be known as the loss of the "element of surprise," with administration officials asserting that Chojnacki and Sarabyn went forward in the face of a direction to the contrary if the element of surprise were lost.

In their report, Treasury Department officials assert that Stephen Higgins, then Deputy Director of the ATF, had instructed "those directing the raid . . . to cancel the operation if they learned that its secrecy had been compromised . . . ."[82] This statement was purportedly made by Higgins to Ronald Noble, then Assistant Secretary-Designate of the Treasury for Law Enforcement, and John P. Simpson, the acting Assistant Secretary of the Treasury for Enforcement. Noble and Simpson had expressed concerns about the raid when they first learned of it on the afternoon of the Friday before the raid was to take place and Simpson had initially ordered that the raid not go forward. According to the Treasury Department Report, Higgins made this statement to Noble and Simpson in response to their concerns about the raid and in order to convince Simpson to reverse his earlier decision.[83] At the hearings before the subcommittee, Undersecretary of the Treasury Noble testified:

> It's been our—it's been our contention in the Department of the Treasury's report that only Mr. Hartnett and Mr. Chojnacki and Mr. Sarabyn deny, because Mr. Simpson—I mean Mr. Higgins made it absolutely clear that this raid was not supposed to proceed if the advantage of surprise was lost and Mr. Aguilera testified about that being clear on February 12th as well.[84]

Representative Bill McCollum, co-chairman of the joint subcommittees, read into the record at the hearing a similar statement that Mr. Noble had made during an appearance on the television news program "60 Minutes" in May 1995.[85]

But ATF on-site commanders and senior ATF officials disputed the position asserted by the admin-

[78] *Id.* at 466.
[79] *Id.*
[80] *Id.* at 788.
[81] *Id.*

[82] Treasury Department Report at 179.
[83] *Id.*
[84] Hearings Part 1 at 934–935.
[85] During that program Noble stated, "What was absolutely clear in Washington at Treasury and in Washington and ATF was that no raid should proceed once the element of surprise was lost." *Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians (Part 2): Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary and the Subcommittee on National Security, International Affairs, and Criminal Justice of the House Committee on Government Reform and Oversight*, 104th Cong., 1st Sess. 7 (1995) [hereinafter Hearings Part 2].

istration in the Treasury Department Report, by Noble in his television interview, and by Noble during his testimony to the subcommittees. As Dan Hartnett, Deputy Director of the ATF for Enforcement in February 1993, testified:

> Mr. HARTNETT: I saw Ron Noble testify on a national program several months ago or a month ago where he said both Treasury and ATF ordered the commanders at Waco not to proceed, or to abort the raid if they lost the element of surprise. And what I'm saying to this committee is that I have never heard the term, "element of surprise," until after the raid, when we started using it ourself and the media started using it.
>
> But I have to also add that in the briefings, the briefings that I had and Mr. Higgins had, the secrecy of the raid was discussed and was an element of the raid plan that was given to me and to Mr. Higgins. It was just that nobody ever called and said abort the raid if you lose the element of surprise. That just never happened. But secrecy was a part of the plan—secrecy and safety. I mean it was discussed over and over again.[86]

Later, under further questioning on this point by Representative Bill Zeliff, co-chairman of the joint subcommittees, he stated that the administration had tried to cover up the failure of its senior Treasury Department officials to properly direct the actions of ATF officials:

> Mr. ZELIFF: In fact, the element of surprise was never in that plan. Is that correct?
>
> Mr. HARTNETT: The terminology. Secrecy was part of the plan, sir.
>
> Mr. ZELIFF: One final question so the record may stand clearly on its own. Do you believe that these facts demonstrate an effort to cover up the truth by the Treasury Department Report?
>
> Mr. HARTNETT: Yes, yes, I do.
>
> Mr. ZELIFF: By Ron Noble, specifically?
>
> Mr. HARTNETT: Yes.

Sarabyn also testified before the subcommittees that he was never ordered not to go forward if the tactical advantage of surprise had been lost.

> Mr. CHABOT: Mr. Sarabyn, I'd just like to follow up again with your statement, where you said, "Obviously, some people way up said some things after that which weren't true. It goes right down to the decision to go. And they were part of it." By "way up," you're talking about upper echelon officials, I assume. Is that correct?
>
> Mr. SARABYN: What I was making reference to, sir, is the element of surprise. Throughout—at this point, it became a very big issue. The point I was trying to make is I was never given the order not to go if we lost the element of surprise. There has been much conversation after that about the element of surprise and I was trying to say I do not know who up above me, how far, whatever, gave that order to somebody, but I never received that order.[87]

The Clinton administration's attempts to suggest that maintaining the "element of surprise" had been an overriding feature of the directives of Treasury Department officials to ATF officials is inaccurate. While the issue was discussed, there was no absolute direction given to ATF officials or ATF commanders on-site that if secrecy were compromised that they were to not go forward with the raid. The Clinton administration's attempt to suggest otherwise, appears to be a veiled attempt to distance the administration and its most senior officials from the results of the failed raid.

But as Hartnett testified, "Secrecy was part of the plan—secrecy and safety. I mean it was discussed over and over again."[88] And Secret Service Agent Louis Merletti, the Assistant Project Director of the Waco Administrative Review Team created by the Department of the Treasury to review the Waco incident, testified that there is no difference between "the element of surprise and secrecy." He testified that it was "basic to a dynamic entry" method of conducting a raid.[89] Later, however, Hartnett testified:

> Mr. MICA: Mr. Hartnett, you had said you disagreed with Mr. Merletti . . . about some comments he made about assessing the element of surprise. Do you want to respond now?
>
> Mr. HARTNETT: Well, I've always disagreed with that terminology, ever since the Waco review came out. I think that it's a created phrase, and I don't mean to mislead the committee.
>
> You know, I've testified many, many times that a part of the raid was secrecy. But part of the raid was not specifically directed toward those commanders when they say they were given a direct order. That is just not true. They just were not given a direct order.[90]

Regardless of whether it is called the "element of surprise" or simply "secrecy," it is difficult to understand why senior ATF officials did not require that sufficient checks be in place to ensure that secrecy had been maintained up to the begin-

[86] Hearings Part 1 at 763.

[87] *Id.* at 758.
[88] *Id.* at 763.
[89] *Id.* at 766.
[90] *Id.* at 773.

ning of the raid. And it is almost impossible to understand why ATF commanders did not find Rodriguez's information to be important enough to call off the raid. Given the type of tactical operation selected, maintaining the secrecy of the timing of the raid is so fundamental that the blame for the failure to ensure that it was maintained must be shared not only by the commanders on-site but by senior ATF officials.

It is unclear from the testimony and from the Treasury Department Report why ATF Director Higgins and Deputy Director Hartnett did not significantly involve themselves in the planning and oversight of the execution of a raid of this magnitude. This is especially puzzling in light of the amount of weaponry the ATF suspected was possessed by the Davidians. Given the high risk involved in any dynamic entry, and the fact that the open location of the Davidian residence created a greater risk to the ATF agents in using this tactic, it is simply incomprehensible that the most senior ATF officials were not directly involved with the planning of this operation and in overseeing its implementation. In retrospect, maintaining the secrecy of this operation was one of the most important aspects of this plan. To experienced law enforcement officials this fact should have been obvious from the beginning. In fact, it should have been the overriding concern of all involved. It was not something of which senior officials should have had to order agents to be aware.

Higgins and Hartnett must share a portion of the blame for the failure of the raid because they failed to become significantly involved in the planning for it. Had they done so, they presumably would have ensured that a procedure was in place through which Rodriguez's information was relayed to them and they would have acted upon it. At the very least, they share some blame for not instilling in the senior raid commanders an understanding of the need to ensure that secrecy was maintained in an operation of this type.

But most of the blame for the failure of the raid, and for the loss of life that occurred, however, must be born by the raid commanders themselves, and in particularly by Sarabyn. Both Sarabyn and Chojnacki understood what Rodriguez had told Sarabyn but, inexplicably, somehow did not find it to be significant enough to warrant calling off the raid. Perhaps they thought that because the Davidians were not arming themselves when Rodriguez left the residence that they would not do so. Perhaps they believed that the agents could have arrived at the residence before the Davidians had fully armed and taken up offensive positions against them. Perhaps they even thought that their abilities were so superior to those of the Davidians that they could have successfully overcome the Davidians, even if the Davidians had been expected to be lying in wait. Whatever the reason, however, the facts are that they knew or should have known that the Davidians had become aware of the impending raid and were likely to resist with deadly force. The only realistic conclusion that can be drawn is that Chojnacki and Sarabyn acted recklessly failing to call off the raid.

Given the manner in which Sarabyn relayed the information to Chojnacki, it is perhaps understandable that Chojnacki presumed that the information was not important. But Chojnacki's overriding concern on February 28 should have been that the secrecy of the mission be maintained. When any credible evidence was brought to his attention that secrecy might have been compromised he should have delayed the start of the operation until he could confirm or deny those reports.

As Chojnacki testified before the subcommittees, "I accept the responsibility for making the field decision. I was the incident commander, I was the person to make that decision."[91] Regardless of whether he fully understood the significance of what Sarabyn told him, it was his job to take whatever steps were necessary to insure that secrecy was maintained. Because he did not, his portion of the blame for the failure of the raid and its consequences is equal to that of Sarabyn.

C. OTHER WAYS IN WHICH THE PLAN SELECTED WAS BUNGLED

While the failure of ATF's commanders to recognize and respond to the fact that their raid plan had been severely compromised was, by far, the most significant mistake made on February 28, a number of other failures came to light during the subcommittees' investigation.

1. Command and control issues

A number of command and control issues significantly undermined the possibility of success for the raid. Most of these issues were addressed in the Treasury Department Report,[92] however, three of them bear repeating here.

a. Assigning command and control functions under the ATF's National Response Plan

The decision to designate Chojnacki as incident commander and Sarabyn as tactical commander was mandated under the ATF's National Response Plan. While the tactical experts who testified at the hearings and briefed the subcommittees noted that the use of an overall coordinating document, such as the National Response Plan, is an appropriate organizational and standardization tool, some of the plan's requirements resulted in less qualified people being placed in positions of command and control when agents who were more qualified for these positions, and who were already selected to be involved in the raid, were available.

Chojnacki was selected as incident commander because he was the special agent in charge of the field office in whose region the raid was to occur. While the special agent in charge of a geographic

[91] Hearings Part 1 at 759–760.
[92] Treasury Department Report at 152–156.

area may have a great interest in an operation that takes place in his area, his position has little bearing on his qualification to run the operation. And even though Chojnacki had 27 years of law enforcement experience, there were other agents involved in the raid who possessed substantially more experience in tactical operations.

Chojnacki, in turn, appointed Sarabyn, to be tactical coordinator because the National Response Plan required that position to be filled by an assistant special agent in charge who had completed special response team (SRT) training, as had Sarabyn. But Sarabyn had attended SRT training only as an observer, and there were other agents of lesser rank who had more experience in this area.[93] As in the case with Chojnacki, the National Response Plan's emphasis on rank and geographical assignment created the unintended result of placing a less qualified person into a position for which he was either simply not qualified or for which there were others more qualified.

b. Command and control on the scene on raid day

Chojnacki decided to ride in one of the helicopters on raid day.[94] This decision placed him out of effective communications with the other raid commanders and SRT teams leaders prior to the beginning of the raid. Had he chosen to remain in central position from which he could control the evolving raid, he might have had other opportunities to learn of Rodriguez's information about what the Davidians' forewarning. He might also have been able to learn from agents in the undercover house that the Davidians were not where the ATF anticipated they would be on the morning of February 28, a key element of the tactical plan, but instead were lying in wait for the agents.

Sarabyn, the tactical commander, chose to ride in one of the cattle trailers[95] rather than observing the residence from a vantage point such as the undercover house, where he could monitor activity in and around the building, as well as view the approach of the ATF agents in the cattle trailers. By riding in the trailers with the agents who were to conduct the raid, Sarabyn severely limited his view of the Branch Davidian residence, which also prevented him from observing that the Davidians were not where the ATF expected them to be just before the raid began.

Additionally, once Sarabyn arrived at the residence he became pinned down with the other agents and was unable to communicate with many of the other agents at different points around the building. Had he chosen to place himself in a position where he would not have come under fire, such as the undercover house, he might have been able to communicate with all of the agents, perhaps diverting or redirecting the actions of some and reducing the number of casualties sustained.

c. Command and control from Washington

On February 28, ATF activated its "National Command Center" at its Washington headquarters staffed with "high-level managers . . . experience[d] in field operations."[96] Yet it appears that the command center played no role in the planning or implementation of the operation until after ATF agents had been killed or wounded. The personnel in the command center never learned that Rodriguez knew the Davidians thought the raid was imminent because Chojnacki never told them. Apparently, the person in the command center with whom Chojnacki spoke did not know enough about the raid to know that an undercover agent was to have been inside with the Davidians until shortly before the raid was scheduled to begin and valuable information might have been available. In fact, according to the Treasury Department Report, no one in the command center asked any questions of Chojnacki at all when he reported in shortly before the raid.[97]

2. The lack of a written raid plan

The Treasury Department review of the ATF's investigation of David Koresh noted that the ATF agents who were in command of the raid did not prepare a written raid plan in advance of the raid. While two ATF agents took it upon themselves to create one, it was never reviewed by the senior raid planners and commanders, and never distributed to any of the agents who were to participate in the raid.[98]

During the hearing before the subcommittees, several tactical experts testified that the drafting of a written raid is an important part of developing an overall operational plan. Indeed, the ATF's own National Response Plan, which was drafted to establish "consistent policies and procedures" when several Special Response Teams are involved in an operation,[99] requires that a written plan "for managing the critical incident or major ATF operation" be produced before the operation begins.[100] Yet this was not done in this case.

3. Lack of depth in the raid plan

One problem with overall planning was the fact that no written plan existed. A factor that may have exacerbated the losses the ATF sustained on February 28 was the lack of depth in the oral raid plan. The plan involved agents in two cattle cars driving up an exposed driveway to the front of the Davidian residence and running out of the cars, with one group storming through the front doors while the other went to the side of the building,

[93] *Id.* at 153.
[94] *Id.* at 154.
[95] *Id.*
[96] *Id.* at 175.
[97] *Id.*
[98] *Id.* at 207–208. Additionally, Agent Rodriguez testified before the subcommittees that he never saw any written raid plan. Hearings Part 1 at 821.
[99] Treasury Department Report at 152.
[100] *Id.* at 207.

climbed ladders carried by agents onto the roof and in through the second-story windows.[101] There was little else to the plan and, importantly, little or no discussion of what might go wrong.

There was almost no training given on how to withdraw from the residence.[102] Even the written plan created after the raid and given to the Texas Rangers during their investigation (which was never distributed to the commanders or any agents in advance of the raid) devoted much of its 8½ pages to administrative issues. It contained no mention of what agents were to do if anything went wrong with the "dynamic entry" into the residence. The three short paragraphs under the heading "contingencies" simply mentioned the presence of an ambulance and nurse near the scene.[103]

As discussed above, the most grievous failure on the part of ATF officials on February 28 was the failure to understand and appreciate the significance of undercover agent Rodriguez's report that the Davidians knew the ATF raid was imminent. Yet, the omission of any contingency planning was a failure that may have led to the deaths of agents who might otherwise have survived. Contingency planning might have been effective at a number of stages: when the agents turned into the driveway; when they first realized they were coming under fire from the Davidians; or when the order was given to retreat in the face of the Davidians' fire.

The Treasury Department Report states "the failure of the planners to consider that their operation might go awry and prepare for that eventuality is tragic, but somewhat understandable."[104] It notes that most ATF agents were used to operations going without incident, or at least being resolved in favor of the ATF, and that the only other ATF operation similar in magnitude to the one against the Davidians had been resolved peacefully. The report places stronger blame on ATF's national leadership for this failure, calling its failure to ensure that some contingency planning was done "simply unacceptable."[105]

The subcommittees agree that ATF leadership shares the blame for the failure of this operation and that, clearly, it would have been beneficial had they been involved in a meaningful way in the planning of the operation. But it should not take directives from Washington to ensure that agents in charge of the ATF's various field offices and Special Response Teams, the people who actually conduct an operation, will know enough to ask the simple question "what happens if this doesn't go as planned." No amount of past success is reason enough to explain why this possibility wasn't considered and planned for. The fact that it was not done is, at best, additional evidence of the lack of skill and sophistication of senior ATF commanders involved. At worst, it is evidence of grievous negligence on their part.

4. Tactical teams trained together for only 3 days before the raid

Another fact which indicates a lack of skill on the part of both senior ATF officials and the ATF on-site commanders, particularly overall incident commander Chojnacki, is the fact that the Special Response Teams (SRT's) involved in conducting the operation trained together for only 3 days prior to the operation.[106] The ATF does not maintain a large standing force of specially trained agents which can be dispatched to the site of a disturbance, such as the FBI's Hostage Rescue Team. Instead, the ATF put together its team for the operation against the Davidians by combining special response teams from several of the ATF's regional offices.

While the subcommittees do not conclude that the ATF should have created a special team such as the FBI's Hostage Rescue Team in advance of the raid (and does not conclude that it need do so now), it appears that the reason why the FBI maintains its HRT as a single unit is because coordination of the agents involved in a tactical operation, especially one involving great risk, is of the utmost importance. Senior ATF officials and the ATF's on-site commanders either were unaware of this fact or, more likely, simply ignored it for reasons which are unknown to the subcommittees. Regardless of the reason, however, the fact that ATF officials believed that they could create a force of over 70 agents, adequately trained to conduct an operation of this complexity against a heavily armed opposing force, indicates a lack of foresight on the part of these senior officials which is unacceptable.

5. True National Guard role only made clear 24 hours prior to the raid

The subcommittees have learned that when the Texas National Guard was asked to provide helicopters to the ATF, the purpose given was that they would be used as an observation platform or command and control platform.[107] When the National Guard pilots arrived at Fort Hood to train with the ATF the day before the raid they learned for the first time that the ATF intended to use the helicopters as a diversion just before the raid was to begin. The helicopters were to fly close to the residence, attracting the attention of those inside to the back side of the building, while the ATF agents arrived at the front of the structure.[108]

[101] *Id.* at 54–64.
[102] *Id.* at 151.
[103] *Id.* at C–19.
[104] *Id.* at 151.
[105] *Id.*

[106] *Id.* at 73.
[107] Interviews of National Guard personnel. [See documents produced to the subcommittees by the Department of the Treasury T005368, T005376 at Appendix [hereinafter Treasury Documents]. The Appendix is published separately.]
[108] Treasury Department Report at 95.

While the National Guard was conducting its role in its Title 32 status,[109] and so was not limited by the terms of the Posse Comitatus Act,[110] this change in plan is still troubling. The failure to inform National Guard commanders of the true role for the National Guard troops and equipment well in advance of the raid is an omission that is, at best, additional evidence of the poor planning for the raid done by the ATF commanders. At worst, this may have been an attempt by ATF commanders to obtain operational assistance that, while not prohibited by law, might have been declined by the Governor of Texas as commander of the Texas National Guard had the ATF given sufficient notice for word to have reached her. In any event, it does not appear that senior ATF or Treasury officials gave any consideration to the negative image of military helicopters being used as part of a raid on American civilians.

D. SERVICE OF THE WARRANT

One of the issues considered by the subcommittees was whether the ATF agents serving the arrest and search warrants on February 28 were required to "knock and announce" their intention to serve the warrant before entering the Davidian residence. When the ATF agents conducted the raid on the Davidian residence the agents did not knock on the Davidians' front door and announce their intentions to serve the warrant. Rather, the ATF agents dismounted from the cattle trailers in which they were riding on the run. One group attempted to enter the residence forcibly through the front door. A second group attempted to enter the second floor windows via the roof.

The subcommittees' review of videotapes made of the training sessions during which ATF practiced the raid plan revealed that the plan was designed around this type of dynamic entry and did not involve a knock and announce approach. In other words, the use of these tactics was not the result of any circumstances which had occurred on February 28.

In 1917,[111] Congress enacted the Federal knock and announce statute.[112] Generally speaking, the statute permits forcible entry for the purpose of executing a search warrant only after the officer gives notice of his authority and his purpose but is refused admittance. Courts interpreting the statute, however, have adopted a number of exceptions to the rule allowing unannounced police entries in limited exigent circumstances. For example, courts have held that such an announcement is unnecessary when the facts known to officers would justify them in being virtually certain that the person on whom the warrant is to be served already knows the officers' purpose and that an announcement would be a useless gesture.[113] Courts also have held that police need not knock and announce their intent to serve a warrant if they fear that to do so would allow the person on whom the warrant is to be served to destroy the evidence to be seized under the warrant.[114] A third general exception to the rule requiring the police to knock and announce their intent to serve a warrant is when to do so would increase the risk of danger to the officers serving the warrant.[115]

Given the fact that the arrest and search warrants were based, in part, on the evidence that the Davidians were in possession of illegal automatic weapons, the subcommittees believe it was reasonable for the ATF to have presumed that the Davidians might fire on them had they announced their intent to serve the warrants in advance. The Davidians own behavior in firing on the ATF agents proves the reasonableness of that belief.

E. UNRESOLVED ALLEGATIONS

1. Who shot first?

Much has been made of the issue as to which side in the gun battle shot first. Conflicting evidence on this point was presented to the subcommittees by the ATF agents who were involved in the raid, the Texas Rangers who conducted an investigation into the events of the raid following the end of the standoff on April 19, and by the attorneys for the Davidians.

ATF Special Agent John Henry Williams, a member of the SRT team assigned to enter the front door of the Davidian Residence, and who spoke to David Koresh at the front door of the Davidian residence as the raid began, testified that he was convinced that the Davidians shot first. As Williams testified before the subcommittees,

> As we approached the front door, David Koresh came to the front door dressed in black cammo fatigues.
>
> As he closed the door, before we reached the door, one agent reached the door, and at that point that is when the doors erupted with gunfire coming from inside. It was 10 seconds or more before we even fired back.[116]

Later on that same day, Williams testified at greater length about the start of the gun battle.

> Mr. SCOTT: Can you go through just very briefly, you were walking up to the

[109] For an explanation of the three "statuses" in which National Guard forces operate, see Section V of this report.

[110] *See* Section V of this report.

[111] *See generally* Robert J. Driscoll, *Unannounced Police Entries and Destruction of Evidence After Wilson v. Arkansas*, 29 Colum. J.L. & Soc. Probs. 1, 10 (1995).

[112] The Federal knock and announce statute is found in 18 U.S.C. § 3901. That section states, "The officer may break open any outer or inner door or window of a house, or any part of a house or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[113] Driscoll, *supra* note 111, at 11.

[114] *Id.*

[115] *Id.*

[116] Hearings Part 1 at 725.

door, and how close to the door were you when the shooting started?

Mr. WILLIAMS: About 10 feet from the door.

Mr. SCOTT: Was it your intention prior to that to—had Koresh come out by then?

Mr. WILLIAMS: Yes.

Mr. SCOTT: And how far from the door were you when he closed the door in your face?

Mr. WILLIAMS: Approximately 15 feet from the door.

Mr. SCOTT: And did you continue walking forward?

Mr. WILLIAMS: Yes.

Mr. SCOTT: And how close were you when the shooting started?

Mr. WILLIAMS: I—basically about 10 feet. After that, the shooting started immediately after he closed the door.

Mr. SCOTT: Is there any question in your mind as to where the shooting began?

Mr. WILLIAMS: None.

Mr. SCOTT: Thank you—excuse me, that was from the inside coming out.

Mr. WILLIAMS: Yes, from the inside coming out.[117]

Senior officers of the Texas Rangers also testified as to the findings of their investigation into these events after April 19. The Rangers interviewed virtually everyone who was present at the Branch Davidian residence on February 28, including several of the surviving Davidians and all of the ATF agents who were present. As Texas Ranger Captain David Byrnes testified to the subcommittees:

> I believe the evidence was to me overwhelming in the trial that the Davidians fired first. The cameraman and the reporter, although very reluctantly, finally I believe conceded that. He had broadcast that several times. He was more or less a hostile witness. But in my mind there is no doubt who fired first.[118]

But the attorneys for the Davidians testified that they believed the gun battle erupted as the result of an accidental discharge by one of the ATF agents. Jack Zimmerman, attorney for David Koresh during the standoff, testified

> My personal opinion is that it was an accidental discharge by one of the ATF agents as he was dismounting and that that was a signal to open fire, which you haven't heard a testimony about. Nobody asked them, what was the signal to open fire if you did open fire? Who made that decision? What command was it?
>
> But I believe that what the evidence from the trial, the criminal trial, was that somebody off to the side heard, somebody fired, and they testified that it came from behind them . . . . I will point out to you from talking to the foreman of the criminal trial jury, who heard 6 weeks of testimony by the Government in 2 days of testimony from the defense, they could not decide, he told me. The foreman of the jury told me they could not decide because the evidence was in such conflict as to who fired first.[119]

2. Were shots fired from the helicopters?

Allegations were leveled by the Davidians' attorneys that agents in the National Guard helicopters used in the raid fired into the Branch Davidian residence from the air. The Davidians' attorneys testified that they were shown holes in the roof of the structure which appeared to them to be bullet holes fired from the outside into the structure.

Phillip Chojnacki, who was riding in one of the helicopters, testified, however, that no shots were fired from the helicopters. He testified that ATF personnel on the helicopters were armed only with 9 millimeter sidearms and that he observed no shots fired from the helicopters.[120] His testimony is supported by the sworn statements of each of the pilots of the helicopters, taken on April 20, 1993, that the helicopters were unarmed and that no ATF agents fired from the helicopters.[121] Texas Ranger Captain David Byrnes also testified as to what the Rangers' investigation concluded with respect to this issue. He stated that the Rangers found no evidence that shots were fired from the helicopters.[122]

The subcommittees reviewed videotape of the raid shot by agents in the helicopters as well as videotape of the exterior of the helicopters involved in the raid after the helicopters withdrew from the scene. At no point in the videotape does any ATF agent fire a weapon from the helicopters and the helicopters do not appear to have been equipped with machine guns or other weaponry. The video tape reviewed, however, is not continuous from the point from which the helicopters lifted off to the point at which they landed. The fact that videotape was taken at some points in the raid and not at others has not been explained to the subcommittees.

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[117] *Id.* at 756.

[118] Hearings Part 2 at 150.

[119] Hearings Part 2 at 26.

[120] Hearings Part 2 at 821–822.

[121] *See* Documents produced to the subcommittees by the Department of the Treasury T005723, T005730, T005731, at Appendix [hereinafter Treasury Documents]. The Appendix is separately published.

[122] Mr. MCCOLLUM: What about with regard to firing from the helicopters? Did any of the ATF agents tell you that there had been shots fired from the helicopters?

Mr. BYRNES: Quite to the contrary, we could find no evidence that there was ever any shots fired. Our best evidence is that they peeled off at about 300, 350 meters, because there was gunfire, and those pilots were not going to fly over that residence.

Hearings Part 2 at 197.

It has been suggested that the bullet holes in the roof of the Branch Davidian residence may have come from ATF agents on the roof who were firing into the structure as the firefight continued. Jack Zimmerman, the attorney for Branch Davidian Steve Schneider during the standoff, conceded that this was a possible explanation for the presence of the bullet holes during his testimony before the subcommittees.[123] Given that there were several ATF agents who were on the roof of the residence during the firefight with the Davidians, this explanation seems plausible.

F. THE FIRING AND REHIRING OF CHOJNACKI AND SARABYN

In October 1994, following the Treasury Department's review of the failed raid against the Davidians, the Department terminated the employment of the two senior raid commanders, Chojnacki and Sarabyn.[124] Both of them filed complaints with the Merit System Review Board. While that complaints were pending, the Treasury Department reached agreements with both Chojnacki and Sarabyn.[125] As a result of those agreements, both were rehired by the ATF. However, neither is assigned to positions of authority over other agents and neither is presently empowered to carry a weapon.

At the hearings before the subcommittees, Treasury Department officials were asked why a deal was struck with the two people on whom the Treasury Department blamed the failure of the Davidian raid. No sufficient answers to this question were provided. In light of the Treasury Department Report's conclusion that "raid commanders Chojnacki and Sarabyn appeared to have engaged in a concerted effort to conceal their errors in judgment,"[126] it is difficult to imagine any basis upon which the rehiring of these two individuals can be justified by Treasury Department officials.

G. FINDINGS CONCERNING THE RAID EXECUTION

1. Chojnacki and Sarabyn jointly share most of the responsibility for the failure of the ATF raid against the Davidians. The blame for the failure of the raid, and for the loss of life that occurred, must be born by the senior ATF raid commanders, Phillip Chojnacki and Chuck Sarabyn. They either knew or should have known that the Davidians had become aware of the impending raid and were likely to resist with deadly force. Nevertheless, they recklessly proceeded with the raid, thereby endangering the lives of the ATF agents under their command and the lives of those residing in the compound. This, more than any other factor, led to the deaths of the four ATF agents killed on February 28.

2. The former Director and Deputy Director of the ATF bear a portion of the responsibility for the failure of the raid. Former ATF Director Stephen Higgins and former ATF Deputy Director Daniel Hartnett bear a portion of the responsibility for the failure of the raid because they failed to become involved in the planning for the raid. Had they done so, they might have ensured that a procedure was in place through which the undercover agent's information was relayed to them and they could have acted upon it. At the very least, they share some blame for not instilling in the senior raid commanders an understanding of the need to ensure that secrecy was maintained in an operation of this type.

3. The planning for the raid was seriously flawed. There were numerous problems with the ATF's planning for the raid. These failures evidence the lack of experience and sophistication of the senior ATF agents charged with developing the ATF's raid plan. They also suggest that the ATF's senior officials failed to fully train or monitor the actions of its senior operational commanders. Included among the failures were:

- The ATF's own internal guidelines resulted in less qualified people being placed in command and control of the operation when other, more qualified agents, were available for these positions. The commanders also made strategic command and control errors on raid day, placing themselves in positions that hampered their ability to receive and act upon important information that might have led them to postpone the raid or redirect it to minimize casualties.
- The raid plan itself lacked significant depth, principally in that it contained almost no contingency planning which might have minimized the losses suffered by the ATF on February 28.
- ATF commanders also failed to adequately train the agents involved in the raid or to fully inform the Texas National Guard of the intended role that its personnel would play in the raid.
- ATF commanders failed to reduce the raid plan to writing, as was required by ATF internal guidelines. Had this been done, and the written plan circulated to those involved in the raid, the errors in the raid planning might have been brought to light and corrected.
- The activation of the ATF National Command Center occurred only because it was re-

[123] "I couldn't tell you whether those rounds were fired from a helicopter or not. All I could tell you is they come from the sky downward. If somebody were standing on top of the roof shooting down into the ceiling, it would look exactly the same way." Hearings Part 2 at 27 (statement of Jack Zimmerman).

[124] Memorandum to Charles D. Sarabyn from ATF Deputy Director, "Decision to Remove from Position and from the Federal Service" (October 26, 1994); Memorandum to Phillip J. Chojnacki from ATF Deputy Director, "Decision to Remove from Position and from the Federal Service" (October 26, 1994). Treasury Documents T00012743–T00013735.

[125] Settlement Agreement, *Phillip J. Chojnacki* v. *Department of the Treasury,* Case No. DA–0752–95–0126–I–1, Merit Systems Protection Board, Denver Field Office (December 1994). Treasury Documents T00013868–T00013874. Settlement Agreement, *Charles D. Sarabyn* v. *Department of the Treasury,* Case No. DA–0752–95–0127–I–1, Merit Systems Protection Board, Denver Field Office (December 1994). Treasury Documents T00013428–T00013434.

[126] Treasury Department Report at 193.

quired by the National Response Plan, and not because it was to have any meaningful role in the implementation of the raid plan. Had the senior ATF officials written the National Response Plan in such as way as to ensure that command center personnel would be briefed on the significant details of the operation and would have the clear authority to question on-scene commanders, the raid might have been called off by command center officials asking about the report made by Rodriguez.

4. The ATF agents executing the raid were not required to knock and announce their intention to serve the arrest and search warrants. Given that the arrest and search warrants were based, in part, on the evidence that the Davidians were in possession of illegal automatic weapons, the subcommittees believe it was reasonable for the ATF to have presumed that the Davidians might fire on them had they announced their intent to serve the warrants in advance. Accordingly, the subcommittees conclude that the ATF was not required to knock and announce their intention to serve either the arrest warrant or the search warrant because to do so would have measurably increased the risk to the ATF agents involved.

5. The evidence suggests that the Davidians fired the first shots on February 28, 1993. The subcommittees believe that the question of who fired the first shot on February 28 cannot decisively be resolved given the limited testimony presented to the subcommittees. It appears more likely, however, that the Davidians fired first as the ATF agents began to enter the residence.

6. The evidence presented to the subcommittees generally supports the conclusion that no shots were fired from the helicopters at the Branch Davidian residence. The subcommittees believe, however, that there is insufficient evidence to determine with certainty as to who fired the shots that made the bullet holes in the roof of the Davidian residence.

7. After the raid failed, Clinton administration officials inaccurately stated that the ATF raid commanders had been given explicit orders to not proceed with the raid if the secrecy of the raid was compromised. After the raid failed, Assistant Treasury Secretary Ronald Noble attempted to lay the blame entirely on the ATF despite the fact that Treasury officials, including Noble, failed to properly supervise ATF activities leading to the raid. Moreover, Treasury officials, having approved the raid, failed to clearly and concisely communicate the conditions under which the ATF was to abort the raid.

8. The subcommittees find no justification for the rehiring of Chojnacki and Sarabyn. Given that the largest portion of blame for the failure of the raid against the Davidians must be born by Chojnacki and Sarabyn, the subcommittees find no justification for their rehiring by the ATF. The fact that senior Clinton administration officials approved their rehiring indicates a lack of sound judgment on their part. It also further begs the question as to whether there are facts not disclosed to the subcommittees that led administration officials to agree to rehire these men.

H. RECOMMENDATIONS

Because the largest single cause of the ATF raid disaster was the failure of ATF's senior field commanders to recognize or act upon the undercover agent's information that the Davidians knew the ATF raid was underway, there is no overriding recommendation which, if implemented, would prevent similar tragedies from occurring in the future. The subcommittees believe, however, that had more experienced ATF agents been involved in the planning of this raid the many deficiencies in the raid plan itself would have been avoided. Most importantly, the subcommittees believe that had more experienced commanders been assigned to this operation, the information that the Davidians knew that the raid was impending would not have been ignored but, rather, understood for what it was and acted upon accordingly. There are, however, a number of steps that should be taken to correct other problems associated with the failed raid and which, taken together, might help prevent similar failures in the future.

1. Congress should conduct further oversight of the Bureau of Alcohol, Tobacco and Firearms, the oversight of the agency provided by the Treasury Department, and whether jurisdiction over the agency should be transferred to the Department of Justice. Congress should consider whether the lack of Treasury Department oversight of ATF activities in connection with the investigation of the Davidians, and the failures by ATF leadership during that investigation, indicate that jurisdiction over the ATF should be transferred to the Department of Justice.

2. The ATF should revise its National Response Plan to ensure that its best qualified agents are placed in command and control positions in all operations. As discussed above, the ATF's National Response Plan in effect in 1993 led to the placement of Chojnacki as incident commander and Sarabyn as technical commander for the raid, when more experienced ATF personnel were available. The subcommittees recommend that the National Response Plan be revised to provide that incident commanders for significant operations be selected by ATF headquarters personnel from among the most experienced agents in the ATF, rather than based upon any consideration of the agent who may have administrative responsibility for a given geographic area. Likewise, the subcommittees recommend that other senior positions in significant operations, such as tactical commander, also be selected by ATF headquarters personnel from ATF agents most experienced in

these areas, regardless of geographical assignment.

3. Senior officials at ATF headquarters should assert greater command and control over significant operations. Just as the National Response Plan should be revised to allow greater control by ATF headquarters, the subcommittees recommend that ATF's most senior officials be personally involved in the planning and oversight of every significant operation. While the ATF did activate its National Command Center in Washington just prior to the commencement of the ATF raid against the Davidians, command center personnel played no actual role in the planning or the implementation of the operation until after it went awry.

The subcommittees recommend that ATF's most senior officials be directly involved in the planning of all significant operations and personally approve each operation in advance of its implementation. Additionally, the subcommittees recommend that the National Command Center be activated well before the commencement of an operation, that it be staffed with persons experienced in tactical operations and knowledgeable of the operation in question, and that these persons be given the authority to suspend the operation or revise the operation plan as the situation develops.

4. The ATF should be constrained from independently investigating drug-related crimes. Given that the ATF based part of its investigation of the Branch Davidians on unfounded allegations that the Davidians were manufacturing illegal drugs, and as a result improperly obtained military support at no cost, the subcommittees recommend that Congress restrict the jurisdiction of the ATF to investigate cases involving illegal drugs unless such investigations are conducted jointly with the Drug Enforcement Administration as the lead agency.

V. Military Involvement in the Government Operations at Waco

U.S. military involvement is one of the least explored and most misunderstood elements of the events that took place near Waco, TX in 1993. The Treasury Department Report dedicated only 3½ of 220 pages to explaining the military's involvement, and the Department of Defense and National Guard Bureau have only recently taken an interest in addressing some of the military issues that Waco raised.

A. The Expansion of Military Assistance to Law Enforcement

Historically in America, there has been a general principle that the military should not be involved in civilian law enforcement. Congress codified this principle by enacting the Posse Comitatus Act[127] in 1878. The subcommittees have found that subsequent congressional actions and legal cases have eroded the Posse Comitatus Act to an alarming degree and blurred its legal restrictions.

In determining whether the military assistance provided at Waco was illegal, the subcommittees reviewed the current status of the Posse Comitatus Act and other laws governing the use of the military in civilian law enforcement, why changes in the laws have occurred and what effects those changes have had on the use of the military in civilian law enforcement.[128] Additionally, the subcommittees have addressed the common practice of Governors using National Guard (NG) personnel across State lines.

1. The Posse Comitatus Act

a. Overview of the law

The Posse Comitatus Act was enacted in the United Stated in 1878 in response to the improper use of military troops in the South during the post-Civil War Reconstruction period.[129] The Posse Comitatus Act provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than 2 years, or both.[130]

However, as early as the Magna Carta, prohibitions against the use of the military in civilian affairs were being established.[131] These prohibitions are based on the principle that the military should never be employed against the citizenry of the Nation it supports and is buttressed by the clear separation, in this country, between civilian authority and military support for that authority. The clear separation between civilian and military authority is embodied in the Declaration of Independence[132] and the U.S. Constitution.[133]

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[127] Posse Comitatus means "the power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases; as to aid him in keeping the peace, in pursuing and arresting felon, etc." Black's Law Dictionary (1st ed. 1891) (citing 1 William Blackstone, Commentaries 343).

[128] Roger Blake Hohnsbeen, *Fourth Amendment and the Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement*, 54 Geo. Wash. L. Rev. 404, 404 (1986).

[129] "Until passage of the Posse Comitatus prohibition in 1878, the improper use of troops became a common method of aiding revenue officers in suppressing illegal production of whiskey; assisting local officials in quelling labor disturbances; and insuring the sanctity of the electoral process in the South by posting guards at polling places." Clarence I. Meeks, III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83, 90 (1975).

[130] 18 U.S.C. § 1385 (1988). A post-Waco amendment changed the penalty portion to read, "shall be fined under this title or imprisoned not more than two years, or both." Violent Crime Control and Law Enforcement Act of 1994 § 330016(L), Pub. L. 103–322, 108 Stat. 2147.

[131] Congressional Research Service, The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law 3 (1995) (citing Magna Carta, ch. 39 (1215)).

[132] The Declaration of Independence (U.S. 1776).

[133] U.S. Const. Amend. II, III.

Nevertheless, no one has ever been prosecuted for violating the Posse Comitatus Act.[134] Due in part to a creeping acceptance of military involvement in law enforcement actions, the Posse Comitatus Act has been invoked very rarely.[135] Until the criminal cases arising from the 1973 Indian uprising at Wounded Knee,[136] civilian law enforcement apparently relied upon military support without fear of recourse.[137]

Specifically, at Wounded Knee, the Nebraska National Guard and U.S. Air Force personnel conducted aerial reconnaissance photography of the site, while the South Dakota National Guard maintained military vehicles in the area of the siege.[138] Two regular Army colonels (Title 10 personnel)[139] were present at Wounded Knee as Defense Department "observers"; however, these military personnel also provided "advice, urging and counsel . . . to Department of Justice personnel on the subjects of negotiations, logistics and rules of engagement."[140]

Four criminal cases resulted from the Wounded Knee incident. Each raised similar challenges to the military's involvement.[141] The diverse rulings on these challenges raised questions about the legality of much of the military assistance being broadly and regularly provided to law enforcement agencies. The courts in *United States* v. *Banks* and *United States* v. *Jaramillo* found certain military activities to be in violation of the Posse Comitatus Act, while the court in *United States* v. *Red Feather* found the military involvement at Wounded Knee permissible.[142] The *Red Feather* court determined, that as long as military assistance was passive or indirect, such assistance did not violate the Posse Comitatus Act.[143]

In order to resolve questions raised by the Wounded Knee cases, and at the urging of the Defense Department and Justice Department, Congress adopted the above distinctions set forth by the *Red Feather* court[144] and, in 1981, enacted a number of general exceptions to the Posse Comitatus Act.[145] In general, the 1981 exceptions authorized the military to make available to civilian law enforcement agencies information collected during military operations, training and advice, the use of military equipment and facilities, and the use of some Defense Department personnel.[146] However, direct participation in law enforcement activities like search, seizure and arrest was prohibited.[147]

b. The war on drugs

By the mid-1980's, there was little question that the Nation was struggling with a major increase in illegal drug importation and use, and Congress summoned a massive increase of resources to confront this modern scourge. The fiscal year 1989 Department of Defense Authorization Act significantly expanded the role of the National Guard in support of law enforcement agencies.[148] The following year, the role of the military was expanded further in the fiscal year 1990 Department of Defense Authorization Act which "directed the U.S. Armed Forces, to the maximum extent possible, to conduct military training in drug interdiction areas."[149]

After Congress and the courts expanded permissible military assistance to civilian law enforcement and the Defense Department assumed the lead in the war on drugs, military assistance to law enforcement greatly increased. This increased use of military personnel is most noticeable with the National Guard because of fewer legal restrictions on its use.

c. The National Guard and the Posse Comitatus Act under current law

The National Guard, for reasons that are at least partially historical, is not subject to the same legal restrictions placed on active duty and reserve military personnel with regard to involvement in

[134] Meeks, *supra* note 129, at 128.

[135] *Id.*

[136] In the 1973 Wounded Knee uprising, a dissident Indian group forcibly took control of the Wounded Knee Village on Pine Ridge Reservation, SD. This group entered a U.S. Post Office by force, held hostages and refused to allow Federal investigators into the area. In support of Federal law enforcement agents, military personnel provided an array of assistance, closely resembling the military assistance provided to Federal law enforcement agents during the Waco incident.

[137] Peter M. Sanchez, *The "Drug War:" The U.S. Military and National Security*, 34 A.F. L. Rev. 1, 109 (1991).

[138] As at Wounded Knee, aerial reconnaissance photography and maintaining military vehicles were also conducted by military personnel at Waco.

[139] These two soldiers at Wounded Knee were on active duty, i.e. full-time duty in the active military service of the United States. *See* 10 U.S.C. § 101 (d)(1), codified as amended by Pub. L. 102–484.

[140] Meeks, *supra* note 129, at 121. Ironically, approximately 10 active duty Special Forces soldiers were present at Waco as "observers" during various stages of the post-raid siege, including the day of the use of CS riot control agent and the fire. Additionally, at the request of the commander of the FBI Hostage Rescue Team, two senior Army Special Forces officers were present when Attorney General Reno was briefed on the FBI's plan to end the standoff. Prior to the meeting, one of those officers visited the site of the standoff by helicopter accompanied by the HRT commander.

[141] *United States* v. *Jaramillo*, 380 F. Supp. 1375 (D.Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975); *United States* v. *Banks*, 383 F.Supp. 368 (D.S.D. 1974); *United States* v. *Red Feather*, 392 F.Supp. 916 (D.S.D. 1975); *United States* v. *McArthur*, 419 F.Supp. 186 (D.N.D. 1976), aff'd sub nom., *United States* v. *Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

[142] Congressional Research Service, *supra* note 54, at 23 n.63. The court in *McArthur* ruled that the Posse Comitatus Act is violated only when the civilians are subjected to the direct "regulatory, proscriptive or compulsory" aspect of the military involvement. *United States* v. *McArthur,* 419 F.Supp. at 194.

[143] Sanchez, *supra* note 137.

[144] *Id.* at 7 (citing to 10 U.S.C. § 371–375, as subsequently amended by Pub. L. No. 100–456, 102 Stat. 117 (1988)).

[145] Congressional Research Service, *supra* note 54, 23. *See also* Defense Department Authorization Act of 1982 § 905, Pub. L. No. 97–86, 95 Stat. 1114, as amended by National Defense Authorization Act Fiscal Year 1989 § 1004, Pub. L. No. 100–456, 102 Stat. 2043 (codified as amended at 10 U.S.C. § 377).

[146] 10 U.S.C., Ch. 18.

[147] *Id.*

[148] JTF–6 Operational Support Planning Guide (citing Pub. L. 100–456, 102 Stat. 1218, 2042, codified at 10 U.S.C. § 124 [*See* Documents produced to the subcommittees by the Department of the Treasury T08786, T08788, at Appendix [hereinafter Treasury Documents]. The Appendix is published separately.] *See also* 32 U.S.C. § 112 for the National Guard.

[149] JTF–6 Operational Support Planning Guide, Treasury Documents T08786, T08788. *See also* 10 U.S.C. § 371(b).

civilian law enforcement.[150] Having evolved from the State militia concept, the National Guard holds the unique position as both a State and a national military force. Thus, a National Guard member can wear a U.S. Army or Air Force uniform, fly in a military aircraft, receive Federal military pay and allowances, be covered by the Federal Torts Claims Act and Federal military medical care. Yet, he or she can perform this military service not only as a member of the U.S. Armed Forces, but as a member of the State militia, having a Governor for a Commander-in-Chief rather than the President of the United States.

The ability of the National Guard to perform military service in this capacity exists because the National Guard has three different "statuses" under the law. The first two are a Title 32 status (also called "state active duty" status) and a "pure state" status. Under either a Title 32 or "pure state" status, National Guard troops are under the command and control of the Governor of their State and the Posse Comitatus Act does not apply.[151] However under current law, while the National Guard is in a Title 32 status and under the command and control of the Governor, it is still funded with Federal funds.[152] An example of the National Guard being in a Title 32 status is when National Guard personnel are conducting counterdrug operations.

The third National Guard status is called "Title 10" or "federal active duty" status. Title 10 status occurs when Congress or the President takes affirmative action to "federalize" a National Guard unit as in the case of a natural disaster or civilian disturbance. Only in a federalized status are National Guard troops under command and control of the President of the United States. Under this status, the Posse Comitatus Act applies.

Aside from the Title 10 status and Wounded Knee cases, the Posse Comitatus Act has been widely interpreted as not applying to the National Guard. Thus under current law, the leading interpretation of the Posse Comitatus Act is that unless otherwise prohibited by policy directive, regulation or State law, the National Guard can participate actively in civilian law enforcement. The National Guard, however, does implement similar proscriptions as the Posse Comitatus Act by regulation even while in a Title 32 status.[153]

d. Active duty personnel & the Posse Comitatus Act under current law

Unlike the National Guard, active duty military personnel clearly fall within the proscriptions of the Posse Comitatus Act. Any assistance they provide to civilian law enforcement personnel must be either within a statutory exception or expressly authorized by the U.S. Constitution.

Many of the statutory exceptions to the Posse Comitatus Act have been enacted in the last 15 years and evolved from a desire to support counterdrug efforts. Title 10 U.S. Code, Section 371 *et. seq.* outlines the types of routine law enforcement assistance that active duty military personnel may provide. Such assistance, includes equipment, training and advice.

One of the most important issues for a civilian law enforcement agency in deciding whether to seek and accept military assistance, is whether the agency must reimburse the military for the assistance provided. Generally, a civilian law enforcement agency must reimburse the military for the cost of assistance, except under three circumstances. Reimbursement may be waived if the assistance: (1) is provided in the normal course of military training;[154] (2) results in a benefit to the unit providing the support "that is substantially equivalent to that which would otherwise be obtained from military operations or training;"[155] or (3) is for counterdrug operations.[156]

The counterdrug statutory waiver has come to mean in practice that before a waiver of reimbursement can occur under the counterdrug operation exception, the civilian law enforcement agency must demonstrate the existence of a sufficient "drug nexus" in the investigation.[157] Although there is no defined standard for what constitutes a "drug nexus," it is essentially a quantum of credible evidence that links an otherwise non-drug investigation with the existence, or well-founded belief of the existence, of significant illegal drug crimes.

This waiver for counterdrug operations developed when Congress created a specialized subset of military assistance for counterdrug operations in 1990.[158] Military assistance for counterdrug operations provided under this statutory authority is on a non-reimbursable basis, which means civilian

[150] Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "in Federal Service,"* 35 Army Law. 1 (1994). Active and Reserve military personnel are both subject to the proscriptions found in the Posse Comitatus Act, while the Posse Comitatus Act only applies to National Guard personnel when they have been called "into federal service."

[151] During the Waco incident, the National Guard was operating under Title 32 or "state active duty" status as it provided assistance to the ATF and FBI. By contrast, the status of the Nebraska and South Dakota National Guard units during the 1973 Wounded Knee incident is unclear, since the courts did not rule on whether the Posse Comitatus Act applied to the National Guard personnel based upon their status. In *Jaramillo*, the court did not indicate whether or not the National Guard had been "federalized." Similarly, the *Red Feather* court decided the issue of improper military assistance based on whether the assistance was "active" or "passive," not on the legal status of the National Guard units.

[152] In a pure State status, no Federal funding occurs.

[153] Rich, *supra* note 150. The National Guard Bureau policy on authorized support to law enforcement currently lists 16 approved counterdrug missions. Any mission outside the parameters of the approved list must receive Department of Defense approval. *See also* NGB Reg. 500–2 and National Guard Counterdrug Coordinator's Handbook.

[154] 10 U.S.C. § 377.

[155] *Id.*

[156] Pub. L. No. 102–190 § 1088, 105 Stat. 1484 (1991). *See also* Pub. L. No. 101–510 § 1004, 104 Stat. 1629 (1990) and Pub. L. No. 101–189 § 1212, 103 Stat. 1567 (1989).

[157] Office of the Department of Defense coordinator for Drug Enforcement Policy and Support Memorandum, Subject: Priorities, Policies, and Procedures for DoD CD Support to Domestic Law Enforcement Agencies, 26 Jan. 95. Defense Documents 109–115, at 111.

[158] *Id.*

law enforcement agencies do not have to reimburse the military for the assistance. Instead, Congress provides a separate fund to the military for this type of assistance. However, these funds must be used solely for military assistance to civilian law enforcement agencies for counterdrug operations. Significant portions of military assistance provided to ATF and even the FBI were funded through these counterdrug funds.

A further formalization of the military's increased support to the war on drugs involved the creation of Joint Task Forces [159] between civilian drug law enforcement agencies and the regular army. The Defense Department created these Joint Task Forces to increase the coordination between the military and civilian law enforcement agencies and to increase the civilian agencies' accessibility to regular army assets for counterdrug operations. For the Southwest border region where the ATF investigation of the Davidians took place, Joint Task Force-Six (JTF–6) [160] was responsible for the operational support to ATF by active duty military personnel.

JTF–6's Operational Support Planning Guide, in explaining its support capabilities, states, "No list of military support capabilities is ever all-inclusive. Innovative approaches to providing new and more effective support to law enforcement agencies are constantly sought, and *legal and policy barriers to the application of military capabilities are gradually being eliminated*." [161] This quote from the JTF–6 Operation Support Planning Guide clearly and succinctly describes the weakening of the Posse Comitatus Act proscriptions since the 1973 Wounded Knee cases. This observation foreshadowed the potential for military involvement that was realized eventually at the 1993 Waco events.

2. Interstate use of National Guard by Governors

There is a common practice among the States of using National Guard personnel across State lines.[162] States enter into memoranda of agreement with one another which provide for the mutual use of National Guard forces across State lines. However, these agreements raise several legal concerns, particularly when the National Guard personnel are used to assist civilian law enforcement.

Although a thorough examination of memoranda of agreement is far beyond the scope of the subcommittees' Waco investigation, the most significant legal issues arising from the use of memoranda of agreement will be highlighted. While the National Guard has attempted to address these legal issues, the Defense Department and the States have failed to adequately address the potential legal problems which memoranda of agreement raise. Two major legal concerns are (1) whether these memoranda of agreement, or other similar agreements between states are either a treaty, an alliance, or confederation in violation of the U.S. Constitution, or at the very least a compact requiring congressional ratification; and (2) whether these memoranda of agreement or similar agreements attempt to supersede State constitutions and statutes without legal authority.

a. States' power to enter memoranda of agreement

Only the Congress [163] and the President (to the extent presently delegated by law) have the power to use military force across State lines. Many argue that any agreement between States to concert their military forces for the use of force for any purpose constitutes a treaty or an alliance.[164] However, the U.S. Constitution specifically prohibits States from entering into treaties in any instance,[165] and into alliances or confederations without congressional consent.[166] Applying such an argument would mean that the use of the National Guard for law enforcement purposes across State lines is strictly prohibited by the U.S. Constitution. The National Guard Bureau takes the position that such interstate use of force is prohibited, but the contrary opinion is advanced by the

[159] In early 1989, the Defense Department, at the direction of Congress and the President, "tasked four war fighting, regional Commander's in Chief (CINCs) to carry out the drug interdiction mission. The CINC of Atlantic Command (USCINCLANT) created Joint Task Force, JTF–4 at the Key West Naval Air Station, Florida. The Pacific Command CINC (USCINCPAC) established JTF–5 at the Alameda Naval Air Station, California. And, the CINC for Continental Defense (USCINCFOR) established JTF–6 at Fort Bliss, Texas." Sanchez, *supra* note 137, at 17.

[160] JTF–6 was created in 1989 to serve as the planning and coordinating (operational) headquarters for military assistance to counterdrug operations of drug law enforcement agencies. JTF–6 is located at El Paso, TX (Fort Bliss), and supports the Federal, State, and local law enforcement agencies within the southwest border region. It's region of responsibility mirrors that of Operation Alliance and includes the States of Texas, New Mexico, Arizona, and Southern California. [JTF–6 Operational Support Planning Guide, Treasury Documents T08786–08789.] As of October 1, 1995, JTF–6's area of responsibility expanded from the southwest border to the entire continental United States, Puerto Rico and the U.S. Virgin Islands.

[161] JTF–6 Operational Support Planning Guide, Treasury Documents T08786, 08791 (emphasis added).

[162] The interstate use of National Guard personnel occurred at Waco with the use of the Alabama National Guard in Texas.

[163] "The Congress shall have Power . . . to provide for calling forth the Militia to execute the laws of the Union, suppress insurrections, and repel invasions." U.S. Const. art. I, § 8, cl. 15.

[164] The U.S. Supreme Court, in *U.S. Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 n.12 (1978) discussed the distinctions between treaties, compacts and mere agreements. "Military alliances" are cited as examples of treaties. The Court quotes Story to the effect that: "Treaties, alliances, and confederations . . . generally connote military and political accords and are forbidden by the States. Compacts and agreements, such as questions or boundary; interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of States bordering each other." 434 U.S. at 464. *See also* 32 U.S.C. § 109 (b) which infers that States do not have the authority to employ their militia (i.e., the National Guard) outside their boundaries, "Nothing in this title limits the right of a State or Territory . . . to use the National Guard or its defense forces authorized by subsection (c) within its border in time of peace, or prevents it from organizing and maintaining police or constabulary."

[165] The treaty-making power is exclusively vested by the Constitution, in the President, with the advice and consent of the Senate. U.S. Const. art. 2, § 2, cl. 1.

[166] U.S.C.A. Const. art. I, § 10, cl. 1.

Defense Department General Counsel and the Army Staff Judge Advocate.[167]

The National Guard Bureau further argues, also contrary to the Defense Department General Counsel and the Army Staff Judge Advocate, that even if such agreements among States are not treaties, they are at the very least compacts which require the consent of Congress.[168] If an agreement among States results in a potential encroachment on Federal authority or a tendency to enhance State power, then it would constitute a compact requiring congressional consent.[169] The National Guard Bureau argues that these National Guard memoranda of agreement enhance State power by allowing Governors to command militia employed for force across State lines, and therefore, encroach on the President's power to either deny or command and control such interstate use. Thus, the National Guard Bureau believes they require congressional ratification.[170]

Currently, none of the memoranda of agreement (or compacts) involving the use of National Guard personnel across State lines for law enforcement purposes have been ratified by Congress. Although the Southern Governors' Association recently amended its Southern Regional Emergency Management Assistance Compact at the advice of the National Guard Bureau, to preclude the use of force across State lines *and* seek congressional approval of the compact, most of the interstate National Guard assistance to law enforcement agencies is occurring under the guise of memoranda of agreement, not congressionally approved compacts. Moreover, this issue expands beyond direct involvement in law enforcement actions, such as Waco, to the use of the National Guard for interstate assistance in disaster[171] and emergency relief. In fact, the issue has arisen with respect to the proposed use of non-Georgia National Guard units to assist the Georgia National Guard during the 1996 Summer Olympics, in Atlanta, GA.

b. Memoranda of agreement may attempt to supersede State law without legal authority

During the ATF investigation of the Branch Davidians, National Guard assistance to ATF came not only from the Texas National Guard, but from the Alabama National Guard.[172] At the behest of the ATF, the Adjutant General of the Texas National Guard requested and received support from the Alabama National Guard to take aerial photographs. Those aerial photographs were taken on January 14, 1993. This assistance was authorized by a "memorandum of agreement" between the Adjutant Generals of the Texas and Alabama National Guards which simply provided for the use of the Alabama National Guard at the request of the Texas Adjutant General. However, a review of the State laws of both Texas and Alabama raises legal concerns with the legal authority for conducting this interstate National Guard operation.

Texas law requires that, "[a] military force from another state, territory, or district, except a force that is part of the United States armed forces, may not enter the state without the permission of the governor."[173] Yet, National Guard personnel who were involved in post-raid National Guard investigations of the Waco incident have stated that Governors Richards did not approve the use of the Alabama National Guard. Military documents indicate that Governor Richards was unaware of the extent of even the Texas National Guard's involvement until after the failed raid occurred.

An examination of Alabama law indicates that the Alabama National Guard had no authority to conduct military operations outside Alabama because the Governor's authority over the Alabama National Guard appears only to extend to the State's boundaries.[174] Thus, it appears that the Alabama National Guard entered and conducted military operations in Texas without the proper authority to do so.

If the Alabama Governor's command and control authority ended at the Alabama State line and Gov. Richards did not approve the Alabama National Guard's entrance into the State of Texas, then several questions are raised: Which governor had command and control of the Alabama National Guard unit? Who (Texas, Alabama or the Federal Government) would have been liable for claims of injury and property damage had any occurred? If the Alabama unit is considered to be operating outside its scope of employment, would its personnel lose Federal Torts Claims Act's protection against personal liability? And, would the National Guard personnel risk losing their military health

[167] National Guard Draft Legal Memorandum, "Cross Border use of National Guard for Law Enforcement: Constitutional Issues and Need for Congressional Ratification of Interstate Agreements" (Received by subcommittees on March 12, 1996).

[168] U.S. Const. art. I, § 10, cl. 3. "Not all agreements between states are subject to strictures of this clause; application of this clause is limited to agreements that are directed to the formation of any combination tending to increase the political power in the states and which may encroach on or interfere with the just supremacy of the United States." *U.S. Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 n.43 (1978) (citing U.S. Const. art. 1, § 10, cl. 3). *See also*, *Virginia* v. *Tennessee*, 148 U.S. 503 (1893).

[169] "Appellants further urge that the pertinent inquiry is one of potential, rather than actual, impact on federal supremacy. We agree." *U.S. Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 472 (1978). This is the current position of the National Guard Bureau. However, the position of the Defense Department and the Army SJA is that these agreements violate the Compact Clause of the Constitution only if they actually encroach of Federal power or enhance State power.

[170] National Guard Draft Legal Memoranda, *supra* note 167.

[171] The subcommittees have been informed during meetings and follow-up discussion with National Guard Bureau personnel that the Bureau opposed the loan of Puerto Rico National Guard personnel to the Virgin Islands to suppress looting during Hurricane Marilyn based on these constitutionality concerns.

[172] After Action Report of Texas National Guard Counterdrug Support in Waco, TX as (April 29, 1993). [*See* Documents produced to the subcommittees 2344, at Appendix [hereinafter Defense Documents]. The Appendix is published separately.]

[173] Tex. Code Ann., Title 4, § 431.001.

[174] Ala. Code § 31–2–7.

care and other military benefits in the event of an accident?

Memoranda of agreement currently used fail to address the intricacies which State laws present and they do not appear to have legal authority to supersede State constitutions and statutes. Because State laws differ, these questions must be addressed on a case by case basis if States are going to engage in the interstate use of National Guard personnel.

B. THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS' REQUEST FOR MILITARY ASSISTANCE AND THE MILITARY ASSISTANCE ACTUALLY PROVIDED

The pre-raid military assistance in Waco was provided through active duty and National Guard counterdrug units based on an alleged drug nexus. Much of the post-raid military assistance to the FBI and ATF also came from counterdrug units and funds. Central to understanding how the military became involved in the Waco matter is an understanding of how ATF's initial request for military assistance, based on alleged drug involvement, progressed.

1. Overview

a. The process for requesting military assistance along the southwest border

Military support to counterdrug operations along the Southwest border of the United States is designed "to assist law enforcement agencies in their mission to detect, deter, disrupt, and dismantle illegal drug trafficking organizations."[175] Thus, military support acts as a "force multiplier," allowing law enforcement agencies to focus on "interdiction seizure actions."[176]

When a drug law enforcement agency[177] requests counterdrug military assistance along the Southwest border, that request is received and reviewed by Operation Alliance, which acts as the clearinghouse.[178] The request is then coordinated with support organizations such as JTF–6[179], the North American Aerospace Defense Command (NORAD),[180] the Regional Logistics Support Office[181] and the pertinent National Guard. Operational support is provided as a joint effort by JTF–6, NORAD and the National Guard.[182] Non-operational support which would include, but is not limited to, equipment, institutional training, and use of facilities would be provided by the Regional Logistics Support Office.[183]

To receive assistance through Operation Alliance and from these organizations, the civilian law enforcement investigation must involve criminal violations of U.S. drug laws, i.e., have a "drug nexus." Having initiated 232 Operation Alliance investigations through fiscal year 1989,[184] ATF was no stranger to Operation Alliance's counterdrug mission and its drug nexus prerequisite. In fact, documents dated as far back as March 15, 1990, designated ATF Special Agent Sarabyn, and ATF Special Agent Pali, the ATF coordinator for Operation Alliance during the Branch Davidian investigation, as ATF coordinators for military assistance.[185]

b. Chronology of ATF's request

The chronology of ATF's request for military assistance provides insight into how early ATF wanted military assistance, how the military and ATF became concerned with the drug nexus issue, and how the military's concerns changed the scope of military assistance provided.

As early as November 1992, ATF agents were discussing the need for military support with Lt. Col. Lon Walker, the Defense Department representative to ATF.[186] In his "summary of events"[187] November entry, Lt. Col. Walker specifically states that, at that time, he was not told of any drug connection.[188]

By December 1992 (almost 3 months before the raid), ATF agents were requesting Close Quarters Combat/Close Quarters Battle[189] (CQB) training by U.S. Army Special Forces soldiers for ATF agents.[190] A basic CQB course takes a minimum of

[175] JTF–6 Operational Support Planning Guide, Treasury Documents T08786.

[176] *Id.* at T08790.

[177] A drug law enforcement agency is a law enforcement agency that has jurisdiction over drug laws. ATF was authorized to investigate narcotics traffickers who use firearms and explosives as tools of their trade, especially violent gangs.

[178] Operation Alliance is the clearinghouse for all civilian law enforcement requests for military support along the Southwest border. Operation Alliance reviews all requests and coordinates the requests of Federal, State and local agencies, and determines the appropriate military agency to provide the support. JTF–6 Operational Support Planning Guide, Treasury Documents T08786, 08790.

[179] *See* note 160 and accompanying text.

[180] NORAD incorporated the counterdrug mission into its command structure in 1989.

[181] The Regional Logistics Support Organizations are under the direct supervision of the Office of the Defense Department Coordinator for Drug Enforcement Policy and are the primary point of contact for Drug Law Enforcement Agency requests for equipment i.e., non-operational support.

[182] JTF–6 and NORAD employ active duty military personnel. The State National Guard personnel are in a Title 32 status.

[183] JTF–6 Operational Support Planning Guide, Treasury Documents T08786, 08789.

[184] *Hearings before the Subcommittee on the Treasury, Postal Service, and General Government Appropriations of the House Committee on Appropriations,* 101st Cong., 2d Sess. 688, 695 (1991) (statement of Stephen E. Higgins, Director, Department of Treasury, Bureau of Alcohol, Tobacco and Firearms).

[185] Memorandum from Special Agent Eddie Pali, Tactical Operations Coordinator to the ATF SAC's in Dallas, Houston, and Los Angeles (March 15, 1990). Treasury Documents T006661.

[186] Lt. Col. Lon Walker's summary of events. Treasury Documents T007884.

[187] *Id.*

[188] *Id.*

[189] Close Quarters Battle involves "combative techniques which include advanced marksmanship, use of special purpose weapons, munitions, demolitions and selective target engagement conducted by small, specially trained units against static or halted man-made targets to defeat a hostile force with a minimum of collateral damage." Headquarters, U.S. Army Special Forces Command, Policy Letter on Close Quarters Combat (CQC) Training (24 November 1993). The terms CQC and CQB have been used interchangeably for a number of years. CQC is the military doctrinally correct term. However, in this Report the subcommittees will continue to use CQB since that was the term used throughout the post-Waco investigations and the congressional hearings.

[190] After discussions between the Special Operations Command and Special Forces Command had taken place regarding U.S. Army Special Forces Command (Airborne) participation in conducting CQB/SOT for drug law enforcement agencies, the Commander of the U.S. Army Special Operations Command (USASOC) informed the Commander of JTF–

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2 months and advanced CQB training takes a minimum of 6 months. Moreover, CQB is the type of specialized training a terrorist or hostage rescue team such as the FBI Hostage Rescue Team would use. CQB is also a perishable skill requiring frequent/continuous training that ATF, as an agency, is not designed to maintain or utilize. Somewhat surprisingly, neither the documents from the Treasury investigation, nor the Treasury Report, itself, never refer to this request.

However, one military document furnished to the subcommittees as part of their document request specifically states that *no written documentation* is available on this extraordinary request by ATF for CQB training.[191] This is the case despite ongoing discussions in 1992 and early 1993 within the senior ranks of the U.S. Army Special Operations Command regarding the prudence of making SOT[192] /CQB training available to civilian law enforcement and foreign military personnel.[193] These discussions are significant because they again foreshadow the potential use in civilian law enforcement of highly specialized military training, designed and intended for military operations.

On December 4, 1992, several ATF Special Agents, including the SAC's of the Dallas and Houston ATF offices, met at Houston's ATF field office for the first time to discuss the Waco investigation.[194] In attendance were SAC Phillip J. Chojnacki; SAC Ted Royster; Assistant Special Agent in Charge James Cavanaugh; Resident Agent in Charge Earl K. Dunagan; Special Agents Aguilera, Lewis, Petrilli, Buford, K. Lattimer, Williams, Carter, and John Henry.[195] Also present at that meeting was Lt. Col. Lon Walker, the Defense Department representative to ATF. Lt. Col. Walker's notes of the meeting reveal that he explained to those present "that the military probably could provide a great deal of support and [that he] suggested things like aerial overflight thermal photography."[196] Lt. Col. Walker's notes also state that he explained "that without a drug connection the military support would be on a reimbursable basis."[197] This reference to reimbursement is significant because it reveals that military aid was, as of that date, understood to require reimbursement by ATF unless a drug nexus could be identified and articulated with sufficient specification to warrant military aid on a non-reimbursable basis. Lt. Col. Walker's December 4th entry is followed by a handwritten note that states "Aguilera said there was no known drug nexus."[198]

On December 11, 1992, Special Agent Jose G. Viegra, the Resident in Charge (RAC) of the Austin, TX ATF Office, met with representatives for the Texas Governor's Office about the role of the military in any potential ATF action involving the Davidians.[199] Representatives of the Texas Governor's Office present at the meeting were William R. Enney, Texas State Interagency Coordinator and his assistant Lieutenant Susan M. Justice, Assistant Interagency Coordinator of the National Guard Counterdrug Support Program.[200]

This meeting was requested by ATF to discuss specifically what types of military assistance were available to the ATF for its raid on the Branch Davidian residence[201] in Waco, TX. During the meeting, Special Agent Viegra was told that military assistance through Operation Alliance would *not* be available unless there was a "drug nexus." That meeting constituted the second time in 8 days that ATF agents inquiring about military assistance were told of a drug nexus prerequisite. At the December 11, 1992, meeting, Enney asked the ATF agents to determine whether a drug nexus did in fact exist.

Three days after their meeting with ATF, the Texas counterdrug representatives received a facsimile of a letter dated December 14, 1992, on "Houston SAC letterhead" from the RAC of the Austin ATF office, Earl K. Dunagan, requesting military assistance from the Texas Counterdrug Program.[202] The military assistance requested from the Texas National Guard was for aerial reconnaissance photography, interpretation and evaluation of the photos, and transportation of

6 by military message, dated 4 January 93 (within a very close proximity to ATF's request for CQB), that the USASOC would provide CQB Special Operations Training CQB/SOT training to law enforcement agencies. "It is anticipated that CQB/SOT training support requests may be filled by the U.S. Army John F. Kennedy Special Warfare Center and School (USAJFKSWCS) or other units that include CQB/SOT as part of their METL." The memorandum goes on to state that USASOC and USASFC(A) have only agreed to provide CQB/SOT instruction to the U.S. Border Patrol Tactical Unit (BORTAC).

[191] "SOF Assistance to Federal Law Enforcement in Waco, Texas." Defense Documents D–1116A.

[192] SOT stands for Special Operations Training. Although SOT is not an official military term for Special Operations Training, i.e., it is an acronym for a course taught at the U.S. Army John F. Kennedy Special Warfare Center and School (USAJFKSWCS), it will be used here to identify Special Operations Training because that is how it is used by the military documents referred to by the subcommittee investigators. *See* Headquarters, USASFC (A) Policy Letter on Close Quarters Combat Training (24 Nov. 1993) (unnumbered) for discussion on proper usage of SOT.

[193] *See* memorandum of 3rd Special Forces Group, Headquarter's Memorandum on Special Operations Training and Close Quarters Battl (21 Sept. 1992) (unnumbered); *See also* memorandum of U.S. Army Special Forces Command (Airborne) on USASFC policy for conducting counterdrug operations in the continental United States (23 Feb. 1993) (unnumbered) and Headquarters U.S. Army Special Forces Command (Airborne) Policy Letter on Close Quarters Combat Training (24 Nov. 1993) (unnumbered).

[194] Lt. Col. Lon Walker's summary of events. Treasury Documents T007884.

[195] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589.

[196] Lt. Col. Lon Walker's summary of events. Treasury Documents T007884.

[197] *Id.*

[198] *Id.*

[199] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589.

[200] *Id.* Mr. Enney was designated by Texas Governor Richards as the Texas State representative for Defense Department coordination of the Texas National Guard Counterdrug Support Program.

[201] The Branch Davidian residence was termed a "compound" by ATF, during the investigation, and the media and other commentators subsequently adopted this militaristic term for a fortified or highly secure structure.

[202] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589, T004590.

ATF agents aboard the aircraft during the reconnaissance.[203] Although the request did not mention suspected drug violations (drug nexus), as would be required to secure non-reimbursable assistance or military assistance from a counterdrug unit, Lt. Col. Pettit, the Texas Counterdrug Task Force Commander, initialed his approval on the request.[204]

Lt. Col. Pettit told National Guard investigators that he provided his approval because the request required another person's approval as well.[205] However this decision, in itself, raises several unanswered questions. Did Lt. Col. Pettit assume a drug nexus existed or that one was not needed? Did he believe that the request should be approved *despite* the absence of legally required drug nexus? Or did he believe that ATF would reimburse the National Guard? These questions repeat themselves throughout the approval process, and are raised here to illustrate the difficulties encountered in disentangling a past approval of military aid involving a drug nexus.

Two days after Lt. Col. Pettit's approval, Special Agent Aguilera informed Lt. Col. Walker on December 16, 1992, that he received a facsimile from Mark Breault in Australia suggesting the existence of a methamphetamine lab at the Branch Davidian residence.[206] Mr. Breault was a former Branch Davidian who left the group on bad terms, and exhibited strong personal animosity toward Koresh and several of the Davidians.

The following day, December 17, 1992, SAC Phillip Chojnacki held a meeting in his office with Special Agent Ivan Kallister, Special Agent Davey Aguilera, and Lt. Col. Walker regarding the Waco investigation.[207] According to ATF, Lt. Col. Walker told SAC Chojnacki during the meeting that the Defense Department could provide non-reimbursable military support if there is a "suspicion of drug activity."[208] Aguilera was subsequently instructed to "actively pursue information from his informants about a drug nexus."[209] Additionally, ATF Intelligence Research Specialist Sandy Betterton searched criminal records to determine if Branch Davidians had "some" prior drug offenses.[210] It later was determined that only one Branch Davidian had a prior narcotics conviction.[211]

January 6, 1993 was the first National Guard overflight of the Branch Davidian residence and their auto body shop, called the "Mag Bag." This overflight was conducted by the Texas National Guard Counterdrug unit in a UC–26 counterdrug aircraft. Forward Looking Infrared (FLIR)[212] videotape taken during the overflight indicated a "hot spot" inside the residence and three persons outside behind the residence whom ATF designated as "sentries."[213] The Texas National Guard conducted five more reconnaissance/surveillance overflights over the Branch Davidian property from February 3, 1993, to February 25, 1993. These overflights were conducted to "search for armed guards and drug manufacturing facilities."[214]

On the same day as the first National Guard overflight, January 6, 1993, Richard Garner, Chief of Special Operations Division of ATF, drafted another request on ATF Headquarters letterhead directly to Colonel Judith Browning, Director of Plans and Support, of the Office of the Department of Defense Coordinator for Drug Enforcement Policy and Support.[215] ATF requested the loan of various office equipment, a refrigerator, cots and sleeping bags to be made available on January 11, 1993. The letter states that the ATF was investigating violations of "firearms and drug laws" and requested the equipment as "part of Defense Department support for counterdrug effort." Col. Browning responded by letter on January 15 approving the support to be provided by the Regional Logistics Support Office[216] in El Paso, TX.[217] The same questions asked of Lt. Col. Pettit above must be asked here of Col. Browning. Here, as with Lt. Col. Pettit, key documentation justifying the deployment of non-reimbursable military aid on the basis of a proven or suspected drug nexus is missing. Yet, Col. Browning approved the request and directed further ATF requests to be made directly to the Regional Logistics Support Office in Texas.

Within a week after Col. Browning's response, Garner sent a further request to Major Victor Bucowsky, the Officer-in-Charge of the Regional Logistics Support Office requesting an MOUT[218] site for Special Response Team training, driver training and maintenance support for Bradley

[203] *Id.*
[204] *Id.*
[205] Meeting with Army National Guard Brigadier General Sagsveen, in Washington, DC (October 19, 1995).
[206] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589. This document lists the date as Dec 17th. Lt. Col. Walker's Waco Summary of Events lists the date as the 16th. Treasury Documents T007884.
[207] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*

[212] A FLIR, also called a Thermal Imaging System (TIS), is a type of photography which images thermal heat sources.
[213] Memorandum from Special Agent Robert Tevens, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589, T004591.
[214] Treasury Department Report at 44 n.18.
[215] Treasury Documents T004601, T004602. The proper procedure for requesting military assistance along the Southwest border is to go through Operation Alliance. Letter from Operational Alliance to Special Agent Eddie Pali, ATF Coordinator for Operation Alliance (January 26, 1990). Treasury Documents T006663–006664. Despite ATF not following this process, documents provided by Treasury indicate their agents were aware the procedural requirements. *Id.*
[216] *See* note 181.
[217] Treasury Documents T004603.
[218] MOUT stands for Military Operations on Urbanized Training "which would include all military actions that are planned and conducted on a terrain complex where man-made construction impacts on the tactical options available to the commander. These types of operations are characterized by large-scale offensive and defensive operations. The primary objective is to seize and hold ground using all available means. This often results in extensive damage to the area." Memorandum from U.S. Army Special Forces Command regarding Policy Letter on Close Quarters Combat (CQC) Training (November 24, 1993).

fighting vehicles, seven Bradley fighting vehicles, and on-call support in the event a siege occurred.[219] This was the largest request for assistance in Regional Logistics Support Office's history and eventually had to be supplied by Texas National Guard because the Regional Logistics Support Office was unable to handle a law enforcement request of such magnitude.[220]

On February 2, 1993, Operation Alliance made a request to the Commanding General of JTF–6 for the use of Special Forces personnel assigned to his organization.[221] Lt. Col. Philip W. Lindley,[222] the U.S. Army Special Forces Command Staff Judge Advocate, was notified of this request and advised JTF–6,

> . . . that Rapid Support Unit (RSU)[223] assistance in actual planning and rehearsal of proposed "takedown" could violate posse comitatus law, expose RSU to liability. [A q]uestion also arises as to appropriateness of RSU giving non-METL,[224] i.e., SOT/CQB training to ATF.[225]

However, there again is no written documentation of ATF's request for this highly controversial training.

Within days, the training mission by Special Forces soldiers was revised to include only coordination on Army ranges and teaching ATF how to develop an operations order.[226]

c. Pre-raid military assistance requested by ATF and assistance actually received

The military assistance provided to ATF can be separated into four areas: (1) surveillance overflights by counterdrug National Guard units in January and February 1993; (2) training by Special Forces soldiers assigned to JTF–6 for counterdrug missions in late February 1993; (3) direct support by Texas National Guard counterdrug personnel who conducted an aerial diversion the day of the raid on February 28, 1993; and (4) post-raid support to FBI and ATF.

Six surveillance overflights were conducted by counterdrug National Guard units. Aerial photography missions by the Texas National Guard began on January 6, 1993.[227] The January 6 missions and subsequent missions on February 3, 18, and 25, 1993, were taken by a Texas National Guard Counterdrug UC–26 aircraft.[228] On January 14, 1993, aerial photographs were taken by the Alabama National Guard.[229] And, on February 6, 1993, the Texas National Guard provided infrared video (FLIR) and aerial photography in a Counterdrug UC–26 aircraft.[230]

ATF's request for training of ATF agents by Special Forces soldiers went through several alterations before the actual training took place. Although ATF initially requested Bradley fighting vehicles, SOT/CQB training, on-site medical evacuation assistance and planning assistance, legal restrictions caused the ATF request to be scaled down.[231] A Special Forces Rapid Support Unit, assigned to Operation Alliance, trained ATF on 25–27 February 1993, in company-level tactical C2, Medical Evacuation training, IV ABC's,[232] and assistance with Range and MOUT sites.[233] According to military documents and military witnesses who appeared before the subcommittees, no non-Mission Essential Task List (wartime tasks) training, SOT/CQB, or direct involvement in actual planning occurred.[234]

For the February 28 raid, the Texas National Guard supplied three helicopters and 10 counterdrug personnel. When ATF requested National Guard assistance, their stated mission to the National Guard was to use the helicopters as a command and control platform during the raid, and to transport personnel and evidence after the area was secured.[235] Only when the National Guard team arrived at Fort Hood for the pre-raid training, less than 24 hours before the raid, did ATF agents inform the National Guard personnel that the helicopters would be used as an aerial diversion during the raid itself. ATF had even assigned one of the National Guard counterdrug soldiers to hang from a monkey sling outside the heli-

[219] Treasury Documents T004606 (dated January 22, 1993), T004612. Treasury Document T004610 is a duplicate of the letter except it is dated January 21, 1993 and has handwritten notes along the border. The notes along the border appear to indicate that JTF–6 was responsible for the SRT training and "No, T–32 TX" is written next to the Bradley training (T–32 apparently refers to Title 32).

[220] Memorandum of interview from Special Agent Robert Tevens for the Waco Administrative Review (September 14, 1993). Treasury Documents T005397, T005399.

[221] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589, T004590.

[222] At the time of the Waco incident Philip Lindley served as a Major in the U.S. Army. However, since that time, he has been promoted and testified before the subcommittees with the rank of the Lieutenant Colonel. He will be referred to as Lt. Col. Lindley throughout the Report.

[223] A Rapid Support Unit (RSU) is comprised of a Special Forces Company with attached aviation asset. Rapid Support Unit Description Paper. Defense Documents D–1353. The subcommittees are aware of no RSU aviation assets being used at Waco. "RSU missions are characterized by small, short duration, *interdiction missions* normally *limited to border areas*." *Id.* (emphasis added). The paper states under Mission Parameters that "the mission must be related to the Special Operations Mission Essential Task List (wartime tasks) and *should be intel-prompted." Id.*

[224] Mission Essential Task List (METL) includes soldiers' wartime tasks, i.e. what skills a soldier has been trained in and capable of training others in. Special Forces units who were assigned to Operation Alliance were restricted to their METL training law enforcement agents.

[225] Defense Department Documents D118.

[226] *Id.*

[227] Texas National Guard After-Action Report (April 29, 1993). Defense Documents D2344 at D2346.

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] "SOF Assistance to Federal Law Enforcement in Waco, Texas." Defense Documents D–1116A.

[232] Medical techniques for treating battlefield injuries including intravenous injections of fluids, clearing airways, controlling bleeding and treating shock. Sworn statement of Maj. Petree. Defense Documents D–1147.

[233] "SOF Assistance to Federal Law Enforcement in Waco, Texas." Defense Documents D–1116A.

[234] *Id.*

[235] Treasury Investigation interviews of National Guard personnel. Treasury Documents T005368.

copter to film the raid.[236] The soldier was in that position when the helicopters took incoming fire.[237] Although all of the three helicopters sustained damage from weapons fire, none of the National Guard crews or ATF personnel aboard were injured.[238] Since such direct involvement is prohibited by National Guard Bureau regulations[239] and placed National Guard personnel in imminent danger, it is unclear why the National Guard consented to ATF's "last-minute" changes.

The National Guard's focal group review of the incident did not shed much light on the issue. The summary of its report, dated April 28, 1993, and the report itself "reveal only one major issue. The issue deals with the pre-raid threat assessment of the Davidians provided by ATF to the Texas National Guard as a 'docile' environment. A second issue, which is not included in the written report of the focal group but has been vocalized by Colonel Spence, deals with the suspected methamphetamine laboratory at the Branch Davidian residence. Colonel Spence contends that the drug issue is not included in the focal group report due to the potential media interest and any resulting Freedom of Information Act inquiries."[240]

d. Without the alleged drug nexus, the ATF most likely would not have received the same military assistance as was provided

Treasury and Defense Department officials have repeatedly maintained that ATF would have received military assistance even without a drug nexus, but that ATF would had to have paid for it. However, this statement is misleading because it fails to answer whether ATF would have received the same training it requested from units other than counterdrug units and for purposes other than counterdrug operations.

What is clear is that the ATF would not have received military assistance from the highly trained Special Forces units in such a short time frame and through the streamlined approval process which it enjoyed. As stated above, the ATF originally requested Close Quarters Combat training, a type of training available only from specialized military units like Special Forces. ATF's request was also the largest law enforcement request for military assistance in many of the counterdrug organizations' histories, such as the Regional Logistics Support Office. ATF further requested that its military training be conducted less than 30 days after its request, while even the streamlined Operation Alliance process normally required 90 days. Requesting through Operation Alliance also allowed ATF to avoid an approval process with a greater potential of independent oversight.

The same conclusion can be reached for the National Guard support. Had there been no drug nexus, there again would have been a different approval process. Without a drug nexus (i.e., non-counterdrug purpose), ATF's request for National Guard assistance would only be permitted if both the Texas State Constitution authorized the National Guard's involvement in the type of assistance ATF requested and the Governor was willing to expend State funds for that purpose.[241] National Guard personnel have indicated that the assistance would not have been provided under those circumstances.[242] This is supported by the fact that the National Guard Bureau regulations prohibit the type of direct involvement ATF received from the National Guard counterdrug personnel, i.e., acting as a diversion during the ATF raid.[243] Further, since the Texas National Guard depleted its fiscal year 1993 counterdrug funds during its assistance to ATF at Waco and had to request additional funding during it assistance, it is doubtful that Governor Richards would have approved State funding of so expensive an operation.

2. Concerns of military legal advisors

Assistant Secretary of Defense Allen Holmes and Maj. Gen. John M. Pickler both appeared before the subcommittees. They testified that the approval process worked as it was intended.[244] Yet, documents show that this was so only because Special Forces Command legal advisors at the U.S. Special Forces Command Headquarters, who were outside the normal approval process, but who had learned of ATF's request for assistance from Special Forces soldiers at Operation Alliance, strongly voiced objections to the Special Forces training mission of ATF as proposed by JTF–6. As a result of these concerns reaching extremely senior levels of command within the Department of Defense, the training missions were scaled back significantly and potential violations of the law were avoided.

a. Involvement of Special Forces Command legal advisors

As referred to earlier, a Rapid Support Unit (RSU) from Third Company, Third Division, Special Forces Group was deployed on a regular rotation to JTF–6 for counterdrug missions. When the original ATF request was assigned to this RSU team, Maj. Ballard, the Special Operations Rep-

[236] Treasury Investigation interviews of National Guard personnel. Treasury Documents T005376.

[237] *Id.* Interviews indicate that the helicopters were 350 feet from the Branch Davidian residence when they were hit. Treasury Documents T005370.

[238] Treasury Investigation interviews of National Guard personnel. Treasury Documents T005371.

[239] NGB–500–2.

[240] Memorandum of Interview from Special Agent Tevens for the Waco Administrative Review (March 16, 1995). Treasury Documents T008300.

[241] Memorandum from Debra Diener, Senior Counsel to Geoffrey Moulton, Director of the Treasury Waco Administrative Review regarding the statutory and regulatory criteria and requirements for requesting military assistance and National Guard assistance (August 12, 1993). Treasury Documents T008304 at T008307.

[242] Post hearing briefing by National Guard personnel.

[243] Memorandum of Interview of Special Agent Tevens for the Waco Administrative Review (March 16, 1995). Treasury Documents T008300; Treasury Department Report at 95.

[244] Hearings Part 1 at 385–386.

resentative at JTF–6, telephoned Special Operation Command at Fort Bragg and expressed his concern with the ATF training mission to Mr. Crain, a civilian employee at Special Operations Command.[245]

Upon hearing the details of the original request, Mr. Crain also became concerned and immediately notified Lt. Col. Lindley.[246] Lt. Col. Lindley subsequently spoke with Maj. Petree, the Special Forces Rapid Support Unit Commander, who also expressed similar concerns about the scope of the mission.[247]

Lt. Col. Lindley testified before the subcommittees that he was principally concerned with three areas of the support requested—the review and scrub of the ATF operation plan, medical support in close proximately to the scene, and assistance in developing and constructing the rehearsal sites.[248] Lt. Col. Lindley's first concern was the review and scrub which is an analysis of a mission that has already been planned. The review and scrub of the operation plan and the review of the discriminating fire plan would have been done by the Special Forces unit assigned to JTF–6, which ultimately provided the military training to ATF.[249] Lt. Col. Lindley was of the opinion that the actual planning and rehearsal of the take down was "active" and therefore illegal.[250] He also believed that the Special Forces unit was not authorized to offer expert advice on deconstructing a drug lab.[251]

Lt. Col. Lindley's second concern dealt with the use of military medical personnel. According to ATF's request, these military medical personnel would be on-site and directly involved in potential searches of individuals apprehended and in the collection of evidence, resulting in Posse Comitatus Act implications. This degree of direct involvement would also create liability issues associated with the treatment of the civilians.[252] The medical personnel potentially would be treating gunshot wounds of children, and military medical personnel do not have the training or equipment to treat such trauma wounds (gunshots) in small children. For example, some medical equipment for children such as breathing tubes require special sizes with which these medical teams are not be equipped.[253]

According to Lt. Col. Lindley, the JTF–6 informed him that the law enforcement action was a raid on a methamphetamine lab.[254] Having been involved in law enforcement actions involving methamphetamine labs as a civilian, Lt. Col. Lindley was aware of concerns with the physical characteristics of methamphetamine production and the dangers in the chemicals, as well as ammunition considerations given the explosive nature of methamphetamine labs.[255] Contamination of soldiers' clothing by chemicals used in the production of methamphetamines would involve those soldiers in the collection of physical evidence.[256] Again, such direct involvement would violate the Posse Comitatus Act.

Upon completing his discussions with the Special Operations personnel, Lt. Col. Lindley directly contacted JTF–6 personnel to express his concerns about the mission. When Lt. Col. Lindley informed JTF–6 personnel that, from his initial analysis of the information presented, the request was impermissible as proposed, he received a hostile response from Lt. Col. Rayburn, the JTF–6 Legal Advisor.[257] After his conversation with JTF–6 personnel, Lt. Col. Lindley began a memorandum for record detailing the chronology of events and conversations as they took place.[258] JTF–6, not Lt. Col. Lindley, subsequently provided the legal review of the request.

After the requests for additional evidence of methamphetamine production, the military assistance allowed was drastically restricted.

3. Evidence indicating problems in the approval process

Contrary to assertions by Assistant Secretary Holmes, Brig. Gen. Huffman, and Maj. Gen. Pickler, the approval process did not work as it was supposed to.[259] First, although concerns had been raised that JTF–6 had been providing military assistance to non-counterdrug activities, little documentation of ATF's requests for military assistance exists. Second, while some senior military officers and DEA officials had opportunities to voice concerns about ATF's alleged drug nexus, they chose not to exercise those opportunities. Third, because a few military officers identified major legal problems with the training mission and alerted senior military commanders, despite threats by other senior military officers, the mission was altered to avoid violations of the law. Finally, after Waco hearings were scheduled, the Secretary of Defense acknowledged problems with the military assistance process and created a working group to review the process.[260]

a. Concerns of cheating by JTF–6

Military documents indicate that a problem existed with JTF–6 providing military assistance to law enforcement agencies in the absence of a drug

[245] *Id.* at 368.
[246] *Id.* at 352–353.
[247] *Id.* at 368.
[248] *Id.* at 350.
[249] *Id.* at 351.
[250] Memorandum for record of Lt. Col. Philip Lindley (3 February 1993). Defense Documents D–1168 at D–1169.
[251] *Id.* at D–1172.
[252] Hearings Part 1 at 350–351.
[253] Interview of Lt. Col. Phillip Lindley by Glenn R. Schmitt, Counsel to the Subcommittee on Crime, and Michele Lang, Special Counsel to the Subcommittee on National Security, International Affairs, and Criminal Justice, in Washington, DC (July 19, 1995).
[254] Hearings Part 1 at 367.
[255] *Id.* at 367–368.
[256] *Id.*
[257] *Id.* at 353.
[258] *Id.*
[259] *Id.* at 385–386.
[260] Memorandum of Military Support to Civil Authorities by William Perry, Secretary of Defense, to the Secretary of the Army, Chairman of the Joint Chiefs, Under Secretary of Defense (Policy), Under Secretary of Defense (Comptroller), and the General Counsel of the Department of Defense (May 17, 1995).

nexus.[261] These concerns apparently had reached the highest levels of the Department of Defense.[262]

When JTF–6 provides military assistance in non-counterdrug related law enforcement actions, it is referred to as "cheating" because it allows the law enforcement agency to obtain military assistance without reimbursing the military. Moreover, military assistance provided under these circumstances is funded with money specifically appropriated for counterdrug activities.[263] Furthermore, cheating allows JTF–6 to provide military assistance to non-counterdrug activities, outside the scope of its authorized purpose.[264] Interviews with Defense Department counterdrug personnel revealed that self preservation in part fuels JTF–6 efforts to secure healthy budget allocations.[265] Documents provided by the Treasury Department show that in the months following the tragic end of the Branch Davidian siege, JTF–6 and Operation Alliance were actively promoting their services to ATF. This was occurring even as senior military officials expressed concern that ATF misrepresented the required drug nexus in order to obtain military assistance.[266]

Assistant Secretary Holmes stated that JTF–6 *does not verify* whether a "drug nexus" exists before providing military assistance because it would potentially place the military in a capacity of conducting surveillance and investigations of American citizens, which is a violation of U.S. law.[267] Secretary Holmes' purported concern is not responsive to the issue. Contrary to Mr. Holmes' assertion, the verification of a drug nexus would not require military personnel to conduct surveillance of or otherwise investigate American citizens. Rather, verification could be accomplished simply by establishing a standard which requires sufficient documentation by the law enforcement agency of the existence of drug offenses, as opposed to mere speculation or suspicion. In addition, JTF–6's own planning guide states that it "reviews and validates all requests for support" in conjunction with Operation Alliance, the National Guard, and the Regional Logistics Office.[268]

b. Special Forces paper and ATF's response

Further evidence suggesting a serious problem in the military's approval of assistance to ATF in this case involves ATF agents' reactions to the Bureau's own claim that a methamphetamine lab existed in the Branch Davidian residence.

The alleged presence of a methamphetamine lab was the basis for which the Special Forces assistance provided to ATF. After Special Forces legal advisors concerns' with the proposed training and ATF's alleged drug nexus, Maj. Petree, the Commander of Special Forces Rapid Support Unit which was assigned to provide ATF support, ordered two of his Special Forces medics to research and write a paper on methamphetamine labs for ATF. These Special Forces medics, who are highly skilled military personnel with far more advanced training than a typical civilian paramedic, spent 3 to 4 days researching and writing a memorandum on methamphetamine labs for ATF.[269]

There is no doubt that a central purpose of the memorandum on methamphetamine labs was to inform the ATF of the potential dangers and special precautions required when dealing with an active methamphetamine lab. Yet, when Maj. Petree presented the paper to ATF agents during the February 4–5, 1993, Houston meeting, these agents openly chose to ignore this information in front of the soldiers who prepared the document. In fact, the ATF agents' dismissal of such vital information was so obvious that these agents' reactions alone made to clear that the ATF believed that a methamphetamine lab did not exist.[270]

Maj. Petree indicated that the purpose of the Special Forces paper was for the informational use of Special Forces units who might be involved in future counterdrug activities involving methamphetamine labs. Yet, when the subcommittees requested a copy of the Special Forces paper during a visit by subcommittees' staff to the U.S. Special Operations Command in Fort Bragg, NC, they

[261] "Desires to know the [U.S. Army Special Operations Command] position regarding the attached draft [message]. Intent is to go on record confirming the phonelon arrangements, *and* to reinforce [Special Operations Forces] Resistance to potential *'cheating' which seems to recur at JTF–6*." Comments from a U.S. Special Operations Command facsimile (February 17, 1993). The facsimile cover was attached to the February 3, 1993 message regarding the Special Forces training mission of ATF and had multiple routing destinations. (Unnumbered).

[262] *Id.*

[263] National Defense Authorization Act Fiscal Year 1991, § 1004, Pub. L. 101–510 (as amended by National Defense Authorization Act Fiscal Year 1991 § 1088, Pub. L. 102–190, and by National Defense Authorization Act Fiscal Year 1993 § 1041, Pub. L. 102–484, FY 93 NDAA.).

[264] Hearings Part 1 at 367.

[265] The subcommittees discovered a number of post-Waco promotions of military assistance and ATF requests for military assistance. A sampling of those include: According to a Defense Department memo dated September 9, 1993, ATF requested and received approval for 2 weeks of Special Forces Training for 20 ATF agents less than 5 months after the tragic incident at Waco. Defense Documents D–1167. Another Special Operations Judge Advocate memo addressing this Special Forces training, indicates that ATF again was attempting to obtain military assistance without reimbursing Defense Department: "we cannot waive reimbursement under the fiction that we are 'training the trainer' as is not so subtly suggested by the 3 Aug BATF letter." Defense Documents D–1166. A June 15, 1993 ATF memorandum from Special Agent Pali, the ATF Deputy Senior Tactical Coordinator at Operation Alliance to the Chief of the Special Firearms Division and the Special Agents in Charge of the Dallas, Houston and Los Angeles Field Divisions enclosing an Regional Logistics Support Office document describing the "latest information regarding the types of support and procedures for Drug Law Enforcement Agencies to request excess property, non-operational support or training from the Department of Defense." Treasury Documents T006665.

[266] "[T]he only question I have is related to how we got involved. Was the 'methamphetamine' lab a subterfuge to get our (military) (506) (?) Involvement? Seems to me we need to be sure that what the ground rules are. Reasonable man rule applies." Unsigned handwritten note on a lieutenant general's note paper. Defense Documents D–1363.

[267] Pre-hearing meetings with Assistant Secretary Allen Holmes. See also Hearings Part 1 at 367 (statement of Maj. Gen. John M. Pickler).

[268] JTF–6 Operational Support Planning Guide at 16. Treasury Documents T08786, T08803.

[269] Hearings Part 1 at 361.

[270] *Id.* at 372. Maj. Petree had to have known, or certainly should have known, as a senior military officer assigned to JTF–6, that a drug nexus was absolutely necessary to receive assistance from his unit through JTF–6. Even though Staff Sgt. Fitts, one of the writers of the paper, noticed the ATF agents' disinterest in the vital paper and clearly came to the conclusion that a methamphetamine lab did not exist, Maj. Petree indicated that he did not notice any remarkable reaction by the agents.

were informed that it could not be located.[271] Sgt. Fitts had not seen the Special Forces paper since the meeting in Houston and had no idea what became of the Special Forces paper after the meeting. If the Special Forces paper was written as an information resource, the Special Operations Command would be expected to have a copy of this paper on file.

c. Two DEA agents were members of the Operation Alliance board

Military officers were not alone in their inaction. Documents show that two senior DEA agents were assigned to Operation Alliance at the time of ATF's request for military assistance at Waco.[272] Yet, none of the documents indicate that either of these DEA agents expressed concerns about the evidence ATF offered in support of its claim of an active methamphetamine lab or how ATF was planning to take down the alleged methamphetamine lab.

These two senior DEA agents were members of the Operation Alliance Board which provides the final approval of military assistance missions to drug law enforcement agencies. It is reasonable to assume that these DEA agents were aware of the safety and health risks a methamphetamine lab would present.

Treasury and Defense Department documents provided to the subcommittees indicate that Operation Alliance at least twice requested additional information on ATF's drug nexus, that a very contentious discussion between legal advisors and senior military officials of Special Operations Command and Operation Alliance had taken place, and that this was the largest raid in law enforcement history. Yet, no evidence was presented to show that these DEA agents expressed any concerns that ATF was not addressing these risks in their operational planning.

d. Approval process did not work

Contrary to the testimony of Assistant Secretary Holmes and Maj. General Pickler, the training mission did not violate laws because the approval process worked, but in spite of it. Only because certain soldiers recognized a legal problem and had the courage to raise the issue in light of opposition from their chain of command at JTF–6, was a "major incident avoided, lives were saved, and the law was not violated."[273]

JTF–6 and Operation Alliance have the approval authority for law enforcement requests for military assistance along the Southwest border, which means their legal advisors conduct the legal review of the proposed assistance, not Special Operations Command legal advisors at Fort Bragg.[274]

Soldiers are taught that they should always go through their chain of command to address a problem. Only under significant circumstances are soldiers encouraged to go outside their chain of command for assistance. The Special Forces soldiers assigned to assist ATF, apparently had been properly trained to go outside their chain of command, which at the time was at JTF–6, by contacting their legal advisor at Special Operations Command, (USAFC) if they had concerns about a mission.

The Special Forces soldiers assigned the ATF mission did just that. Maj. Ballard, the Special Operations Representative at Operation Alliance, contacted Mr. Crain at Special Operations Command. Crain then informed Lt. Col. Lindley of their concerns.

It was Lt. Col. Lindley, the legal advisor of the Special Operation Command, who raised the legal concerns with JTF–6. Lt. Col. Lindley received a hostile response from Lt. Col. Rayburn, the JTF–6 legal advisor who accused him of attempting to "undermine" and "undercut" JTF–6's mission.[275] Lt. Col. Lindley was also told that he could consider Lt. Col. Rayburn's words a personal attack.[276] Subsequent to Lt. Col. Lindley's telephone conversation with Lt. Col. Rayburn, these concerns were raised with the Commanding Generals of both Special Operations Command and JTF–6 and eventually reached the Office of the Secretary of Defense. When the legal concerns were reviewed at that level, the Special Forces training mission was modified to comply with the law.[277]

[271] The presence of the Special Forces paper alone would provide evidence to produce charges that: (1) Special Forces trainers were deficient in their training of ATF in failing to ensure ATF took proper precautions; (2) Special Forces trainers knew from ATF's failure to incorporate proper precautions that no methamphetamine lab existed and thus they inappropriately provided military assistance in a non-counterdrug law enforcement operation. Neither of these potential charges is flattering to JTF–6, and especially to Maj. Petree, who presented the paper to ATF and who commanded the Special Forces units which trained ATF.

[272] Senior DEA Representative William C. Rochon and DEA Staff Coordinator Richard G. Thomas were on the Operation Alliance board. However, Special Agent Thomas was on sick leave from approximately October 1992 until his retirement in January 1993, so he has no personal knowledge of Operation Alliance's activities in support of ATF's investigation of the Branch Davidians. Letter from the U.S. Department of Justice to the subcommittees (January 5, 1996) (responding to the subcommittees' October 25, 1995, request for information).

[273] Handwritten memorandum on the letterhead of Judge Advocate General's Corp, U.S. Army. Defense Documents D–1155 at D–1157. The memo refers to the soldiers actions as "doing the right thing, not the easy thing."

[274] All law enforcement agency requests for military assistance along the Southwest border must be routed through Operation Alliance. Once the request is received, it is reviewed by Operation Alliance. If Operation Alliance accepts the request, it is then sent to JTF–6 for processing. JTF–6 Operations Section will develop a draft operations order with the law enforcement agency. Once the planning is complete, the draft order is returned to Operation Alliance for its approval. A final approval of the operations order is then determined at a joint meeting of the heads of supporting field drug law enforcement agencies, the Special Forces Rapid Support Unit tasked by JTF–6 and the tactical coordinator for Operational Alliance. Letter from Operational Alliance Special Agent Eddie Pali, ATF Coordinator for Operation Alliance (January 26, 1990). Treasury Documents T006663–006664.

[275] Memorandum for record from Lt. Col. Philip Lindley. Defense Documents D–1168 at D–1170.

[276] *Id.*

[277] Handwritten memo on the letterhead of The Judge Advocate General's Corps, U.S. Army. Defense Documents D–1155 at D–1156.

e. The working group established by the Secretary of Defense

The final piece of evidence that serious problems exist in the process by which the military provides support to civilian law enforcement agencies is the Secretary of Defense's creation of a working group to review the process in the wake of the subcommittees' announcement of Waco hearings which would also explore the military's role in the incident.

On May 17, 1995, Secretary of Defense William J. Perry directed the Under Secretary of Defense for Policy to establish a working group "to conduct a comprehensive review of the current system by which Defense Department evaluates and responds to requests for assistance initiated by outside agencies."[278] Perry acknowledged in his memorandum that, "several recent events suggest that the process by which Defense Department evaluates and approves outside requests for assistance may be less than adequate" and that "there are indications that Defense Department's ability to respond smoothly is encumbered by conflicting directives, multiple entry points and diverse funding authorities."[279]

C. THE ALLEGED DRUG NEXUS

As explained earlier, in order to receive military assistance at Waco from the military counterdrug units, ATF was required to have a drug nexus. The existence of a drug nexus also would have allowed ATF to receive that military assistance without being required to reimburse the military for the cost of the training. ATF's allegation that a drug nexus existed at the Davidians' residence raised two concerns: (1) whether ATF used this alleged drug nexus as a subterfuge in order to obtain free military assistance from specially trained Special Forces counterdrug units; and (2) assuming ATF actually believed a drug nexus existed, whether ATF ensured that its agents were aware of the extreme health and safety hazards that a methamphetamine lab presents, and were properly trained and equipped to address those hazards.

1. Methamphetamine laboratories

ATF alleged to the military that it had evidence of an "active methamphetamine lab" on the premises of the Davidians' residence. Unlike general narcotics seizures, clandestine labs, by their very nature, "present a unique series of hazards and risks to law enforcement personnel."[280] Therefore, an allegation of an active methamphetamine lab should alarm any law enforcement official, because of the extreme safety and health dangers involved.

a. Dangers associated with methamphetamine labs

Hazards which law enforcement agents may expect to encounter in clandestine lab operations include exposure to toxic chemicals, explosive and reactive chemicals, flammable agents, irritant and corrosive agents, booby traps, and physical injury from close quarter contact with illegal lab operators.[281]

Illegal methamphetamine labs use highly volatile chemicals during the production process. Notwithstanding the booby traps law enforcement agents frequently encounter at methamphetamine labs, the firing of a single bullet, sparks from turning off and/or on light switches, flashlights, or even a flash from a typical photography flashbulb can easily trigger an instantaneous explosion. Toxic vapors produced during chemical reactions can permeate a building's structure and buildings with poor ventilation and temperature controls (like the Davidians' residence) "add to the potential for fire, explosion, and human exposure."[282] One chemical used in clandestine drug labs is so deadly that an amount small enough to fit on the head of a pin, could kill a room full of people.[283]

Other health concerns are no less serious. In the absence of proper safety precautions and cleanup procedures, law enforcement agents may "experience both acute and chronic adverse health effects as a result of exposure to solvents, reagents, precursors, by-products, and drug products improperly used or generated during the manufacture of illegal drugs."[284] Toxic materials produced at these labs can injure the lungs or the skin, damage the liver, kidneys, even the central nervous system.[285] Some toxins have been linked to malformation of embryos, other genetic damage, cancers, and reproductive failure.[286]

In determining appropriate safety and health precautions, the subcommittees relied on standards set forth by the Drug Enforcement Administration (DEA). DEA has primary jurisdiction over investigations of clandestine drug labs. As the lead Federal agency, it has established procedures that DEA agents must follow during the investigation and seizure of drug labs.[287] Moreover, this approach by DEA has been a model for State and local agencies in developing their own clandestine drug lab programs.[288]

[278] Memorandum of Military Support to Civil Authorities by William Perry, Secretary of Defense, to the Secretary of the Army, Chairman of the Joint Chiefs, Under Secretary of Defense (Policy), Under Secretary of Defense (Comptroller), and the General Counsel of the Department of Defense (May 17, 1995).

[279] *Id.*

[280] The Joint Task Force of the Drug Enforcement Administration, the U.S. Environmental Protection Agency, and the U.S. Coast Guard, Guidelines for the Cleanup of Clandestine Drug Laboratories 8. *See also*, Bureau of Justice Assistance, Developing a Strategy for a Multiagency Response to Clandestine Drug Laboratories 4 (September 1995).

[281] *Id.* at 8.

[282] *Id.* at 3.

[283] Drug Enforcement Administration briefing to the subcommittees (June 8, 1995) and subsequent telephonic interviews with DEA chemists.

[284] *Id.* at iii.

[285] Bureau of Justice Assistance, *supra* note 280, at 5.

[286] *Id.*

[287] The Joint Task Force of the Drug Enforcement Administration, the U.S. Environmental Protection Agency, and the U.S. Coast Guard, *supra* note 280, at 4.

[288] *Id.*

b. Certification/training requirements for deconstruction of methamphetamine labs

Law enforcement personnel engaged in the investigation and seizures of clandestine drug labs should have specialized training in the investigation of such labs, in appropriate health and safety procedures, and in the use of the protective equipment.[289]

The DEA requires all of its personnel to complete a course on clandestine methamphetamine labs and be certified *prior to ever participating* in a methamphetamine lab raid.[290] Simply stated, no DEA agent may participate in "take downs" of methamphetamine labs without proper certification. Annual recertification also is required. In addition, DEA provides seminars on clandestine methamphetamine labs throughout the Nation to other local, State, and Federal law enforcement personnel.

DEA agents are also required to receive a "baseline medical screening, including an occupational/medical history, a complete physical examination, a blood chemistry screen, pulmonary function and spirometry testing, and a stress-treadmill test prior to assignment."[291] Agents have regular follow-up medical evaluations and, because of the risks associated with long-term exposure, regularly are rotated out of the Clandestine Lab Program.

The initial entry team also must have and be trained in the use of "appropriate monitoring instrumentation, such as air-sampling pumps, explosimeters, oxygen meters, organic-vapor analyzers . . . that are used to determine the lower explosive limit and the concentration of organic vapors in the laboratory atmosphere."[292] All of the monitoring devices must be "designed to suppress sparks" that may ignite and cause fires or explosions.[293]

c. The special precautions required when law enforcement actions involve a methamphetamine lab

After an investigation has gathered sufficient probable cause to establish that a drug lab is operating on a premises, DEA agents obtain a search warrant. Agents may request in the warrant the authority to destroy any hazardous bulk chemicals and equipment.[294] A forensic chemist is consulted prior to and during the seizure.[295] Once the warrant is obtained, the case agents begin a six step process for conducting the seizure: planning, entry, assessments, processing, exit, and follow-up.[296] Because ATF entered the Branch Davidian residence, only the first two steps will be discussed in detail.

In the planning stage, the case agents must first assess of the hazards likely to be encountered and determine who needs to be notified before the raid (i.e. police, fire department, hospitals, hazardous waste contractors.)[297] This includes a determination of what chemicals the agents might encounter. Once the assessment is complete, certified teams, including a forensic chemist and site safety agent trained and equipped with the requisite safety equipment, are assigned.

The second stage is the initial entry to apprehend and remove the operators and to secure the lab. Typically in methamphetamine lab operations, law enforcement agents will attempt to arrest the suspects away from the premises to avoid many of the aforementioned dangers. This is usually accomplished through surveillance and investigative techniques which provide law enforcement agents with sufficient information to determine the lab's exact location, what chemicals are being used, the stage of the production process and when the suspects will leave the premises.

If the lab operators cannot be apprehended away from the premises, then the initial entry takes place. "DEA protocol calls for the initial entry team to employ ballistic protection equipment and fire retardant clothing."[298] Other safety procedures include avoiding the use of shotguns or diversionary devices such as flash bangs, smoke, or tear gas canisters which can ignite fumes.[299] Additionally, agents should avoid turning light electrical switches on or off, use only explosion-proof flashlights, and use electronic strobes, not flashbulbs.[300] Once the premises are secure and everyone is evacuated, the assessment step begins.

d. Did ATF address the extreme safety and health concerns a methamphetamine lab presents in its raid on the Branch Davidian residence?

In 1990, Stephen E. Higgins,[301] the Director of the Bureau of Alcohol, Tobacco and Firearms, testified before the Subcommittee on the Treasury, Postal Service, and General Government Appropriations of the Committee on Appropriations. In written responses to questions from subcommittee members, Higgins acknowledged:

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[289] *Id.*

[290] *Id.* at 5.

[291] Bureau of Justice Assistance, *supra* note 280, at 16.

[292] The Joint Task Force of the Drug Enforcement Administration, the U.S. Environmental Protection Agency, and the U.S. Coast Guard, *supra* note 280, at 8.

[293] *Id.*

[294] ATF did not mention a drug lab or possession of illegal drugs as suspected crimes in its search warrant.

[295] The Joint Task Force of the Drug Enforcement Administration, the U.S. Environmental Protection Agency, and the U.S. Coast Guard, *supra* note 280, at 5.

[296] *Id.*

[297] "In seizing a clandestine drug laboratory, the law enforcement agency may encounter materials that technically qualify as hazardous wastes and therefore are 'subject to regulation.' If those wastes exceed certain minimal quantities, the law enforcement agency becomes a hazardous waste generator and is required to adhere to waste disposal regulations promulgated under RCRA, and to regulations governing the transportation of hazardous materials promulgated by the Department of Transportation." *Id.* at iv.

[298] *Id.* at 8.

[299] *Id.*

[300] *Id.*

[301] Mr. Higgins was Director of the ATF both during the investigation and at the time of the February 28, 1993, raid on the Branch Davidian residence.

> [W]e [at the ATF] are aware of the considerable hazards presented by the careless storage of chemicals and the sensitivity of the explosive mixtures at these [clandestine methamphetamine] laboratories. In an effort to ensure a safe and thorough investigation, ATF has proposed specific, specialized training for select ATF personnel to readily identify narcotics laboratories and to recognize certain hazardous materials associated with the laboratories.[302]

Given that Higgins was still the ATF Director during the period when David Koresh was being investigated, when the Waco raid took place and during the post-raid investigation, it is reasonable to conclude ATF was aware of the safety and health hazards presented by methamphetamine labs. Furthermore, since the case had the "highest interest of BATF Washington and had been approved at that level,"[303] ATF headquarters was aware of the alleged presence of a methamphetamine lab.

Even so, in response to the subcommittees' inquiries, ATF has acknowledged that no "ATF agent who was present on February 28, 1993, . . . had received specific, specialized training in investigating methamphetamine laboratories."[304] In reviewing videotapes of the Fort Hood training, subcommittee investigators also found no discussion of the potential safety and health hazards that the suspected active methamphetamine lab would present. In other words, ATF agents participating in the raid had little or no notice of the dangers they might have forced in the active methamphetamine labs.

From numerous briefings and a review of videotape shot on the day of the raid, it appears that ATF agents did possess ballistic protection equipment and fire retardant clothing. ATF agents also possessed regular flashlights and regular cameras (i.e. flash photography), shotguns and flash bangs,[305] each of which could trigger instantaneous explosions if used in the vicinity of a methamphetamine lab. Nor is there any evidence that any ATF agents possessed appropriate monitoring equipment to determine the lower explosive limit and the concentration of vapors in the atmosphere, or explosion proof flashlights.

Clearly, ATF disregarded the safety of its agents and innocent civilians. Agencies involved in clandestine lab operations fall under OSHA regulations requiring the following actions by employers:[306]

- "Communication to employees of clear, unambiguous warnings, as well as provision of educational programs on the hazards of chemical substances."
- "Training of all employees who may be exposed to hazardous substances in how to recognize and handle safety and health hazards at laboratory sites, in the use of protective equipment, and in safe work practices." Training must meet OSHA standards.
- Examining and monitoring the health of all employees exposed to hazardous substances including documentation of any exposure.
- Provide information to employees regarding any hazardous conditions in their work environments.

When agencies fail to adhere to these requirements, "supervisors can be held strictly and severally liable for situations involving employee exposure to hazardous substances and the resulting adverse health effects."[307]

2. Evidence purporting to show the alleged drug nexus

a. Mark Breault's statement

Coincidentally, after repeatedly being informed by military officials of the drug nexus requirements, Aguilera received a facsimile on December 16, 1992, from Mark Breault in Australia, which according to ATF "suggest[ed] the existence of an illicit methamphetamine laboratory at the Branch Davidian compound."[308] Mr. Breault's facsimile relays that upon taking over the Mount Carmel (Residence of the Branch Davidians) property from George Roden, the former Branch Davidian leader, Koresh found methamphetamine lab equipment and "recipes" and called the Sheriff's Department to turn over the materials.[309] It had been long rumored that an individual who used to rent from Mr. Roden was into drugs but he had later gone to prison.[310] This individual was no longer on the property when Koresh took over.[311]

Mr. Breault's facsimile to Special Agent Aguilera also indicated that although Koresh did call the Sheriff's Department and Sheriff's Department personnel did come out to the property, one indi-

[302] *Hearings before the Subcommittee on Treasury, Postal Service, and General Government Appropriations of the House Committee on Appropriations,* 101st Cong., 2d Sess. 688, 695 (1991).

[303] Operations Order, February 17, 1993, Defense Documents D–587.

[304] Undated Department of Treasury response to subcommittees' request for information.

[305] ATF policy on the use of "flash bang" diversionary devices states, "Drug laboratories or other explosive environments may be so hazardous as to preclude the use of [flash bang] devices." and "If [a flash bang] lands on a combustible material a fire is not only possible but likely, (laundry, newspaper, clothing, etc.)." [Page 66 of the ATF training manual on the use of diversionary devices] no mention of the alleged presence of a methamphetamine lab is mentioned in ATF's request to the Chief of Special Operations Division for the use of flash bangs during the raid. [Request to use flash bangs, dated February 5, 1993, Treasury Documents 008213–14].

[306] Bureau of Justice Assistance, *supra* note 280, at 7 (citing 29 C.F.R. Part 1910).

[307] *Id.* at 8.

[308] Memo from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589, 004590. Actual facsimile, Treasury Documents T008912.

[309] Facsimile from Mark Breault to Special Agent Davey Aguilera (December 16, 1992). Treasury Documents T00008912.

[310] *Id.*

[311] *Id.*

vidual present at the residence when the Sheriff's Department visited said she did not personally observe Koresh turn the lab equipment over to the Sheriff's Department.[312] Mr. Breault also stated in his facsimile that one night in 1989, Koresh "was talking about trafficking drugs as a way of raising money.[313] He [Koresh] seemed very interested in getting money through this means."[314] However, Mr. Breault also admits in his facsimile that he was the only ex-member who was present for this statement.[315] Mr. Breault goes on to say in the same document that the building in which he implies the drug lab equipment was located burned down in Spring 1990.[316] Lt. Col. Gen. Pickler testified before the subcommittees that this information from Mr. Breault regarding a methamphetamine lab also was told to the military by ATF.[317] However, military documents indicate that ATF was conveying to the military the presence of an active methamphetamine lab.[318]

There were at least six significant problems with its credibility as evidence that the Branch Davidians were operating a methamphetamine lab prior to ATF's raid. First, the allegations were very stale by legal standards. ATF received the information more than 5 years after the methamphetamine lab equipment was found and the Sheriff's Department visited the premises to investigate the claim. Second, it is undisputed that Koresh found the methamphetamine lab equipment and Koresh himself called the Sheriff to pick up the equipment. Third, the person rumored to have been involved in drugs was an occupant of the premises prior to Koresh taking over, and subsequently was sent to prison. Fourth, the former leader, Mr. Roden, not Koresh, was suspected of having been involved in illegal drugs. Fifth, the alleged statement by Koresh about drugs could not be verified independently. Sixth, the building Mr. Breault implies housed the methamphetamine materials burned down in 1990, 3 years before the raid.

Perhaps the most disturbing fact about this information, however, is that all of this drug nexus information originated with Mr. Breault, a disgruntled former member who left the group in 1989. The fact that Mr. Breault maintained an extensive biographical database on present and former members and was working with a self-proclaimed cult-buster Rick Ross in and of itself should have raised questions about Mr. Breault's intentions and credibility to the ATF agents.

Lt. Robert A. Sobozienski, a New York City Police officer who acted as an expert consultant to the Treasury Department's Waco Review Team, summarized the problem with the information Breault provided when he wrote in his Waco Raid Assessment, "Former cult members were interviewed and, apparently much, if not all of their statements are reported to be facts. No thought is given to the idea that these ex-cult members had been away from the residence for some time, or to the individual biases, or if they had an ax to grind with present cult members."[319]

ATF agents did check with the McLennan County Sheriff's Department personnel who acknowledged Koresh's request but "found no record" of the removal of methamphetamine lab equipment.[320] However, Joyce Sparks[321] states in written testimony, that during her child protective services investigation in 1992 she checked with the Sheriff's Department and was told that Department personnel did receive drug evidence from David Koresh.[322] During her interviews with him, Koresh told her that he had given the Sheriff's Department information, pictures, and drug evidence but nothing had ever come of it.[323] Koresh complained in his interviews with Sparks that the Sheriff's Department was aware of the illegal methamphetamine lab.[324]

The disposal of methamphetamine lab equipment and chemicals presents great risk and significant problems. As a matter of routine, DEA hires certified State and local chemical disposal companies to remove the lab equipment and chemicals for proper disposal under EPA guidelines.[325] Because the cleanup costs can easily total $20,000, or significantly more, depending on the size and condition of the lab site, local law enforcement officials sometimes choose not to remove the lab equipment and chemicals or not to follow the proper environmental guidelines for removal in an effort to avoid the legal liabilities and costs associated with such labs.[326]

[312] *Id.*
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] Hearings Part 1 at 369–370.
[318] There are numerous examples of where ATF indicated to the military there was an "active methamphetamine lab" and "deliveries of precursor chemicals." A few are the February 17, 1993, Operations Order, and the February 2, 1993, letter from Operation Alliance to the Adjutant General of the Texas National Guard counterdrug unit informing them that ATF had requested National Guard assistance in serving a Federal search warrant "to a dangerous, extremist organization believed to be producing methamphetamine." Treasury Documents T005551. See also Defense Documents D–581.

[319] Waco Raid Assessment by Lt. Robert A. Sobozienski. Treasury Documents T00021383.
[320] Treasury Department Report at 212.
[321] Ms. Sparks was an investigations supervisor for the Texas Department of Protective and Regulatory Services, Children's Protective Services, who was interviewed repeatedly by ATF.
[322] Prepared statement of Joyce Sparks. *See* Appendix. [The Appendix is published separately.]
[323] *Id.*
[324] *Id.*
[325] The hiring of State and local chemical companies was the result of legislation which corrected the problem of DEA disposing of the methamphetamine lab materials. Each time DEA disposed of a methamphetamine lab, the agency came under the Hazardous Waste laws, as a hazardous waste generator.
[326] Although the Sheriff's Department acknowledged visiting the Branch Davidian residence to remove methamphetamine lab materials at Mr. Koresh's request in 1989, there was no record of the actual removal of the methamphetamine lab materials. However, there could be numerous reasons why no such record existed from a Sheriff's call 4 years prior, and without further evidence of the methamphetamine lab's continued use or even its continued existence there is little probative value to Mr. Breault's information. Neither ATF's search warrant nor its

b. The National Crime Center check

As mentioned earlier, after a December 17, 1992, meeting of SAC Chojnacki, Aguilera and Lt. Col. Walker in which Lt. Col. Walker informed the ATF agents that ATF could receive non-reimbursable military support if a drug nexus existed, ATF Intelligence Research Specialist Sandy Betterton was instructed to search criminal records of Davidians to identify prior drug offenses.[327] However, when ATF Special Agent Pali was interviewed by Treasury Agents during the Post-Waco review, he admitted that only one Branch Davidian had a prior drug conviction.[328]

c. FLIR hot spot

Treasury Department documents provided to the subcommittees indicate that at the request of ATF, Forward Looking Infrared Radar (FLIR) imaging was taken on January 6, 1993, by the Texas National Guard Counterdrug unit in a National Guard counterdrug aircraft. Eugene Trevino, a Texas National Guard airman aboard the aircraft, offered an *unofficial interpretation* of the FLIR photos to the Austin ATF agents in which he stated that the "hot spot" inside the residence "could be indicative of 'a methamphetamine lab.'"[329] It is unclear whether ATF agents solicited Trevino's personal interpretation or if he offered it on his own volition.

Regardless of the impetus for the interpretation, Lt. Col. Pettit and Lieutenant Justice "maintained that only information about grid coordinates was *officially* provided to ATF" and that "no official interpretation was ever provided to ATF regarding the 'hot spot.'"[330] Even though ATF never sought an official interpretation,[331] ATF agents later offered the "hot spot" as direct evidence of a methamphetamine lab to the military when JTF–6 requested additional proof of the drug nexus at a February 4, 1993 meeting.[332]

Major General Pickler testified that at the February 4 meeting there was some pictorial evidence (i.e., FLIR evidence) that an active methamphetamine lab was on the site of the residence and ATF expected the lab to be there.[333] Interviews with DEA agents have revealed that FLIR imaging is not a technique used to identify clandestine drug labs because using "hot spots" as signatures for methamphetamine labs is too unreliable.[334] DEA agents have informed subcommittee staff that the use of FLIR imaging to identify an active methamphetamine lab would be a last resort and only as "icing on the cake" under that circumstance.

d. The DEA lab team

Only when General Pickler of JTF–6 continued to request additional evidence of a methamphetamine lab, did ATF indicate it intended to include a lab team from the DEA in the operation.[335] Treasury documents indicate that two DEA officials were at the Command Post at the Texas State Technical Institute on the day of the raid; but ATF declined the DEA offer of direct assistance from a DEA Clandestine Certified Laboratory Team.[336] Such a lab team is specially trained and certified to "take down" active methamphetamine labs. These teams also have the specialized equipment and tactical training required for methamphetamine lab operations.

e. The precursor chemicals used to produce methamphetamine

There are numerous methods to produce methamphetamine. However, certain chemicals required in the synthetic process are themselves incorporated into the molecule of the target drug (in this case methamphetamine).[337] These chemicals are referred to as precursor chemicals and their delivery would be evidence that methamphetamine was being produced. While ATF agents repeatedly proffered evidence of deliveries of precursor chemicals to the Branch Davidian residence as proof of an active methamphetamine lab, the Treasury Department has since been unable to locate or produce the documents offered to support its precursor contentions.[338]

Treasury documents outlining the series of meetings between military, Texas National Guard, and ATF officials, describe a February 4, 1993, meeting held at the SAC/Houston office regarding military support. In attendance were Special Agent Lewis; Special Agent Sarabyn; Lt. Col. Bertholf; Special Agent Pali, ATF coordinator to Operation Alliance; William Enney, Texas State Interagency Coordinator; and Maj. Lenn Lannaham, JTF–6 Liaison. During the meeting, Sarabyn offered ATF documents including a list of methamphetamine precursor chemicals, in support

supporting affidavit contain any information about suspected illegal drug activity.

[327] Memorandum from Colleen Callahan and Robert Tevens to Geoff Moulton and Lew Merletti, "Chronology and Witnesses Re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589, 004590.

[328] *Id.*

[329] *Id.*

[330] *Id.*

[331] *Id.*

[332] *Id.*

[333] Hearings Part 1 at 363.

[334] Drug Enforcement Administration briefing to the subcommittees (June 8, 1995) and telephone interviews with Drug Enforcement Administration chemists.

[335] General Pickler testified that Lt. Col. Berthal was told at the February 4 and 5, 1993, meeting in Houston that ATF had intended to include a DEA lab team in the Waco operation. Hearings Part 1 at 369–370.

[336] Treasury Document T4589.

[337] U.S. Department of Justice, Drug Enforcement Administration publication, Chemicals Used in the Clandestine Production of Drugs at ii (March 1995).

[338] On February 2, 1993, ATF Special Agents Pali and Phil Lewis met with representatives of the JTF–6, Texas National Guard and Operation Alliance. Lewis mentioned the delivery of precursor chemicals to the residence. On February 4, 1993, ATF Special Agents Lewis, Pali, and ATF Special Agent Chuck Sarabyn met with representatives from JTF–6 and the Texas National Guard to discuss evidence of a possible drug nexus. Attendees recall Sarabyn showing documents detailing the delivery of precursor chemicals to the residence. However, Treasury has been unable to find those documents. Letter from Department of Treasury to the subcommittees (January 26, 1996) (responding to the subcommittees' request for information on November 16, 1995.)

of the drug nexus.[339] As a result of the meeting, military support of the Branch Davidian investigation continued.

According to General Pickler's testimony before the subcommittees, Lt. Col. Berthal was told at the February 4, 1993 meeting in Houston that precursor chemicals were discussed as one of the elements of proof proffered by ATF that an active methamphetamine lab existed and those chemicals may have been on site at the Branch Davidian residence.[340] General Pickler testified that the ATF representative, while giving a background briefing as to why ATF had targeted the Davidians, indicated that UPS or shipping documents ATF was tracking included a great deal of precursor chemicals consistent with the production of illegal drugs.[341] However, General Pickler also testified that precursor chemicals were discussed in the context of the possibility of a delivery of those kinds of chemicals much earlier than 1993, but he is not exactly certain which precursor chemicals were there.[342]

General Pickler's testimony raises several questions: First, what did ATF actually tell the military about precursor chemicals? Second, General Pickler's testimony implies it was that information about deliveries of precursor chemicals that ATF offered when the military requested additional evidence. If General Pickler was uncertain when precursor chemicals were present at the Branch Davidian residence, why did he approve the ATF training by an elite Special Forces military unit assigned to do counterdrug missions? Third, did General Pickler simply rely on the absence of a defined drug nexus standard in approving the training mission? Fourth, after he requested additional information before approving the military training, why did General Pickler and other military officials say it is not the position of the military to question the veracity of a drug law enforcement declaration that a drug nexus exists? Especially, since JTF–6's own planning guide States that in conjunction with Operation Alliance, the National Guard and Regional Logistics Office "reviews and validates all requests for support."[343]

3. Evidence refuting ATF's claim of a drug nexus

a. ATF failed to address the issue of an active methamphetamine laboratory into raid planning

Undermining ATF's claim that a methamphetamine lab existed at the Branch Davidian residence, is the fact that briefing papers which went up to ATF Headquarters, status reports and other requests failed to mention the existence of a methamphetamine lab at the planned raid site or suspected illegal narcotics production.

A review of the January 5, 1993, briefing paper sent to ATF's Washington, DC. Headquarters reveals that no mention of the subject of drugs or military involvement even though senior ATF officials at headquarters were signing off on requests for military assistance under the guise of a counter-narcotics operation.[344] Treasury documents indicate that this briefing paper was forwarded to the Assistant Secretary of the Treasury for Enforcement after review by the ATF Director and his staff.[345] The forwarding of this type of briefing paper was the normal procedure the ATF Director used to notify Treasury of major on-going cases.[346]

In addition to the January 5 briefing paper, monthly status reports were prepared by Aguilera, reviewed by Dunagan, the Assistant Resident Agent in Charge of the Austin, TX office and approved by Chojnacki, the Special Agent in Charge of the Austin, TX office who then forwarded the reports to the Special Agent in Charge of the Houston Office. Although these reports being provided over a 9 month period and almost daily during the weeks leading up to the raid, they never mention the case as a counter-narcotics investigation or any military involvement.

As late as February 5, 1993, Chojnacki requested the use of flash bangs and failed to mention the possible existence of an "active methamphetamine lab," even though ATF policy states that drug laboratories or other explosive environments may be so hazardous as to preclude the use of flash bangs.[347] In fact, the only consistent mention of any drug activity by Branch Davidians in any of the ATF Waco documents on Waco is in requests for military assistance which required drug activity to justify military intervention and assistance.

b. ATF agents were not properly trained and certified

The second piece of evidence refuting ATF's claim that a drug nexus actually existed is the fact that ATF agents involved in the raid on the Branch Davidian residence were not trained and/or certified in methamphetamine operations. Furthermore, the lack of necessary safety precautions taken in the planning, training and operation indicate that these agents were ill-equipped and unprepared for the "suspected" presence of an active methamphetamine lab. These failures are in direct conflict with ATF's own guidelines on clandestine lab operations.

[339] Again, the subcommittees have never received this document listing the methamphetamine precursor chemicals, nor has ATF documentation on the delivery of such chemicals to the Branch Davidian residence been provided.
[340] Hearings Part 1 at 363, 369–370.
[341] *Id.* at 378. The Treasury Department has been unable to locate these documents.
[342] *Id.*
[343] JTF–6 Operational Support Planning Guide, p. 16–T08786, 08803.
[344] Treasury Documents T004634–T004642.
[345] Treasury Documents T004621–T004624.
[346] *Id.*
[347] Treasury Documents T008213–T008214.

c. The DEA's offer of assistance

ATF's claim that a drug nexus actually existed is called into question by ATF's response to DEA's offers of assistance. The Drug Enforcement Agency is the lead Federal agency in enforcing narcotics and controlled substance laws and regulation. While Operation Alliance was assisting ATF with its investigation of the Davidians, DEA had a Senior Special Agent, Mr. William Roshon, acting as a Coordinator for DEA at Operation Alliance. On January 22, 1993, Deputy Tactical Coordinator William Roshon offered DEA assistance in the form of on-sight laboratory technicians to ATF Special Agent Pali. Pali placed DEA Agent Roshon in touch with the SAC/Houston Office.[348]

Post-raid interviews of Pali by the ATF Waco Review Team revealed that ATF refused twice DEA's offer of on-sight lab technicians, but did have two DEA officials from the Austin DEA office present at the Command Post the day of the raid.[349] Two DEA agents from the Waco office were on stand-by for the raid.[350]

On February 2, 1993 ATF Agent Lewis provided a briefing to Operation Alliance members on the "suspected methamphetamine lab" at the Branch Davidian residence which, according to the ATF summary of events, was known at that date "to have received deliveries of chemical precursors for the manufacture of methamphetamine." After the briefing by Lewis, Gen. Pickler, Commander of JTF–6, stated "that it is not the position of the military to question the veracity of a law enforcement request regarding a drug nexus."[351] DEA Agent Rochon told Waco Review Team interviewers, after the February 2, 1993, briefing, that he had offered the assistance of a DEA Clandestine Certified Laboratory Team and Pali declined the request. However, Agent Rochon did provide Lewis the phone number of the Austin DEA Resident in Charge. Agent Roshon "'opined' that precursor chemicals for methamphetamine could also be used in the manufacture of explosives."[352] However, senior DEA chemists told subcommittee investigators when interviewed regarding the use of methamphetamine chemicals to make explosives, "that they had never heard that one before" and they were unaware of any chemicals used to produce methamphetamine which could be used to make explosives. Although some methamphetamine chemicals are very volatile in nature, using them to make explosives is another matter entirely. Given that ATF has jurisdictions over explosives and DEA has jurisdiction over illegal narcotics, it seems odd that ATF agents and DEA agent Rochon would attempt to blur this distinction.

Although DEA was never informed officially of the Waco investigation by ATF, two senior DEA officials were well aware of the facts surrounding the ATF investigation of the Davidians. Two senior DEA officials were members of the Operation Alliance board which reviewed law enforcement agency requests. Documents indicate that at least one of these DEA agents did offer DEA methamphetamine lab assistance and ATF declined that offer. However, no documents received by the subcommittees indicate that these DEA agents expressed any concern with ATF's apparent plan to raid an active methamphetamine laboratory.

In addition, when the subcommittees requested copies of the UPS receipts as proof of the delivery of chemicals that are required for the production of methamphetamine or any other evidence of the delivery of these chemicals, the subcommittees were informed that none could be found.

d. The Special Forces paper and the ATF response to it

The fourth piece of evidence undermining ATF's claim that a drug lab existed is ATF's own reaction to the Special Forces paper on the methamphetamine lab. Sergeant Fitts testified that he and another Special Forces medic where directed by Major Petree, their Commander, to research and draft a paper on methamphetamine labs.[353] Interviews with Sgt. Fitts revealed that the paper addressed the dangers of methamphetamine labs from both tactical and exposure perspectives.[354] Sgt. Fitts and the other medic took 3 or 4 days to complete the project.[355]

During the February 4–5 Houston meeting, Maj. Petree presented the paper to ATF agents who showed no interest in its contents. Sgt. Fitts testified that ATF agents never expressed any concern about the dangers that would be presented by a methamphetamine lab and that it was his impression that the subject of a methamphetamine lab "dropped off the face of the earth after the paper was presented."[356] In his opinion, it was obvious from the reaction of the ATF agents that no methamphetamine lab existed.[357]

[348] Special Agent Robert Tevens' "Chronology and Witnesses re: Military Support of ATF" (July 14, 1993). Treasury Documents T004589–T004593.

[349] *Id.*

[350] *Id.*

[351] Treasury Documents T004589–T004594.

[352] *Id.*

[353] Hearings Part 1 at 361. Special Forces medics are considered to be highly trained.

[354] The subcommittees requested a copy of the paper and were told that it could not be located. In its production of documents to the subcommittees, the Treasury Department failed to supply a copy of the paper although testimony before the subcommittees indicated that the paper was presented to ATF agents at a meeting on February 4–5, 1993 in Houston, TX.

[355] Hearings Part 1 at 361.

[356] Hearings Part 1 at 372; subcommittees' interview of Staff Sgt. Steve Fitts, in Washington, DC (July 11, 1995).

[357] *Id.* Although it was very clear from the interview of Staff Sgt. Fitts and his testimony before the subcommittees, that this paper was drafted to be presented to ATF at a Houston meeting on February 4–5, 1993, Maj. Petree during a pre-hearing review at first said that he could not recall the paper and later whether it was presented to ATF. After Staff Sgt. Fitts answered under oath that he was present when Maj. Petree himself presented ATF the paper, Maj. Petree acknowledged that he had received it.

D. POST-RAID MILITARY ASSISTANCE TO THE FEDERAL BUREAU OF INVESTIGATION (FEBRUARY 28–APRIL 19)

The standoff between the government and the Branch Davidians began on February 28, 1993, as the cease-fire went into effect following the ATF's failed raid on the Branch Davidian residence. During that time personnel and equipment of the U.S. Armed Forces were present at or near the Branch Davidian residence.

1. Military equipment and personnel provided

a. Active duty personnel and equipment

During the standoff, a limited number of active duty military personnel were present at the Branch Davidian residence providing services to the FBI in support of the FBI's activities during the standoff. Most of these troops were dressed in uniforms which indicated their, rank, service, and function. A small number of troops present at the site were assigned to Army Special Forces units. Because the military occupational specialties of these troops are classified, they dressed in civilian clothes while at or near the Branch Davidian residence and did not identify themselves as military personnel. Additionally, one of the two senior Army officers present at the April 14 meeting with the Attorney General also visited the Branch Davidian residence in order to personally view the tactical situation. This officer was present at the Branch Davidian residence for part of 1 day.

The type of support provided by the active duty troops consisted primarily of performing repairs and maintenance on sophisticated observation and electronics equipment[358] provided by the Defense Department to the FBI. Active duty, enlisted military personnel set-up the equipment and performed necessary maintenance on it. There is no evidence that military personnel actually operated the equipment. Instead, it appears that FBI agents operated this equipment. In one instance, however, civilian employees of the Department of Defense operated one piece of sophisticated electronics equipment.[359] In addition, active duty, enlisted military personnel performed repair and maintenance work on the electronics equipment belonging to the FBI. The accounts given by all personnel familiar with this aspect of the operation and who were interviewed by the subcommittees confirm that, with this one exception, only FBI personnel operated the equipment during the standoff.

b. National Guard personnel and equipment

During the standoff, the Texas National Guard provided a number of military vehicles to the FBI. Principal among these were 10 Bradley Fighting Vehicles (Bradleys), 4 M728 Combat Engineering Vehicles (CEV's), 2 M1A1 Abrams tanks, and 1 M88 tank retriever. The weapons systems in those of these vehicles which are normally armed were removed before they were transported to the Branch Davidian residence.[360]

During the standoff the Bradleys were used primarily as armored personnel carriers to transport FBI officials to meetings with the Davidians, to transport FBI agents to their observation posts around the Branch Davidian residence, and by FBI agents to guard the perimeter of the operation. During the insertion of the CS agent on April 19, the Bradleys were used by FBI agents to maneuver close enough to the Branch Davidian residence so that the agents could fire Ferret round projectiles containing CS agent into the windows of the residence.

The CEV's were not used until April 19. Attached to each CEV was a long triangular boom-like arm. Attached to the booms of two of the CEV's were mounted devices that sprayed CS agent mixed with carbon dioxide. On April 19, these CEV's were used to ram holes into the Davidians residence. The operators in each CEV then inserted CS agent into the building using the devices affixed to the boom. Insertions of CS agent occurred in four distinct phases throughout the morning of the 19th. At one point, one of the CEV's became damaged and could no longer spray CS agent. As the day progressed, the FBI began to use the CEV's to "deconstruct" the Branch Davidian residence, using them to ram into the corners and sides of the building, creating large openings in the building. At one point, part of the rear roof collapsed after one CEV made multiple entries into the side of the building.

In addition to these vehicles, a number of support vehicles (e.g., Humvees, used to transport personnel, and flatbed trucks, used to haul the Bradleys and CEV's to Waco) were located at or near the Branch Davidian residence. Additionally, Defense Department provided support equipment (e.g., tents, generators, concertina wire) to the FBI.

An unknown number of Texas National Guard personnel were present during the standoff. Most of these personnel performed maintenance on the military vehicles loaned to the FBI or to provide support services for these troops (i.e., National Guard cooks were present to prepare meals for the mechanics). Other National Guard troops provided remedial training to the FBI's HRT members who were to operate the Bradleys and CEV's. Additionally, on April 19, some National Guard troops assisted FBI agents in refilling the CEV's with the CS riot control agent.

c. Reimbursement

The Economy Act[361] requires the Justice Department to reimburse the Department of Defense for the cost of the equipment and personnel sup-

[358] The electronics equipment was used to block the Davidians' television reception.

[359] Hearings Part 3 at 315 (statement of Allen Holmes, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict).

[360] *Id.* at 314.

[361] 31 U.S.C. § 1535.

port provided to it. The subcommittees have been informed that this reimbursement has been made.

2. Advice/consultation provided by military officers

a. Request by Texas Governor

When Texas Governor Ann Richards learned of the failed ATF raid on February 28, she requested to consult with a knowledgeable military officer about the incident. In response to her request, the commander of the U.S. Army's III Corps at Fort Hood, TX, asked the assistant division commander of the First Cavalry Division of the III Corps, also at Fort Hood, to meet with Governor Richards. That officer met with the Governor on the evening of February 28. During the meeting, the officer answered the Governor's questions concerning the types of military equipment the ATF had used during the raid and the types of military equipment which Federal law enforcement officials might use in the future. The Governor also requested that the officer meet with the Texas Adjutant General (the commander of the Texas National Guard), who only recently had been appointed to his position.

b. Visit to the Branch Davidian residence with FBI officials

Two senior Army officers participated in a meeting of Justice Department and FBI officials with the Attorney General on April 14. During the meeting, the participants discussed the FBI's plan to end the standoff. The subcommittees' investigation revealed that one of the Army officers visited the Branch Davidian residence on April 13, accompanied by HRT commander Rogers.

During a briefing of the subcommittees these officers indicated that Rogers had arranged for the officers to be included in the April 14 meeting and had invited one of them to view the Branch Davidian residence to better understand the tactical situation. Rogers met the officer at the Branch Davidian residence and arranged for a helicopter tour of the perimeter of the area. The officer informed the subcommittees that he only observed the FBI's activities there and did not take part in the ongoing operation. The officer and Rogers then left Waco to travel to Washington for the meeting with Attorney General Reno.

The officer further informed the subcommittees that his visit to the Branch Davidian residence was his first visit and that he did not return to the Branch Davidian residence after April 14. The other officer present at the April 14 meeting stated that he did not visit the Branch Davidian residence at any time. The subcommittees' interviews with both FBI and other military personnel present at Waco during the standoff confirmed the statements of the Army officers.

c. April 14, 1993 meeting with Attorney General Reno

On April 14, 1993, a meeting was held in the office of the Director of the FBI with Attorney General Reno and several Justice Department and FBI officials. According to the Justice Department Report, "several military representatives" were also present.[362] The subcommittees' investigation identified the two senior military officers present at the meeting. These two officers briefed the members of the subcommittees in a classified briefing in July of 1995 in conjunction with the subcommittees' public hearings. Additionally, a Defense Department representative testified before the subcommittees in open session generally as to the discussions between the officers and Attorney General Reno on April 14, 1993.

The officers present at the April 14 meeting at the invitation of FBI officials were to answer any questions Attorney General Reno might pose about the FBI's plan to end the standoff. The officers understood they had been selected to attend the meeting because of their special tactical training and experience. Additionally, HRT commander Rogers knew one of the officers personally and had facilitated the request from the Justice Department to Defense Department that the officers attend the meeting.[363]

The officers informed Attorney General Reno that they could not comment on specific FBI plans to end the standoff.[364] One of the officers did inform Attorney General Reno that if the HRT had been a military force under his command, he would recommend pulling it away from the Branch Davidian residence for rest and retraining.[365] They also explained to Attorney General Reno that if the military had been called in to end a barricade situation as part of a military operation in a foreign country, it would focus its efforts on "taking out" the leader of the operation.

The officers believed Attorney General Reno understood their comments as an illustration of the tactical principal that a group heavily dependent on a charismatic leader for direction, such as the Davidians, can best be controlled if the leader is removed from control. The officers believe Attorney General Reno understood that their comments were appropriate to a military operation abroad but were not directly applicable to the domestic law enforcement situation facing Attorney General Reno.

3. Foreign military personnel

Foreign military personnel were present at the Branch Davidian residence during the standoff sometime in March. The two persons present were

[362] Justice Department Report at 266.
[363] Hearings Part 3 at 304, 314 (statement of Allen Holmes, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict).
[364] *Id.* at 304.
[365] *Id.* at 304, 314.

members of the 22nd Regiment of the British Army's Special Air Service (SAS). This branch possesses special tactical military skills and has a role similar to U.S. Army Special Forces troops. American military personnel present during the standoff informed the subcommittees that the SAS personnel observed the activities of the FBI and took no part in the actions of the military or the FBI. The two SAS representatives were not present on April 19, the date the standoff ended.

Accordingly to the Justice Department's written response to questions submitted by the subcommittees, the SAS personnel were present at Fort Bragg, NC in early 1993 on other business and requested to observe the FBI's HRT command post and forward tactical positions at Waco. FBI officials have informed the subcommittees that the HRT maintains liaison with the military and law enforcement counter-terrorist units of friendly foreign countries, including the United Kingdom, Germany, Italy, Spain, Australia, and Denmark. HRT commanders occasionally invite representatives of these units, a well as the U.S. Army Special Forces, to observe operations in which the HRT is engaged, as each of the organizations has similar skills and performs similar functions. This professional courtesy apparently is extended to FBI officials as well by the U.S. Special Forces and the counter-terrorist units of the countries listed above. The FBI explained the presence of the SAS personnel at the Branch Davidian residence as an example of this type of information-sharing.

The subcommittees' investigation finds no support for the assertions made by some that SAS personnel, or any other foreign persons, took part in the activities of U.S. Government agencies at the Branch Davidian residence. Accordingly, the subcommittees conclude that the two SAS personnel were the only foreign persons present at the Branch Davidian residence[366] and that they took no part in the government's activities there.

E. FINDINGS CONCERNING MILITARY INVOLVEMENT IN THE GOVERNMENT OPERATIONS AT WACO

1. The Posse Comitatus Act was not violated.

a. No violations of the Posse Comitatus Act occurred up to February 28, 1993. The subcommittees conclude that no actual violation of the Posse Comitatus Act occurred as a result of the military support provided to the ATF through February 29, 1993. The subcommittees review of this question was divided into two parts: the support provided by active duty military personnel prior to February 28 and the support provided by Texas National Guard troops up to and on February 28, 1993.

The subcommittees find no violation of the Posse Comitatus Act as a result of the support provided by the active duty military personnel who facilitated the training of ATF agents at Fort Hood, TX in late February 1993. The ATF's initial request to Operation Alliance included a request that military medical personnel actually participate in the raid on the Branch Davidian residence. The ATF also requested that military personnel participate in the formulation of the ATF's overall raid plan against the Davidians' residence. These requests raised the concern of military lawyers due to their Posse Comitatus implications. The subcommittees conclude that these officers were correct to raise these concerns and that their actions helped prevent a violation of the Posse Comitatus Act.

As a result of the concern by these officers as to ATF's request, less support was provided than initially requested. That support was limited to providing and staffing a training area for the ATF at Fort Hood, teaching basic first aid, and providing general advice on communications questions. Because these activities do not rise to the level of direct participation in a law enforcement action, they did not violate the Posse Comitatus Act.

The subcommittees also find no violation of the Posse Comitatus Act as a result of the support provided by the Texas National Guard which participated in the training that the ATF conducted for its agents at Fort Hood, TX in late February 1993 and which flew the helicopters on February 28 that were part of the ATF's raid on the Branch Davidian residence. The Texas National Guard troops who participated in these activities were acting in their "state national guard" status under the command and control of the Governor of Texas, even though the costs of the operation were paid by the Federal Government pursuant to title 32 of the U.S. Code.

The Posse Comitatus Act does not govern the actions of the National Guard when it is acting in a non-Federal (i.e., State) status. Because the Texas National Guard troops participating in the ATF's training and the raid itself were acting in this status, the Posse Comitatus Act did not apply to them. Accordingly, no violation was possible and none, therefore, occurred.

b. No violations of the Posse Comitatus Act occurred after February 28, 1993. The subcommittees conclude that no actual violation of the Posse Comitatus Act occurred as a result of the military support provided to the FBI after February 28, 1993. The subcommittees review of this question involved two issues: the support provided by active duty military personnel prior to February 28 and the support provided by Texas National Guard troops through April 19, 1993.

The subcommittees find no violation of the Posse Comitatus Act as a result of the support provided by the active duty military personnel who were present at the Branch Davidian residence from February 28, 1993 to April 19, 1993. The subcommittees' investigation indicates, and the testimony of the witnesses who testified at the hear-

[366] Other than some of the Davidians, several of whom were foreign nationals.

ings confirmed that no active duty military personnel actively participated in any actions that can be characterized as the exercise of the law. The actions of the enlisted personnel appear to have been limited to setting up equipment and performing maintenance on it, or providing support to other military personnel (e.g., transportation, food service). All of the military personnel interviewed by the subcommittees confirmed that only FBI employees operated the military equipment during the law enforcement activities conducted at the Branch Davidian residence. The subcommittees found no evidence to the contrary.

As discussed above, the Posse Comitatus Act does not govern the actions of the National Guard when it is acting in a non-Federal (i.e., State) status. Accordingly, none of the actions taken by the National Guard during the standoff violated the Posse Comitatus Act. The subcommittees note, however, that it appears that the National Guard's role during the standoff was very limited. The National Guard role generally involved troops transporting to the Branch Davidian residence all of the military vehicles used by the FBI during the standoff and performing routine maintenance on them.

On April 19, National Guard troops assisted the FBI in refilling the CEV's with the CS agent used in the unsuccessful effort to induce the Davidians to leave the residence. Because the National Guard troops are not subject to the Prohibitions of the Posse Comitatus Act when acting in their State status, no violation occurred. The subcommittees note, however, that had the National Guard troops instead been active duty personnel, or acting in a Federal status, their participation in the execution of the CS gas plan would have violated the Posse Comitatus Act.

2. The ATF misled the Defense Department as to the existence of a drug nexus in order to obtain non-reimbursable support from the Defense Department. The subcommittees conclude that the ATF intentionally misled Defense Department and military personnel as to whether the Davidians were operating an illegal drug manufacturing operation at the Davidian residence. It appears that the ATF agents involved in planning the raid knew that they could obtain support from the military at no cost in preparation for their raid. It also appears that the ATF knew that this support would be provided promptly if the presence of a drug manufacturing operation was alleged. While there had been allegations that a drug manufacturing operation was located at the Davidian residence at some point in the mid to late 1980's before Koresh took control of the group, there was no evidence that the drug operation continued into late 1992. The ATF's misrepresentations improperly enabled it to obtain military assistance from forces which otherwise would not have provided it, more quickly than might have been possible, and without having to reimburse the Defense Department as otherwise would have been required under Federal law.

The subcommittees also conclude that the commander of the military personnel providing the training knew or should have known that the ATF's allegations as to the existence of a drug manufacturing operation at the Davidian residence were, at best, overstated and were probably untrue. His failure to raise this issue with his superiors is troubling. The subcommittees believe this failure should be reviewed by Defense Department authorities.

3. No foreign military personnel or other foreign persons took part in any way in any of the government's actions toward the Branch Davidians. While some foreign military personnel were present in Waco during the government's operations toward the Davidians, there is no evidence that any of these persons took part in the government's operations in any way.

4. Civilian law enforcement's increasing use of militaristic tactics is unacceptable. The FBI's and ATF's reliance on military type tactics greatly concerns the subcommittees. The Waco and Ruby Ridge incidents epitomize civilian law enforcement's growing acceptance and use of military type tactics. The subcommittees find this trend unacceptable.

When ATF faced the option of conducting a regulatory inspection or tactical operation, it chose the tactical operation. When ATF had to decide between arresting Koresh away from the Branch Davidian residence or a direct confrontation, it chose direct confrontation. ATF also decided to conduct a dynamic entry as opposed to a siege.

The subcommittees are not recommending that the use of militaristic tactics should always be precluded. The subcommittees acknowledge that there are certain circumstances in which military type tactics may be necessary. The subcommittees urge all Federal law enforcement agencies to review their policies on military training and tactics and develop appropriate guidelines for when such tactics are acceptable. Military training, especially specialized training in combat tactics, should be highly restricted and the use of military tactics, such as a dynamic entry should be approved at the highest agency levels.

F. RECOMMENDATIONS

1. Congress should consider applying the Posse Comitatus Act to the National Guard with respect to situations where a Federal law enforcement entity serves as the lead agency. The subcommittees acknowledge that the Posse Comitatus Act has been and continues to be a significant protection for the rights of the people. The events in Waco, however, suggest that these protections may not be as strong as most citizens assume.

As discussed above, the Posse Comitatus Act does not apply to the National Guard when it is

acting in its State status. As the events at Waco illustrate, actions taken by National Guard troops can never violate this law, even when those same acts would violate the law were they undertaken by active duty military personnel. The subcommittees question whether this distinction is acceptable to the American people.

The purpose of the Posse Comitatus Act is to prevent the government from using the military against its own citizens. Yet the National Guard and the Reserve exists in part, to augment the active duty military in times of need. National Guard troops receive military training. National Guard units are equipped with military equipment, in some cases the most sophisticated and lethal military equipment in the Defense Department's arsenal, including tanks, fighter and bomber aircraft, and armored personnel carriers. These units, by design, possess many of the same capabilities as active military units. In fact, almost one-half of the U.S. Armed Forces is composed of National Guard and Reserve forces. When activated by the President, the National Guard becomes part of the active duty military.

While Federal law distinguishes between the National Guard in its various "statuses," this distinction is unclear to the vast majority of the public. Many citizens no doubt would be surprised and concerned to learn that components of the same forces the United States used in Operation Desert Storm, Somalia, and Bosnia also can be used against them in the United States as long as the "status" of the troops used fits within the proper category. Given that many National Guard units have force capabilities similar to that of active duty units, it makes little common sense that one unit's activities may be constrained by the Posse Comitatus Act while another's are not. In short, if it is important to prevent military force from being used to enforce the civil laws, it should matter little the "status" of the force used against the citizenry.

The question of applying the Posse Comitatus Act to the National Guard has not been examined recently by the Congress. Accordingly, the subcommittees recommend that Congress hold hearings on this matter to determine whether the Posse Comitatus Act should be broadened to apply to the National Guard and what exceptions to the act's prohibitions, if any, are appropriate to the National Guard in light of its role and mission.

2. The Department of Defense should streamline the approval process for military support so that both Posse Comitatus Act conflicts and drug nexus controversies are avoided in the future. The subcommittees' investigation revealed that Department of Defense procedures for receiving, evaluating, and deciding upon requests for assistance from domestic law enforcement agencies was unclear in early 1993. Generally, requests for military assistance to domestic law enforcement agencies were channeled through the Director of Military Support (DOMS), an Army two-star general headquartered at the Pentagon who heads a staff that is on-call 24 hours a day. In some cases, commanders of local military bases are authorized to provide support without approval of the DOMS if the requests are limited in scope.

As of 1993, requests for military support relating to counterdrug operations were not required to be submitted to the DOMS for approval but instead were channeled through Operation Alliance, a group representing agencies such as the ATF, the Border Patrol, and other Federal law enforcement agencies together with military representatives. Operation Alliance serves merely as a clearinghouse for requests, tasking actual military organizations to provide the support. In this case, Operation Alliance tasked Joint Task Force-6 and the Texas National Guard, two of the military organizations at its disposal.

Requests for support involving the use of lethal equipment, such as Bradley Fighting Vehicles and tanks,[367] were to be made through the Office of the Secretary of Defense in the Pentagon. Apparently, however, that requirement was not complied with in this case.

The subcommittees believe that authority for approving military support for domestic law enforcement operations should be located within one office within the Office of the Secretary of Defense. Centrally locating this responsibility will help ensure that uniform standards are applied in evaluating all requests for military support and that no agencies can successfully "end-run" the approval process. It also will reduce confusion among law enforcement agencies which, under the process as it existed in 1993, first had to determine without Defense Department guidance the purpose for the support (i.e., counterdrug or not counterdrug) and the type of military assets that might be involved (i.e. lethal assets or strictly non-lethal assets). The subcommittees believe that it is best left to the military, in the first instance, to determine the nature and type of support it is able to provide, in keeping with the Posse Comitatus Act and it own need to fulfill its primary defense mission.

The process for civilian law enforcement agencies receiving military assistance must require that all requests and approvals be in writing, specifying in detail the requested and approved military assistance. Additionally, the Department of Defense needs to establish a clear and concise standard for what constitutes a sufficient drug nexus. Congress should specifically establish criminal and pecuniary penalties for willful violations of the drug nexus standard.

[367] As discussed above, however, while some of these vehicles are considered lethal equipment the weapons systems in all of the military vehicles used by the FBI during the standoff had been rendered inoperative prior to the delivery of the vehicles to the Branch Davidian residence. Hearings Part 3 at 314 (statement of Allen Holmes, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict).

The subcommittees acknowledge that in May 1995, the Secretary of Defense directed the Under Secretary of Defense for Policy to establish a working group "to conduct a comprehensive review of the current system by which Defense Department evaluates and responds to request for assistance initiated by outside agencies." As a result of the working group's recommendations, the Secretary recently directed that requests for military support are to be channeled through the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict. The subcommittees commend this decision to centralize the approval process for providing this type of support. This policy should be frequently monitored so as to ensure that law enforcement agencies, and field commanders, are complying with it.

3. Congress should review the legal status of memoranda of agreement for the interstate use of National Guard personnel for civilian law enforcement purposes. The subcommittees' investigation revealed that the use of National Guard personnel across State lines for law enforcement purposes is a common practice. This practice is conducted through simple, pro forma memoranda of agreement which rarely take into account State laws governing the use of the National Guard. The subcommittees believe that, in practice, many of these agreements supersede State constitutions and statutes without legal authority. The subcommittees are concerned that these agreements do not comply with Federal laws and may violate the U.S. Constitution.

The subcommittees recommend that Congress, the Department of Defense, and its National Guard Bureau come to an agreement on the proper legal status of these National Guard Memoranda of Agreement. If it is determined these agreements require congressional ratification, procedures to obtain such approval should be established by the National Guard Bureau.

Regardless of whether these memoranda of agreement require congressional ratification, however, the National Guard Bureau should establish a centralized review process for all Memoranda of Agreement involving the interstate use of the National Guard personnel. This review process must include a per case legal determination that pertinent State law is not violated by the agreement.

4. The General Accounting Office should audit the military assistance provided to the ATF and to the FBI in connection with their law enforcement activities toward the Branch Davidians. Given that the subcommittees have been unable to obtain detailed information concerning the value of the military support provided to the ATF and the FBI, the subcommittees recommend that the General Accounting Office conduct an audit of these agencies to ascertain the value of the military support provided to them and to ensure that complete reimbursement has been made by both agencies. If violations of the Anti-Deficiency Act or other Federal laws are found, the appropriate legal action should occur, including criminal prosecution if permitted under existing law.

5. The General Accounting Office should investigate the activities of Operation Alliance in light of the Waco incident. The subcommittees concluded that Operation Alliance personnel knew or should have known that ATF did not have a sufficient drug nexus to warrant the military support provided to it on a non-reimbursable basis. Senior DEA agents were members of the Operation Alliance board which approved requests for military assistance, yet they voiced no concerns regarding ATF's plan to directly assault an alleged active methamphetamine laboratory. Military officers were present when ATF was presented a paper detailing the potential dangers and special precautions required when dealing with an active methamphetamine laboratory. The purpose of the meeting was to determine whether a drug nexus existed. Even though there was evidence that no drug existed, those military officers present took no action. UPS receipts which allegedly detailed deliveries of precursor chemicals to the Branch Davidian residence and were used to substantiate the drug nexus were nowhere to be found when the subcommittees requested copies.

Additionally, the subcommittees' review of military documents provided at their request and the results of interviews with persons involved in this matter clearly demonstrate that there was a continuing concern from senior military officers that JTF–6 was providing support to non-counterdrug activities, and that the Special Operations Command was attempting to reinforce resistance to this recurring misuse of military counterdrug assets and funds, referred to as "cheating." Given that the military assistance to ATF for Waco under dubious circumstances appears to not have been an anomaly, and the fact that Operation Alliance's jurisdiction has significantly expanded since Waco, the subcommittees recommend that the General Accounting Office investigate the activities of Operation Alliance.

VI. Negotiations To End the Standoff With the Davidians

Negotiations between the FBI and the Branch Davidians continued for 51 days during which time the negotiators utilized generally accepted negotiation techniques. The FBI was unwilling to engage in a novel approach toward the Davidians.

While American hostage negotiation training, especially FBI training, is thought to be the best in the world, there remains considerable room for reassessment and, based on the Waco record, improvement. The FBI possesses exceptional negotiators, but the Bureau was unwilling to engage outside experts and too eager to ignore the advice given by its own experts. The evolving nature of hostage barricade situations necessitates that in

the future the FBI continually strive for the preparedness to confront more emotional and unpredictable barricaded subjects. At Waco, FBI resistance to different negotiation methods may have contributed to a premature decision to end the standoff.

A. THE CONFLICT BETWEEN TACTICAL COMMANDERS AND NEGOTIATORS

1. The problem with two teams: one negotiating team and a tactical team

At Waco, the FBI Crisis Management Team was deployed. The Crisis Management Team is made up of a variety of law enforcement professionals, among them agents trained as tactical agents and as negotiators. The team was divided into groups with separate leadership and different responsibilities. Each team gave its perspective to Jeffrey Jamar, the Special Agent in Charge, who determined which strategy to employ in negotiations. There often was a conflict between these two approaches.

Although disposed to the active approach, Jamar allowed the proposals of each team to be implemented simultaneously, working against each other.

a. Standard Procedure in Negotiations

According to the FBI's Chief Negotiator, Gary Noesner, the conflict between tactical and negotiating teams is the one universal element in law enforcement operations of this type.[368] FBI tactical forces are trained to act in stressful, violent situations. Agents are inclined toward the "action imperative," the sense among agents that motivates them to act.[369] Negotiators are more inclined to seek a nonviolent resolution of the standoff simply by virtue of their training.

The FBI has a policy in place that favors a negotiated settlement.[370] Through a type of negotiation called active listening, negotiators attempt to find ways to explain to the barricaded subject why it is in his best interest to seek a nonviolent solution. This FBI policy and training of negotiators conflicts with the "action imperative."

b. Major disagreements between the two teams

Each team adamantly argued to Jamar on behalf of its perspective and adamantly opposed the other's.[371] Dr. Alan A. Stone[372] chronicled the progression in strategy that occurred among the FBI Commanders at Waco in his *Report and Recommendations*. At first, according to Stone, "the agents on the ground proceeded with a strategy of conciliatory negotiation, which had the approval and understanding of the entire chain of command. Pushed by the tactical leader, the commander on the ground began to allow tactical pressures to be placed on the residence in addition to negotiation."[373] Stone summarized the feelings of negotiators of this inevitable progression. Stone writes, "This changing strategy at the residence from (1) conciliatory negotiating to (2) negotiation and tactical pressure and then to (3) tactical pressure alone, evolved over the objections of the FBI's own experts and without clear understanding up the chain of command."[374]

The disagreement was called a "fundamental strategy disagreement."[375] The negotiators suggested that tactical maneuvers worked against the negotiation process. The tactical team wanted to employ aggressive tactics. Regarding the conflict with tactical people, McClure says simply, "Tactical people think in tactical terms and negotiators think in negotiation terms."[376] Byron Sage, a Supervisory Special Agent and the lead day-to-day FBI negotiator at Waco, testified before the subcommittees, "[The conflict between tactical and negotiation teams] presented difficulties, for sure, but that is not unusual. These are not matters that we were not prepared to attempt to negotiate through."[377] In the end, however, the tactical team won the endorsement of Jamar.

Jamar decided to constrict the perimeter of the building by moving vehicles closer to the residence. On March 9, 1993 the FBI began to use Bradley Fighting Vehicles to clear debris (including automobiles and boats) from the front of Mount Carmel. On March 14, 1993 the FBI focused bright lights on the residence in an effort to disrupt the sleep of those inside. Four days later, loudspeakers were set up to communicate messages from the FBI to the Davidians inside the residence. Soon thereafter, the FBI began playing recordings of Tibetan chants, rabbits being slaughtered, and other sound effects.[378]

While negotiators were trying to gain the trust of Koresh and the Davidians, the actions of the tactical team gave Davidians reason to distrust FBI's negotiators. At the hearings, Sage explained,

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[368] Briefing by Federal Bureau of Investigation Supervisory Special Agent Gary Noesner to the subcommittees, November 1995.

[369] *Id.*

[370] *Id.*

[371] U.S. Dept. of Justice, Report to the Deputy Attorney General on the Events at Waco, TX 75 (1993) [hereinafter Justice Department Report]. "The guiding principle in negotiation and tactical employment is to minimize the risk to all persons involved—hostages, bystanders, subjects, and law enforcement officers." But the Justice Department report states that the negotiating components of the FBI strategies were "more often contradictory than complimentary."

[372] Alan A. Stone, M.D., Touroff/Glueck Professor of Psychiatry and Law at Harvard University, originally was asked to participate in the Department of Justice Waco review team. For a variety of reasons, including time constraints, Dr. Stone submitted an individual report apart from the Justice Department Report. *See infra* note 373.

[373] Alan A. Stone, Report: To Deputy Attorney General Philip Heymann, Report and Recommendations Concerning the Handling of Incidents Such as the Branch Davidian Standoff in Waco, TX, Panelist, Alan A. Stone, M.D., (November 8, 1993) [hereinafter Stone Report].

[374] *Id.*

[375] Hearings Part 2 at 316. Gary Noesner testified before the subcommittees, "At Waco, there was a fundamental strategy disagreement on what was the best way to proceed. In Waco, the negotiation team wanted to have a lower-keyed approach and the tactical team's approach was more to apply pressure." *Id.*

[376] *Id.* at 147.

[377] *Id.* at 321.

[378] Justice Department Report at 78.

"It is not uncommon to, as part of the negotiation process, to actually try to ingratiate yourself a little bit more with Koresh and his followers by saying, look, this is out of our hands, but that is why you need to give us something to work with."[379] It is difficult to imagine that use of tactical force could be a beneficial tool with those whom experts say should be treated with caution and conciliation. Notwithstanding Sage's description of the tactical maneuvers as helpful to negotiations, any consequences of aggressive movements on the part of FBI were not ones it intended. They were predicted, however. Gary Noesner remarked, "I do not awake from nightmares or have trouble sleeping at night . . . because everything that I predicted would happen, did happen."[380]

c. Insufficient communication between the two teams and their commanders

In testimony before the subcommittees, Jamar described the strategic decisionmaking process. He said, "The supervisors of each component would get together and report and discuss matters. And we would have various meetings."[381] Noesner said the problem was not one of communication. Jamar's office was across from the negotiation room. Noesner communicated the desired approach of negotiators with regularity and often in heated exchanges. Jamar heard opinions from the negotiators and tactical agents given with equal force. He let each strategy go forward as if it was the primary one.[382]

d. Decisions between the options presented by the two teams

In early 1993, FBI policy was to place the Special Agent in Charge of the FBI's regional office in charge of making operational decisions in a crisis like Waco. Noesner described the role of the SAC saying, "He has to take the information and couple that with the information he receives from other intelligence sources, from the tactical team and he has to weigh all those things, weigh them with his own experiences and his own perceptions and he has to come to a decision."[383]

Noesner emphasized the fact that the real problem in Waco was one of leadership. The situation at Waco required someone to make the decision on what strategy to utilize to confront this "unconventional" group. He characterized Jamar as an action-oriented agent, one who fell prey to the "action imperative."[384]

Stone describes the action imperative in terms of the FBI's "group psychology." The options available to the FBI, according to Stone, fell somewhere between "doing nothing (passivity) and a military assault (the action imperative)."[385] In light of the fact that "the appeal of any tactical initiative to an entrenched, stressed FBI must have been overwhelming," Stone reasons, "the desultory strategy of simultaneous negotiation and tactical pressure was enacted as a compromise."[386] Stone concluded that tactical maneuvers were initiated as a way to relieve agents' desire to act. It is left to the SAC to override the group psychology of the agents on the ground and make the decisions necessary to reach a peaceful conclusion. Stone writes, "The FBI should not be pushed by their group psychology into misguided *ad hoc* decision making the next time around."[387]

e. The effect on negotiations of the decision to employ tactical maneuvers

The decision to employ tactical maneuvers had the exact result negotiators and experts predicted. The experts advised against antagonizing the Davidians.[388] In a memorandum coauthored by Peter Smerick, an FBI Criminal Investigative Analyst, and Park Dietz, Clinical Professor of Psychiatry and Biobehavioral Sciences at the UCLA School of Medicine, the FBI was advised that "negotiations coupled with ever increasing tactical presence . . . could eventually be counter-productive and could result in loss of life."[389] When tactical maneuvers were utilized, negotiations were set back. The Davidians were unable to sleep with sounds of loud music and rabbits being slaughtered. The Davidians were angered by movements of the armored personnel carriers. They were angered by the clearing of debris from the grounds.[390] As Richard DeGuerin, the lawyer representing Koresh, says, tactical maneuvers appeared to be "calculated to discourage anyone from coming out."[391]

The effect that the tactical maneuvers had on negotiations was only one of the problems resulting from that decision. In fact, some believe that playing loud music bonded the Davidians closer together.[392]

f. Tactical maneuvers may have fed into the vision anticipated by Koresh

Koresh often warned Davidians that they would die in a fire brought on by "the Beast."[393] In Smerick's March 8 memo, he recommended that tactical pressure "should be the absolute last option we should consider, and that the FBI might

[379] *Id.*
[380] Briefing by Gary Noesner to the subcommittees.
[381] Hearings Part 2 at 300.
[382] Briefing by Gary Noesner to the subcommittees.
[383] Hearings Part 2 at 311.
[384] Briefing by Gary Noesner to the subcommittees.
[385] Stone Report at 23.
[386] *Id.*
[387] *Id.* at 24.
[388] Memorandum from Criminal Investigative Analyst Peter Smerick and Dr. Park Dietz, Clinical Professor of Psychiatry and Biobehavioral Sciences at the UCLA School of Medicine (March 5, 1993).
[389] *Id.*
[390] Hearings Part 2 at 74–75.
[391] *Id.*
[392] *Id.* at 195. Captain McClure thought the playing of chants and rabbit slaughters was unwise.
[393] Thomas Robbins & Dick Anthony, *Sects and Violence: Factors Enhancing the Volatility of Marginal Religious Movements, in* Armegeddon in Waco: Critical Perspectives on the Branch Davidian Conflict 236, 240 (Stuart Wright ed., 1996). "Koresh clearly anticipated a government assault, and the actual military-style raid that the BATF perpetrated against the Waco Davidian settlement in late February 1993 'seemed to those inside to validate at least part of Koresh's prophecy.'" *Id.*

unintentionally make Koresh's vision of a fiery end come true."[394] When the FBI began to play loud music and inch closer to the residence in armored vehicles, experts maintained that those were exactly the wrong tactics.[395] More than simply bonding the Davidians together, experts concluded that these actions proved Koresh right in the minds of the Davidians. The Justice Department Report notes, "Some of the experts felt that the aggressive tactical moves played into Koresh's hands."[396] Even Jamar, who made the decision to use these tactics, said, "I did not like it."[397]

B. NEGOTIATION OPPORTUNITIES LOST

1. Why the FBI changed negotiators

Soon after the raid, the FBI was called to take command of the situation at the Davidian residence. Edward Dennis writes that "ATF requested assistance from the FBI on February 28, 1993 after ATF agents had attempted to serve an arrest and search warrant on the Branch Davidian Compound."[398] Before the FBI took over, negotiations with the Davidians had begun. Lieutenant Larry Lynch, of the McClennan County Sheriff's Department, and Branch Davidian Wayne Martin talked over the Waco 911 Emergency line.[399] Soon thereafter, ATF Assistant Special Agent in Charge James Cavanaugh and Davidians Steve Schneider and Koresh spoke by telephone in an attempt to resolve the initial firefight.[400] Finally, Cavanaugh successfully negotiated an end to the shooting.

Cavanaugh, with the help of the Texas Department of Public Safety, made measurable progress toward release of Davidians. Communication was extremely difficult between Davidians inside and ATF agents outside. Nonetheless, Cavanaugh manipulated the dialog from the hysterical screaming during the gun battle to productive conversation leading to a cease fire.

a. Cavanaugh's rapport with the Davidians

The most difficult task after the raid failed was to establish a reliable, common sense method for communicating with those inside Mount Carmel. Communicating the agreed upon cease fire was made difficult by the size of Mount Carmel and the fragmentation of ATF agents.[401] Eventually, however, the shooting stopped and negotiations began.

In his statement to the Department of Justice, Agent Cavanaugh gave a compelling description of the first moments after the raid.[402] The atmosphere was frenetic and hostile. Cavanaugh's tone was friendly as he sought to gain the trust of those in the residence.

Cavanaugh gained the Davidians' trust by acknowledging the Davidians' point of view.[403] He granted many of their requests.[404] He talked with them as though they were "equals" trying to achieve the same goals. Cavanaugh assuaged their concerns by promising that they would be addressed. Most importantly, Cavanaugh established a routine that produced the release of some Davidians.[405]

Cavanaugh established a rapport with Koresh and other Davidians. When Cavanaugh left the negotiations, Koresh mentioned that he missed Cavanaugh. He noted that Cavanaugh promised to be there until the end.[406] But on March 4, 1995 Cavanaugh left Waco, only to return briefly in April. After Cavanaugh's departure, the negotiations were an FBI operation.

b. Why the FBI was brought in

The ATF asked for the aid of the FBI and agreed that it would be best for the FBI to assume operational control of the entire siege.[407] All of the official reports note that the FBI was asked to take over the siege.[408]

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[394] Memorandum from Criminal Investigative Analyst Peter Smerick (March 8, 1994).

[395] Justice Department Report at 185.

[396] Justice Department Report at 185.

[397] Hearings Part 2 at 317.

[398] Edward S.G. Dennis, Jr., Evaluation of the Handling of the Branch Davidian Standoff in Waco, TX 5 (1993) [hereinafter Dennis Report].

[399] McLennan County Sheriff's Department, 911 Transcripts (February 28, 1993).

[400] *Id.*

[401] Justice Department Report at 105. [E]ven after Schneider and Cavanaugh had agreed to call a cease-fire, it took several minutes to achieve one. Schneider for his part had to walk throughout the residence to tell people inside to stop shooting. Cavanaugh, who had no direct radio link to each agent, had to advise the team leaders of the cease fire and the team leaders in turn had to communicate with their agents. The cease-fire was negotiated for a period of time before the shooting finally stopped. *Id.*

[402] Department of the Treasury Document, statement of James Cavanaugh:

"I called the compound directly on the phone from the undercover house. I reached a man named Steve, later identified as Steve Schneider. I told him I was an ATF agent and I wanted to talk to him about this situation. As should be expected, the activity inside the compound was very frantic, people were screaming and yelling, and there was still shooting going on both sides. Steve was very excited and very hostile.

"I wanted to negotiate a cease fire, and he [Schneider] was agreeable. I am not going to be good on the time of how long it took, but it took a little while to negotiate that. He had to go throughout the compound, which is very large, telling everyone not to shoot. While he was doing this, there was still shooting going on both sides. I had to get on the command net frequency and tell the commanders on the ground there not to shoot, and they had to relay that to all 100 agents, who were around there, so it took a little time to arrange it.

"Once I returned to the rear command post I called back in on the telephone to the residence about 2:00 p.m. and I spoke with Steve and David Koresh about what was going on. We had long conversations about the warrant and we also had a lot of conversations about Biblical passages and Mr. Koresh's belief that he was the Lamb of God, who would open the Seven Seals. As you might assume, he was very hostile, very angry, and very upset."

[403] Hearings Part 2 at 187. ATF agent James Cavanaugh, the initial negotiator during the standoff, testified before the subcommittees, "[The FBI] established trust with Koresh. *Id.* Cavanaugh appears to have been accomplished at active listening. The FBI, however, did not choose to retain Cavanaugh.

[404] A summary of the Davidians' requests can be found in the Justice Department Report in the Appendix.

[405] Hearings Part 2 at 74. Representative Peter Blute, when questioning a witnesses, stated, "We also know that, after the raid, when the siege started, the initial negotiator was getting through to Koresh and they had a kind of relationship intellectually that allowed numerous people to be released during that period. . . ." *Id.*

[406] Transcripts of the Negotiations Between the FBI and the Davidians (March 4, 1993) [hereinafter Negotiation Transcripts].

[407] Justice Department Report at 22.

[408] Treasury Department Report at 114. Justice Department Report at 1.

According to the Justice Department Report, the FBI Hostage Rescue Team was the law enforcement organization best equipped to handle the standoff.[409] It is because of its expertise that the FBI is called in to take control of complex barricade situations throughout the country and the world. According to the Treasury Department Report on the incident, ATF knew immediately after the raid began that it would need the help of the FBI. The apparent unanimity is expressed in the Department of Treasury Department Report.[410] Once the decision was made to turn the operation over to the FBI, the FBI was in charge of the scene in Waco within a matter of hours.

2. Why the FBI didn't allow others to participate in the negotiations

The FBI was disinclined to allow anyone, other than the FBI's own negotiators, to participate in negotiations with the Davidians. Many were offering their assistance, but few were allowed to participate. McLennan County Sheriff Jack Harwell and the Texas Rangers were suggested and offered their help. Attorneys for Davidians repeatedly asked to speak with the Davidians. It was with great hesitance that the FBI allowed Sheriff Harwell to speak with the Davidians, and with even greater reluctance that the FBI allowed the attorneys into the residence.[411]

a. Sheriff Jack Harwell

Early in the negotiations, Koresh and the Davidians told the negotiators they had a cordial relationship with Sheriff Jack Harwell. On March 13, Jamar allowed Sheriff Harwell to participate in negotiations. According to the Justice Department Report, to allow an untrained negotiator to participate in such operations was a "departure from conventional negotiation doctrine."[412] In preparation for these negotiations, Noesner and the FBI negotiations put Harwell through quick and intense training in professional negotiations. Harwell was put in this position only because he was a person whom both sides trusted. And although the negotiators were worried about Harwell making the situation worse, negotiators' worries were soon quelled when they discovered, according to Noesner, "Harwell was a natural."[413]

Two days after he began participating in negotiations, Harwell participated in a face-to-face meeting with Sage and Davidians Martin and Schneider. The meeting produced no substantial change in the situation. Harwell and Sage attest to the fact that a "rapport was established, particularly with Schneider."[414] Unfortunately, whatever success may have been brought about by Harwell's participation was hindered by what Sage called a "distinct change in negotiation strategy."[415] From that point on, Harwell's participation in the negotiations consisted of having his previous conversations broadcast into the residence via loudspeaker.

b. The Texas Rangers

Another group for which Davidians expressed their trust was the Texas Rangers. A longstanding and well respected law enforcement entity, the Texas Rangers were charged with conducting the final investigation into the raid on the Davidians. The Rangers were never allowed to participate in negotiations with the Davidians. They often had concerns about the conduct of the siege and attempted to express these concerns to Jamar. The Rangers were frustrated by a lack of communication with Jamar. As Captain Byrnes testified before subcommittees, "[I]f I went over there, the door was already closed to where Mr. Jamar was. Several times I waited a half hour, 45 minutes to see him and never saw him, and I finally quit going over there. We couldn't even get a phone call through. It was total lack of communication."[416]

c. The attorneys for the Davidians

Another concern of the Rangers was the FBI's decision to allow face-to-face meetings between the Davidians and their attorneys. While it is common for a client under investigation or prosecution to meet with his attorney, it is rare for an attorney

[409] Justice Department Report at 144. At the time, the FBI's HRT consisted of a 50 person force. It was trained to deal with highly dangerous missions. The team boasts "sophisticated armament including infra-red aiming devices, daytime and nighttime sniper capabilities, explosive and mechanical breaching abilities, and certain non-lethal weapons." The agents are trained for tactical operations on land and at sea. The HRT was created in the 1980's to confront a growing number of unusually dangerous and complicated criminal situations.

[410] U.S. Dept. of the Treasury, Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell also known as David Koresh at 113–114 (1993) [hereinafter Treasury Department Report].

Shortly after the shoot-out, Chojnacki spoke with Hartnett, who was in Washington, DC and recommended that the FBI Hostage Rescue Team be brought to Waco to handle what had become a siege situation. At roughly the same time, FBI Director William Sessions learned of the shoot-out, contacted ATF Director Stephen Higgins and offered his condolences and his agency's assistance. After Hartnett arrived at the National Command Center and was fully briefed, he determined that the FBI HRT should be sent to Waco.

Soon after the cease-fire Hartnett contacted Douglas Gow, FBI Associate Deputy of Investigations, and formally requested FBI assistance. Gow, in turn, contacted FBI SAC Jeffrey Jamar (San Antonio) and briefed him on the situation. FBI Special Agent James Fossum (Waco) was informed of the crisis by both AUSA Phinizy and another local FBI agent. Shortly after [Fossum] arrived, Chojnacki told him the ATF would welcome whatever assistance the FBI could provide.

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Clark informed [Noble] that a request for the HRT had already been made by ATF and that the HRT was on its way to the residence to evaluate the situation.

Jeffrey Jamar (San Antonio), as the SAC of the affected district, was given command of the FBI operation. He arrived in Waco at about 5:30 p.m. and together with Fossum and several other local FBI agents, immediately began to establish a command post and assess the situation. The balance of the HRT members began arriving on March 1. After further discussions with FBI, ATF and Treasury officials, Noble spoke with ATF Director Higgins and ADLE Hartnett early March 1. Noble advised them that if the FBI determined that the HRT was needed for a long term, the FBI should have operational command to resolve the standoff. *Id.*

[411] Justice Department Report at 133.

[412] *Id.*

[413] Briefing of Gary Noesner to the subcommittees.

[414] Justice Department Report at 133.

[415] *Id.* at 134.

[416] Hearings Part 2 at 159.

to meet with his client while his client is the subject of a "hostage barricade situation."[417] The negotiators and the tactical agents had different opinions on the wisdom of letting the attorneys into the residence.[418]

The negotiators were concerned that any third party intermediary was ill equipped to be thrust into the fragile negotiations that consume barricade situations. Negotiators were willing to use the attorneys in ways that would jumpstart the negotiations.[419] The tactical team, along with the Texas Rangers, were concerned about the opportunity that DeGuerin and Jack Zimmerman, the attorney for Steve Schneider, would have to destroy evidence. But even Texas Ranger Senior Captain Maurice Cook agreed with the wisdom of letting the attorneys into the residence by saying, "[Y]ou got to do what works."[420] Jamar made the decision because he was "focused on resolving the standoff peacefully."[421] DeGuerin and Zimmerman entered the residence on several occasions. The attorneys spent a total of 32 hours with Koresh.[422]

(i) Progress was made from the visits.—Negotiators and Jamar had the sense that the meetings were "positive."[423] On April 1, when the attorneys requested extensions of the pre-approved time limits, they described their progress as "terrific." In that meeting, David Koresh promised to come out "after Passover."[424] The actual date of Passover, however, was a matter of controversy.

On April 14, a telephone conversation between DeGuerin and Koresh produced what DeGuerin called a promise to come out.[425] The FBI called this promise "a new precondition for his coming out."[426] The precondition was the completion of David Koresh's written interpretation of the "Seven Seals," discussed in the Bible's Book of Revelation.

A letter attesting to the surrender offer followed the verbal promise. But the FBI remained skeptical.[427]

(ii) Negotiator and lawyers consultation after the first visit.—After each visit and on occasion when there was no visit, the FBI and the lawyers had discussions about strategy and about arranging more visits with Davidians. The agents worked closely with the attorneys before each visit and attorneys cooperated with the FBI.

Before the trips into the Davidian residence, the agents and attorneys arranged time limits and topics for discussion while the attorneys were inside.[428] On only one occasion did the attorneys ask to remain in the residence longer than the arranged time.

C. LACK OF APPRECIATION OF OUTSIDE INFORMATION

1. Why the FBI did not rely more on religious advisors to understand Koresh

Many argue that the reason negotiations failed was that the FBI failed to grasp the nature and strength of Branch Davidian beliefs. There exists a conflict among those who believe negotiators should never become sympathetic with the "hostage taker" and others who believe the only way to negotiate is to understand the subject of the negotiations.[429] The FBI became frustrated with endless dissertations of Branch Davidian beliefs and ignored assertions of religious experts that Koresh could be negotiated with on a theological level.[430] The FBI grew skeptical that Koresh could be convinced that ending the siege was in his best interest.

a. The FBI standard in negotiations

Mainstream negotiation tactics call for the negotiator to remain aloof from the subject of the negotiations, to pursue crisis management team goals, and never become embroiled in the message of the hostage taker.[431] The focus of negotiation training

[417] *Id.* at 23. DeGuerin says it's a frequent practice of attorneys to meet with their clients before they are arrested. *Id.* Texas Ranger Captain Byrnes testified before the subcommittees, "We went to see Mr. Jamar and offered a Ranger to help with the negotiations, if that would be helpful—not one of the captains but one of the Rangers that had been trained, most of them, by the FBI. He thanked us for that offer, and we never heard anything else about it." *Id.* at 297.

[418] *Id.* at 23.

[419] FBI Commander Jeffrey Jamar testified before the subcommittees, "I was hopeful they could appeal to his self-interest. Everything Mr. Koresh did was to his self-interest." *Id.* at 312–313.

[420] Texas Ranger Captain Cook testified before the subcommittees that when all else fails in negotiations, "you got to do what works. I think you can get too formalized." Although formal training opposes this. McClure says it can be used as a last resort. *Id.* at 146.

[421] Justice Department Report at 91. "The proposed face-to-face meeting between Koresh and DeGuerin caused significant controversy within law enforcement. SAC Jamar made the decision to permit the meeting, clearing it with U.S. Attorney Ederer. The AUSA's [Assistant U.S. Attorney] and the Texas Rangers, who would be responsible for the eventual prosecutions, strongly opposed the meeting. Jamar was focused on resolving the standoff safely, while the prosecutors and the Texas Rangers were focused on the integrity of future court proceedings. The prosecutors and Texas Rangers were afraid that the defense attorney would give advice to Koresh which could result in the destruction of evidence and cause a more difficult prosecution." The attorneys met inside the residence approximately seven times.

[422] Hearings Part 2 at 79.

Mrs. THURMAN: How many total hours did you spend with [Koresh], do you think, in the period of time that you represented him.

Mr. DEGUERIN: About 32 hours.

[423] *Id.* at 304–306.

[424] *Id.* at 47.

[425] Negotiation Transcripts (April 14, 1993).

[426] Hearings Part 2 at 304–306.

[427] Jamar testified before the subcommittees, "They would build their [DeGuerin and Zimmerman] spirits up. I can remember one instance when DeGuerin came out and, believe me, he put his best effort in and I give him all the credit in the world for the effort he made. He would build him up and then cut his legs out from under him. I remember one instance where he said he was making a point with him and Koresh feigned illness. It happened to us all the time." *Id.* at 297–298.

[428] *Id.*

[429] Noesner Briefing. Noesner maintains that a negotiator should never become embroiled in a discussion of the beliefs of the subject of the negotiations; never give the barricaded person the benefit of believing he has control of the conversation. Dr. Phillip Arnold, of the Reunion Institute in Houston, TX, and Dr. James Tabor, Associate Professor of Religious Studies at the University of North Carolina at Charlotte, suggest that Koresh could have been dealt with through a discussion of his biblical interpretations. According to the Harvard Negotiation Project, "negotiating [with people acting out of religious conviction] does not require compromising your principles. More often success is achieved by finding a solution that is arguably consistent with each side's principles." Roger Fisher et al., Getting to Yes (1991).

[430] Justice Department Report at 26–28. The Department of Justice report recounts Koresh's attempt to tell his side of the situation.

[431] Noesner Briefing.

is "active listening." The negotiator is supposed to find out what the subject wants or demands.

Negotiation training gives preference to those with a social science background. The FBI negotiation curriculum includes abnormal psychology and the social sciences. Time after time, David Koresh, and Davidians Wayne Martin and Steve Schneider, sought to speak with someone who could understand the Branch Davidian interpretation of the Seven Seals. The FBI resisted the desire to engage Koresh in such a discussion, saying that it was sure to be fruitless.[432] McClure testified at the hearings that he had been involved in a similar situation when religious discussions of a barricaded group had proved fruitless. He said, "In 1987, I was involved in a situation in Atlanta where 1,400 Cubans were holding 121 hostages. Their religious belief was very important to them during that period of time. Those hostages were held for 12 days. Every time that we gave a negotiations and responded to their religious questions and got in their head or tried to get into their head and they tried to get into our about religion, no progress was made. When we talked about secular issues, we got people out."[433] This experience appears to have led the FBI to avoid religious discussions with the Davidians.

b. Experts consulted

When the FBI first arrived in Waco, it had little information about David Koresh and the Davidians. Negotiators sought as much information as possible about the group. It was left to the experts hired by the FBI to create a profile of David Koresh and develop a plan to negotiate with the Davidians.

Dr. Eugene Gallagher, professor of Religion at Connecticut College, calls Glenn Hillburn, Dean of the Baylor University Department of Religion, "the one expert with a firm grasp of the history of the Davidians within the framework of the Seventh Day Adventists."[434] According to the Justice Department Report, Glenn Hillburn, Dean of the Baylor University Department of Religion, "provided information on the Book of Revelations, the Seven Seals, and other Biblical matters."[435] The report makes no mention of special insight Hillburn provided into the peculiar habits of the Davidians or David Koresh. Other than Dr. Hillburn, Dr. Gallagher concludes, the FBI consulted few religious experts with knowledge of Branch Davidians and what they believed. Indeed, Stone says in his Report and Recommendations, "One of my fellow panelists believes—and I am convinced—that the FBI never actually consulted with a religious expert familiar with the unconventional beliefs of the Davidians."[436]

c. The failure to consult outside experts

The FBI relied on experts with whom it was familiar. But, there were individuals who embraced the peaceful resolution of the situation in Waco as their personal crusade. Among those who made serious efforts to help were Philip Arnold, Associate Professor of Religious Studies at the University of North Carolina at Charlotte, and Gene Tabor of the Reunion Institute in Houston, TX. It was difficult for Arnold and Tabor to intercede. The Justice Department Report mentions that "[t]he FBI refused to permit a live telephone conversation" between Arnold and Schneider although Schneider requested Arnold by name.[437]

d. What communications did they have with Koresh?

Tabor and Arnold saw a video sent out by Koresh and thought effective negotiation was possible if the FBI dealt with Koresh within a framework of the Bible, particularly the Seven Seals.[438] Koresh had heard Arnold giving his interpretation of the Seven Seals and offering assistance on the KJBS radio.[439]

Neither Arnold nor Tabor ever spoke with Koresh. Koresh and Schneider repeatedly asked to speak with Philip Arnold. Arnold and Tabor were allowed to send in tapes of their interpretations at the request of DeGuerin, Zimmerman and Koresh, himself. But at no time were they allowed to participate in the negotiations.

e. Did the FBI take any of this advice?

It goes against standard negotiation policy to allow outsiders to participate in serious and dangerous "hostage" negotiations. Consistent with the advice of FBI experts, the negotiators in Waco did not allow outsiders to participate in negotiations out of fear that something they said might inflame David Koresh. Arnold and Tabor were no exception, they were ignored.

From the very beginning, negotiators failed to take seriously the point of view of the Davidians.[440] According to the Justice Department Report, "There were certain areas of activity in which the FBI did not seek outside help. The FBI

[432] Hearings Part 2 at 181.

[433] *Id.*

[434] Interview of Dr. Eugene Gallagher by Robert J. Shea, Special Assistant to the Subcommittee on National Security, International Affairs, and Criminal Justice, in New London, CT (October 23, 1995).

[435] Justice Department Report at 189.

[436] Stone Report at 43, 44.

[437] Justice Department Report at 186. "On March 17, Schneider told the FBI that he and some of the other residence members had heard of Dr. Arnold as someone with expertise about the Book of Revelations and the Seven Seals, and that they wanted to speak with him. The FBI refused to permit a live telephone conversation, but offered an exchange of audiotapes instead. On March 19, the FBI sent an audiotape that Dr. Arnold had made into the compound." *Id.*

[438] Hearings Part 2 at 46–47.

[439] *Id.*

[440] *Id.* at 362. Cavanaugh testified before the subcommittees, "I fully respected their religious beliefs. I think all the other negotiators did, also. I do not mean to be sarcastic, but my feeling was they can worship a golden chicken if they want to, but they cannot have submachine guns and hand grenades and shoot Federal agents. I played the role as policeman. I did not try to fool the Davidians that I was something else. I think that is one reason that Koresh certainly trusted me from the beginning." *Id.*

did not request assistance . . . with negotiations, since the FBI's best negotiators were assigned to Waco throughout the fifty-one day standoff."[441] It appears that the FBI paid no attention to those experts who believed Koresh could have been reasoned with within the proper religious and biblical context.

Koresh and Davidians talked frequently in religious terms. In their book, Tabor and Gallagher quote the following passage from the negotiation tapes to point out frustration with the FBI's lack of familiarity with theology:

> HENRY: Let's not talk in those terms, please.
>
> KORESH: No. Then you don't understand my doctrine. You don't want to hear the word of my God.
>
> HENRY: I have listened to you and listened to you, and I believe in what you say, as do a lot of other people, but the, but the bottom line is everybody now considers you David who is going to either run away from the giant or is going to come out and try to slay the giant. For God's sake, you know, give me an answer, David. I need to have an answer. Are you going to come out?
>
> KORESH: Right now, listen.
>
> HENRY: Right now you're coming. . .
>
> KORESH: "He that dasheth in pieces is come up before thy face: keep the munition." What's the munition? "Watch the way."
>
> HENRY: One of the things, one of the things is I don't understand the scriptures like you, I just don't.
>
> KORESH: Okay, if you would just listen, then I would show you. It says here—it says here, "The Chariots shall be with flaming torches." That's what you've got out there [referring to the tanks].[442]

FBI negotiators maintain that they never discounted Branch Davidian beliefs. However, in one conversation with Koresh, Byron Sage responds to another long dissertation by Koresh. Sage says, "That's garbage." Later in that same conversation, Sage says, "No one in the FBI has ever scoffed at your beliefs."[443]

In their book about Waco, Tabor and Gallagher are critical of the negotiations. They write, "Koresh's interpretations went completely over the heads of the FBI negotiators, who were understandably put off by this approach."[444] Despite the fact that the overwhelming majority of David Koresh's communications involved intense and lengthy dissertations on biblical text, the FBI refused to allow a religious expert to engage David Koresh or to consult in negotiations.

Much of the criticism of negotiations centered on the fact that the FBI never engaged Koresh or the Davidians in a discussion of theology. Noesner said "there are two consistent themes that you will hear from every mental health expert that knows anything about crisis intervention, crisis negotiation, and that is that you neither embrace someone's belief system nor do you discount it."[445] Some are convinced that a prerequisite to successful negotiations with the Davidians is a firm grasp of the religious doctrine on which they base their beliefs.[446] In hearings before the subcommittees, Arnold testified that the FBI negotiators were ill prepared for productive discourse with the Davidians, "[The negotiators] were not able to perceive the meaning of the religious language the Davidians were using. They were not able to understand the actions the Davidians took. Had they had knowledge of the religious faith of the Davidians, this story could have ended in a much better and happier way."[447] Others simply suggested that negotiators should search out experts to grasp better the subjects of the negotiations. As Representative Henry Hyde, chairman of the Committee on the Judiciary, said, "There is an unwillingness to understand or believe that there are people in the world who are persons of belief and they believe strange things by our standards. [H]ad the understanding been these weren't hostages, these were willing members of a religious group, and to get in there and to dissipate them would take persuasion, argumentation from their frame of reference, not tear gas and tanks."[448] With at least a good background on the subject of religion, particularly the religious dogma professed by the Davidians, the negotiators could have better manipulated the conversations.

2. Others who contributed information

It is clear that all of the attention focused on Waco and the standoff at Mount Carmel encouraged many people to contribute their ideas to the negotiations. The method for processing this information is central to discerning whether any valuable advice or data was omitted or, inadvertently or intentionally, ignored. In this case, as in others, the actions taken by the FBI depended largely upon the information used, and to whom it was made available when key decisions were being made.

[441] Justice Department Report at 157.
[442] James Tabor and Eugene Gallagher, Why Waco? 110 (1995).
[443] Negotiation transcripts, March 17, 1993.
[444] *Id.*
[445] Hearings Part 2 at 325.
[446] Nancy T. Ammerman, *Waco, Federal Law Enforcement and Scholars of Religion, in* Armegeddon in Waco: Critical Perspectives on the Branch Davidian Conflict 282, 282–283 (Stuart Wright ed., 1996). Ammerman writes, "Did [the FBI] not know that apocalyptic beliefs should be taken seriously, that they were playing the role of the enemies of Christ? Did they not know that any course of action that did not seem to come from the Bible would be unacceptable to these students of Scripture? I have yet to encounter a single sociologist or religious studies scholar who has the slightest doubt that the strategies adopted by the FBI were destined for tragic failure." *Id.*
[447] Hearings Part 2 at 144–145.
[448] *Id.* at 47–48.

a. How much information was coming in?

It is clear that a great deal of unsolicited information was being sent to Waco. In addition to people honestly offering assistance, a variety of people came to Waco to express a variety of sentiments to officials on site.[449] This was in addition to the experts retained by the FBI. As the Justice Department report suggests, "The FBI also received unsolicited advice and offers of assistance from many individuals; not surprisingly, this input was rarely useful." The report continues, "A smaller number of offers came from individuals lacking a firm grip on reality, such as people claiming to be God or Jesus offering to 'order' Koresh to leave the compound."

Negotiator Byron Sage recounted in a Justice Department interview that "an incredible number of people called the negotiators offering help.[450] [I] tried to field these offers early on, but then [I] farmed it out to the behavioral science people to weed out the good stuff."[451] Others indicate that information was indiscriminately delivered to negotiators.[452] According to Dr. Stone, "all kinds of experts . . . allegedly were consulted . . . and took it upon themselves to offer unsolicited advice." Stone continues, "the prevailing pattern in the information flow during the crisis was for each separate expert to offer the FBI an opinion." The problem, it seems, was too much information.[453]

b. The method set up to communicate with people calling to help

Many people called who were deemed "lacking a firm grip on reality." When asked about such contacts with agents and officials in Waco, Chief Negotiator Gary Noesner said he knew nothing about them. Offers for help, however, were referred to the consulting experts. The experts analyzed the information provided or the assistance offered and passed it along to the negotiators in the form of memoranda.[454] Rarely did these people talk to negotiators, themselves, and never were they allowed to speak to the Davidians.

Sage maintains that the theologian on whom he depended the most was Glenn Hillburn, the chairman of the Baylor School of Religion. In addition to his role as religious advisor to Sage, Hillburn "provided . . . his feeling as to the credibility and bona fides of people who called in offering their help."[455] In one instance, an offer of assistance was made by the Harvard Negotiation Project.[456] The letter sent to Waco was written by Roger Fisher, director of the Harvard Negotiation Project, and was based on an analysis of the situation that was underway at the project and utilized the principles of negotiation that the project taught every day. The proposal made in the letter to Jamar included putting together "a small team . . . as familiar as possible with Koresh and the situation inside the residence" that would "find a potential 'third party' and work urgently on putting together a package that would be attractive to Koresh." The letter suggested that the government allow "the third party to come to Waco and make the offer, which will inherently expire if not accepted before the third party leaves Waco in two or three days."[457] The advice that the Harvard Negotiation Project offered was disregarded. Although the letter is mentioned in the Justice Department report, there is little evidence that the negotiators took any of that advice.

Despite a steady flow of information and advice, the FBI did not make any serious attempt to evaluate and disseminate the suggestions that came to its attention. The Justice Department maintains that it kept "meticulous"[458] track of the offers of assistance. It also concedes that it did not need or accept help in many areas.[459] Yet it is difficult to understand why the offers of help from respected, credible religious experts and experts in negotiations were rejected.

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[449] Justice Department Report at 156. The report discusses the among and type of information coming into Waco. "The FBI also received unsolicited advice and offers of assistance from many individuals; not surprisingly, this input was rarely useful." For example, on March 16, 1993 a well-known rock band contacted the FBI and offered to perform outside the Mount Carmel Residence, and to play a song that U.S. helicopters broadcast at enemy troops to demoralize them during the Vietnam war. On the other hand, the FBI received an unsolicited letter from the Harvard Negotiation Project containing thoughtful and specific suggestions to assist the negotiators in formulating a framework for further negotiations with Koresh. A smaller number of offers came from individuals lacking a firm grip on reality, such as people claiming to be God or Jesus offering to "order" Koresh to leave the compound. One person was arrested on his way to the compound brandishing a samurai sword, which he said "God had told him to deliver to Koresh." *Id.*

[450] All incidents investigated by the Department of Justice contain interviews of those involved in the incident. This interview was conducted in conjunction with the investigation of the incident at Waco.

[451] U.S. Dept. of Justice, record of interview of Byron Sage by Susan DeBusk (August 26, 1993).

[452] Stone Report at 43.

[453] Hearings Part 2 at 145. Tabor registers his sympathy for the FBI in the fact that they were on information overload. He also suggest some procedural way of compiling information and discerning the "nuts from the bolts." *Id.*

[454] U.S. Dept. of Justice, record of interview with Byron Sage by Susan DeBusk (August 26, 1993). In this interview, Sage recounted how he got information from those offering assistance. In that interview, Sage says, "Many of the contacts with experts would be through the behavioral science people rather than through the negotiators. The negotiators would get the end result of their input from people like Smerick, Young and Van Zandt."

[455] *Id.*

[456] The Harvard Negotiation Project is an enterprise of Harvard Law School that attempts to present alternatives to traditional negotiation techniques.

[457] Letter from the Harvard Negotiation Project to Jeffrey Jamar (March 29, 1993).

[458] Justice Department Report at 156.

[459] *Id.* at 156 "Throughout the Waco standoff, the FBI meticulously kept track of all unsolicited offers of assistance, and followed up on those that seemed to promise any reasonable chance of producing helpful information. There were certain areas of activity in which the FBI did not seek outside help. For example, the FBI did not request assistance from any outside law enforcement agencies in performing any of its tactical operations; it did not request assistance with negotiations, since the FBI's best negotiators were assigned to Waco throughout the 51-day standoff, and it did not consult with outside experts regarding the decision to play loud music and Tibetan Monk chants over the loudspeakers to irritate those inside the residence." *Id.*

D. THE FBI'S FAILURE TO FOLLOW ITS OWN EXPERT'S RECOMMENDATIONS

1. What the FBI's own experts recommended

According to Stone, "the FBI investigative support unit and trained negotiators possessed the psychological/behavioral science expertise they needed to deal with David Koresh and an unconventional group like the Davidians."[460] Among the many experts, the talent was extraordinary and the amount of information they had to use was enormous. It was not difficult for the experts to come to a consensus.

The clearest consensus among the FBI experts and others was not to provoke the Davidians. The experts feared that any provocation could lead Koresh to initiate the fiery end he predicted. FBI experts agreed with this approach.[461] As Stone writes in his separate evaluation, "I believe the FBI behavioral science experts had worked out a good psychological understanding of Koresh's psychopathology. They knew it would be a mistake to deal with him as though he were a con-man pretending to religious beliefs so that he could exploit his followers."[462]

Smerick coauthored six memoranda on David Koresh based on Koresh's past behavior and listening to negotiations. In each of the early memoranda, Smerick proposed that the FBI approach the Davidians with caution and avoid provocation. Smerick said that the cautionary memoranda were written expressly because "the FBI commanders were moving too rapidly toward a tactical solution, and were not allowing adequate time for negotiations to work."[463] In his final memorandum, Smerick proposed "'other measures' . . . because negotiations had met with only limited success."[464] As the Justice Department Report maintains, "those other measures included sporadically terminating and reinstating of utilities; moving equipment and manpower suddenly; downplaying the importance of Koresh in the daily press conferences; controlling television and radio reception inside the compound; and cutting off negotiations with Koresh."[465] Although these suggested measures are exactly the tactics the FBI used in Waco, Smerick suggests that while the "negotiators were building bonds . . . the tactical group was undermining everything."[466] Smerick continued, "[e]very time the negotiators were making progress the tactical people would undo it."[467]

During the hearings before the subcommittees, Smerick was questioned about this abrupt change in his advice; and whether senior Justice Department officials pressured him to change his advice to match the course of action preferred by the on-scene commanders. Smerick testified that he felt "no overt pressure"[468] to alter his memoranda. But he said that he was aware that the FBI wanted different advice. Smerick told the subcommittees:

> I had received information from FBI headquarters that FBI officials were not happy with the tone of my memos. From the standpoint that they felt it was tying their hands, meaning they were not going to be able to increase any type of pressure within that compound and instead were going to have to rely on strictly negotiations.[469]

Smerick developed profiles and memoranda that corroborated the opinions of qualified experts both in and outside the FBI. Smerick's opinion on this matter is the only expert opinion that changed as the crisis continued.

E. THE DECISION TO DISMISS THE SURRENDER PLAN

On March 2, everyone in the residence was lined up, ready to exit, when Koresh was "told by God to wait."[470] As far as the FBI was concerned, Koresh's credibility was broken. After a trip into the residence, DeGuerin and Zimmerman told Jamar of a new surrender plan based on the writing of the Seven Seals. The FBI did not believe it. But there was evidence that pointed to a genuine change in attitude.[471]

1. "Kids lined up with their jackets on"

The surrender plan on March 2 was marked by evidence that everyone but Koresh was prepared to exit the residence. After making much of his promise to come out, Koresh maintained that God told him to wait. In preparation for the surrender, the FBI and the Davidians worked out a complicated plan that involved everything from buses that would carry the Davidians to the order in which everyone would stand. A proposal to involve the Texas Rangers in a surrender "wasn't rejected, but it wasn't greeted with a lot of enthusiasm."[472]

In connection with the DeGuerin and Zimmerman visits to the residence, Jamar negotiated a similar surrender plan with the attorneys. The

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[460] Stone Report at 12.

[461] Edward Dennis summarized the opinions of the experts as follows: On March 3, 1993 the behavioral experts wrote a joint memo recommending a strategy of trying to work within the Davidians own belief system to talk them out. They recommended acknowledging the conspiracy against the Davidians and their right to defend themselves, and creating an illusion that Koresh could win in court and in the press and would not go to jail. On March 5 behavioral experts wrote a memo advising that the negotiation strategy focus on insuring the safety of the children and facilitating the peaceful surrender of the Davidians. This memo recommended a de-escalation of tactical pressure because movement of tactical personnel would validate Koresh's prophesy that his followers must die defending their faith. As an alternative tactic, the memo recommends that efforts be made to drive a wedge between Koresh and his followers by convincing them that a battle is not inevitable.
Dennis Report at 49.

[462] Stone Report at 13.

[463] Justice Department Report at 182.

[464] *Id.*

[465] *Id.*

[466] U.S. Dept. of Justice, record of interview of Peter Smerick (August 24, 1993).

[467] *Id.*

[468] Hearings Part 2 at 238.

[469] *Id.*

[470] Justice Department Report at 35.

[471] Hearings Part 2 at 68–69.

[472] *Id.* at 49.

only change that the attorneys and the Davidians suggested was that the children come out with their parents, rather than separately.[473]

2. Breakthrough with Koresh's letter

Following one visit to the residence by DeGuerin and Zimmerman, Koresh sent out a letter attesting to the fact that he was working on the Seven Seals.[474] On April 13 and 14, Koresh said that he had "received his mission" from God and that he would be out of the residence soon. According to DeGuerin, "everyone was relieved they did not have to die."[475] Koresh had written letters before. Most had been rambling biblical dissertations. The final letter was different, because it mentioned a deadline by which to determine when Koresh would surrender. That deadline was the writing of Koresh's interpretation of the Seven Seals.

There were other reasons that some saw the letter as a true breakthrough. The April 14 letter was written in a prosaic form different from the other letters. Koresh's letter expressed the desire to come out of the residence and to "stand before man to answer any and all questions regarding my actions."[476] More important to some religious scholars and observers than a professed desire to surrender, however, was the fact that the letter indicated Koresh had found a basis for surrender in his own religious doctrine.[477] Tabor and Arnold had been attempting to persuade Koresh that adequate reason for surrendering could be found in the Bible. The major change in the April 14 letter, according to Tabor, was that "Koresh used the religious arguments in this letter for why he had now seen that the scriptures told him to come out."[478] Arnold and Tabor, among others, found affirmative evidence that Koresh would surrender in the fact that "[Koresh] could come out and preach his message."[479] Tabor told the subcommittees that "[t]hat was the positive end. And court was negative. But DeGuerin convinced [Koresh] that court would end positively."[480] Tabor, Arnold, DeGuerin and Zimmerman believed that a surrender was eminent.

Further evidence of the fact that Koresh's letter was a genuine breakthrough was the reaction of those in the residence to the news of the surrender. Upon discovery that Koresh had given a deadline for surrender, there was obvious "jubilation" at the prospect of ending the siege.[481] In the background of the tapes, cheering can be heard. As Tabor told the subcommittees, "You can exactly see the mental state of the people inside. It is buoyant. They are talking about coming out. They are excited about it."[482] And in interviews on the subject, Tabor quotes surviving Davidians as saying, "We were so joyful that weekend because we knew we were coming out, that finally David had got his word of how to do this legally, the lawyers, and theologically in terms of his system."[483] The Davidians believed that they were coming out.

3. The breakthrough communicated to Jamar

On April 14, DeGuerin gave Koresh's letter to Jamar. Jamar testified that he knew of the "breakthrough." Upon reading the letter and talking with DeGuerin and Zimmerman, Jamar told them "that there was plenty of time."[484] In his testimony before the subcommittees, Jamar recalled, "What I said was, if there is writing of a manuscript, if there is progress, we will take the time."[485] Jamar gave DeGuerin and Zimmerman the impression that he believed the offer to surrender was serious. DeGuerin and Zimmerman were so confident that Koresh was writing the seals and would soon surrender, that they returned to Houston. Jamar, however, never took the surrender offer seriously. He told the subcommittees, "It was serious in [DeGuerin's and Zimmerman's] minds. I think they were earnest and really hopeful but in Koresh's mind, never a chance. I'm sorry."[486]

4. The failure to communicate this breakthrough up the chain of command

In the final days of the standoff, no one communicated to the Attorney General or anyone senior to Jamar that there might be a genuine attempt to end the siege by Koresh. No one put forth the possibility that a surrender was in the future. When asked by the subcommittees whether the Attorney General had been notified of the surrender plan, Jamar said, "I doubt it because it was not, from our understanding . . . a serious plan."[487] In an April 15 conversation, Sage told Associate Attorney General Webster Hubbell that there was little use in negotiating further.[488] Sage, Jamar, and Ricks all acted as though nothing out of the ordinary had occurred in Waco on April 14. They did not give the Department of Justice all of the information they had about the situation in Waco and misled them about the previous success of some negotiators.

It appears that DeGuerin and Zimmerman were the only people involved in the negotiations who took Koresh's promise seriously. SAC Jamar and the FBI negotiators saw this as another attempt at

[473] *Id.* at 77.
[474] Letter from David Koresh to Dick DeGuerin (April 4, 1993).
[475] Hearings Part 2 at 77.
[476] Letter from David Koresh to Dick DeGuerin (April 14, 1993).
[477] Hearings Part 2 at 68–69.
[478] *Id.*
[479] *Id.* at 199–200.
[480] *Id.*
[481] Negotiation transcripts April 14, 1993.
[482] Hearings Part 2 at 172.
[483] *Id.*
[484] *Id.* at 42.
[485] *Id.* at 305.
[486] *Id.* at 323.
[487] *Id.* at 305.
[488] Justice Department Report at 270. "Hubbell recalls that Sage said further negotiations with the subjects in the residence would be fruitless. The only people Koresh had released were older, or people who had given him problems during the time they were in the residence, or children who he had not fathered." Sage further advised Hubbell that Koresh had been disingenuous in his discussions with Sage about the "Seven Seals." He was also convinced that the FBI had not succeeded in getting anyone released from the residence through negotiation. Sage indicated that he had never been in any previous situation in which he had experienced such an impasse. *Id.*

delay by Koresh. As a result, they did not give this new surrender offer a chance to work.

5. Evidence that Koresh was writing his interpretation of the Seven Seals

The FBI had no concrete evidence that the Seals were being written.[489] Even negotiation transcripts give conflicting indications as to whether the work was in progress. Only after physical evidence was removed from the destroyed residence did the FBI find proof that the Seals were being written. Surviving Branch Davidian Ruth Riddle said that the Seals were being written.[490] Judy Schneider was transcribing the Seals and Riddle had the computer disc containing that writing.[491] It is clear that some work was being done on Koresh's interpretation of the Seven Seals.

6. Why the FBI disregarded the evidence that the Seven Seals were being written

Although Koresh indicated he was writing his interpretation of the Seven Seals, the FBI was not willing to give the surrender plan an opportunity to work. The FBI was frustrated and appeared to give to Justice Department officials only one option. Of the breakthrough to write the Seals, Sage testified before the subcommittees that "this first of all was not a new revelation to us as far as the Seven Seals."[492] From early in the standoff it appeared that the FBI had made up its mind that the Davidians weren't coming out of the residence of their own free will. Of the possibility of surrender, Jamar testified, "From [Koresh's] conduct from February 28th until April 19th, I would have every reason to believe he would not [surrender]."[493] The FBI was convinced Koresh would never surrender.

F. FINDINGS CONCERNING THE NEGOTIATIONS TO END THE STANDOFF WITH THE DAVIDIANS

1. The FBI allowed negotiators to remain in position at the Branch Davidian residence for too long, resulting in the physical and emotional fatigue, affecting the course of the negotiations. The negotiators were in place for 51 days. Negotiations occurred almost constantly 24 hours a day. Despite a steady rotation of negotiators, it is clear from the transcripts that negotiators allowed their emotions to influence the discussions.

2. The FBI did not take appropriate steps to understand the mindset of the subjects of the negotiations. Numerous experts offered their advice on the specific beliefs of Koresh and the Davidians. Throughout the process, it is clear that the negotiators did not engage the Davidians in meaningful negotiations by ignoring the Davidian point of view. The subcommittees believe that the course of the negotiations could have been better directed by an increased understanding of the Davidians' religious perspective.

3. The FBI leadership failed to make crucial decisions about which strategy to employ. Two separate strategies were enacted simultaneously. The tactical pressure constantly worked against the strategy of negotiation. FBI leadership engaged these two strategies in a way that bonded the Davidians together and perpetuated the standoff.

G. RECOMMENDATIONS

1. Federal law enforcement agencies should redesign negotiation policies and training so that physical and emotional fatigue will not influence the course of negotiations. In anticipation of future negotiations involving unusually emotional subjects, such as Koresh, or those which may involve prolonged periods of time during which negotiators may become physically or emotionally fatigued, law enforcement agencies should implement procedures to ensure that these factors do not influence the recommendations of negotiators to senior commanders. Such procedures may involve using additional negotiators in a team approach, limiting the amount of time a particular negotiator remains on duty, limiting the amount of interaction between law enforcement officials and the subject of the negotiations until satisfactory behavior is elicited from the subject, or applying other "rewards" and "punishments" in order to elicit positive responses from the subject during negotiators.

2. Federal law enforcement agencies must take steps to foster greater understanding of the target under investigation. The subcommittees believe that had the government officials involved at Waco taken steps to understand better the philosophy of the Davidians, they might have been able to negotiate more effectively with them, perhaps accomplishing a peaceful end to the standoff. The training, policies and procedures of Federal agencies should be revised to emphasize the importance of developing an understanding of their investigative targets.

3. Federal law enforcement agencies should implement changes in operational procedures and training to provide better leadership in future negotiations. The subcommittees believe that senior commanders should be given additional training in critical decisionmaking and that operational procedures be modified in accordance with this training. The subcommittees believe that the result of these changes should be that commanders will be better equipped to make necessary decisions from limited options with limited information during critical incidents. The benefits of these changes will protect not only the targets of government action but, by making it more likely that Federal law enforcement officials will carry out their mission in the manner most likely to suc-

[489] Hearings Part 2 at 323.
[490] *Id.*
[491] *Id.* at 69.
[492] *Id.* at 357.
[493] *Id.* at 306.

ceed, but will help to protect the safety of the law enforcement officers as well.

4. Federal law enforcement agencies should take steps to increase the willingness of its agents to consider the advice of outside experts. The subcommittees recommend that Federal law enforcement officials expand their capacity to obtain behavioral analyses of the targets of their investigations. This could be done through an expansion of those parts of the agencies in which behavioral analyses is performed. Additionally, this capacity could be enhanced through more formal arrangements with reputable outside consultants. The Nation's universities contain a wealth of experts whose expertise cuts across all fields of human behavior. Federal law enforcement should consider a more formal process for identifying qualified experts and entering into arrangements with them whereby they would be available when called upon.

5. Federal law enforcement agencies should modify standard negotiation policies to allow senior commanders to seek outside expert participation in negotiations when warranted by special and extenuating circumstances and the absence of in-house expertise. The immense number of people seeking to assist in the negotiations at Waco provided a good pool of resources from which to choose experts. Some of those people offering their assistance could have proven useful in the negotiations. The FBI should encourage agents to reach out for creative solutions to barricade situations in the future.

VII. The Attorney General's Decision to End the Stand-off

A. Overview of the Plan to End the Standoff

On April 12, 1993, the FBI presented Attorney General Janet Reno with a plan to end the standoff with the Branch Davidians. On April 17, 1993, the Attorney General gave her approval for the plan to be implemented on April 19. The stated mission of the plan was to "secure the surrender/arrest of all adult occupants of the residence while providing the maximum possible security for the children within the compound." A key component of the plan was the decision to use CS, a chemical riot control agent, which would be sprayed into the Branch Davidian residence in an attempt to induce the Davidians to leave. The plan was implemented on April 19, but the Davidians did not leave their residence as government officials suggested. Instead, 6 hours after the beginning of the operations, a fire erupted inside the structure, ultimately consuming it and the more than 70 persons inside.

B. The Operation Plan for April 19, 1993

1. Overview of the written operation plan to end the standoff

As early as March 22, 1993 the FBI began formulating an operation plan to end the standoff with the Davidians.[494] On April 12, 1993, the FBI presented its plan to the Attorney General for her approval.[495] According to the Justice Department Report, "Over the next several days the Attorney General and Senior Justice Department and FBI officials discussed, debated and dissected every aspect of the plan."[496]

The operations plan provided that its mission was to "secure the surrender/arrest of all adult occupants of the residence while providing the maximum possible security for the children within the compound." The key component of the plan was the delivery of a chemical riot control agent, known as CS, into the Branch Davidian residence in order to induce the Davidians to leave. While the CS agent was being inserted, FBI officials planned to use a loud speaker system and the telephone to advise the Davidians that tear gas was being inserted into the residence to force them to leave, but that an attack was not underway. The plan also provided for a demand that all subjects leave the building and surrender to authorities.[497]

The plan provided for the operation to last up to 48 hours or until all subjects had exited the residence and surrendered. The plan provided for the first insertion of CS agent to be made into the front/left portion of the residence. After a period of time, which was to be dependent on the Davidians' response to the initial delivery of the CS agent and any subsequent negotiations that were possible, an additional tear gas delivery was to be made into the back/right portion of the residence. After a third delivery of CS, into an area not specified in the plan, all subsequent deliveries of CS agent were to be made into the upper and lower windows of the residence.[498]

During the first three insertions, the CS agent was to be delivered into the residence by two combat engineering vehicles (CEV's), an armored vehicle similar to the Bradley Fighting Vehicle (Bradley), but which is unarmed. The CEV's at Waco were mounted with boom-like arms which were capable of penetrating the walls of the structure.

[494] U.S. Dept. of Justice, Report to the Attorney General on the Events at Waco, Texas 79 (1993) [hereinafter Justice Department Report]. Larry Potts, Assistant Director of the FBI in 1993, testified before the subcommittees that "[I]n terms of the formation of the gas plan, I think that Mr. Jamar first contacted me around March 27th or sometime near the very end of March, to indicate that such a plan was being submitted [to senior FBI officials]." Hearings Part 2 at 480.

[495] Justice Department Report at 263.

[496] *Id.*

[497] Federal Bureau of Investigation, Briefing for the Attorney General, at 25. [*See* Documents produced to the subcommittees by the Department of Justice 003370–003480, at Appendix [hereinafter Justice Documents]. The Appendix is published separately.]

[498] *Id.*

Mounted on the arms of the CEV's were mechanical devices designed to spray a stream of CS agent into the holes made by the booms. After the third insertions of CS agent, the operations plan called for agents located in unarmed Bradley Fighting Vehicles to maneuver close enough to the residence so that they could fire Ferret round projectiles through the windows of the structure. These small non-explosive grenade-like projectiles contained CS agent which would rise into the air when the projectile broke open upon impact. The use of Ferret rounds was to be in addition to continuing insertions of CS by agents in the CEV's.

The plan also provided for specific assignments for the different HRT and SWAT teams involved in the operation. It specified the maneuvers to be made by the two CEV's, the nine Bradley Fighting Vehicles, and the M–88 tank retrieval vehicle, and provided for miscellaneous administrative and logistical issues such as types of uniforms to be used and the appropriate manner for handling prisoners.

Additionally, the plan provided to the Attorney General on April 12, 1993 included details concerning where the FBI's snipers were to be positioned and the positioning and capabilities of SWAT team members. The plan contained a "medical annex" providing for a means to treat "the potentially large number of casualties which could exceed the current medical capabilities of any single agency present" as well as procedures to be followed to arrest persons who had been exposed to CS. The annex also provided for locations where the injured were to be treated, provided a list of local and secondary hospitals (including address, latitude/longitude location, and estimated air travel time). And the medical annex provided instructions to the agents on the procedure to handle a mass surrender by the Davidians.

Finally, the plan provided for the possibility that the Davidians might not surrender. The final contingency provision in the plan stated that "if all subjects failed to surrender after 48 hours of tear gas, then a CEV with a modified blade will commence a systematic opening up/disassembly of the structure until all subjects are located."

2. Acceleration provisions of the operations plan

While the operations plan called for the government's actions to end the standoff to unfold over a period of 2 days, the plan also contained contingency provisions that allowed for a departure from the concept of a methodical insertion of CS. One of these provisions was implemented on April 19 and resulted in a rapid acceleration of the insertion of CS agent.

The first of the two contingency provisions in the plan provided that if the Davidians were observed in the tower during the operations, after having been informed not to be there, agents were permitted to insert CS gas into the tower by firing Ferret round projectiles into the tower. More importantly, however, the second contingency provision in the plan provided:

> If during *any* tear gas delivery operations, subjects open fire with a weapon, then the FBI rules of engagement will apply and appropriate deadly force will be used. Additionally, tear gas will immediately be inserted into all windows of the compound utilizing the four Bradley Vehicles as well as the CEV's.[499]

C. THE WAY THE PLAN ACTUALLY UNFOLDED

At approximately 5:55 a.m., Dick Rogers, commander of the FBI's Hostage Rescue Team, ordered the two CEV's, which were to insert the CS riot control agent, deployed to the compound. At 5:56 a.m., the FBI's chief day-to-day negotiator, Byron Sage, telephoned the residence and asked to speak with Davidian Steve Schneider. It took approximately 3 minutes for someone to come to the phone.[500] At 5:59 a.m., Sage informed the person answering the telephone that "We are in the process of putting tear gas into the building. This is not an assault. We will not enter the building." The person on the other end of the telephone responded "You are going to spray tear gas into the building?" whereupon Sage replied, "In the building . . . no, we are not entering the building."[501] While the Justice Department Report is ambiguous on the person to whom Sage was speaking, Sage testified at the hearings before the subcommittees that the person he talked with was Schneider.[502] At the conclusion of this conversation, someone threw the telephone outside of the building.[503]

From 6 a.m. to approximately noon on April 19, 1993, FBI agents implemented the operations plan and injected a large quantity of CS riot control agent into the Branch Davidian residence in four distinct phases. The agents moved close to the Davidian residence in CEV's equipped with devices[504] which could shoot a horizontal stream of CS agent in short bursts or continuously for up to 15 seconds.[505] The device uses carbon dioxide as a

[499] *Id.*
[500] Justice Department Report at 285.
[501] Justice Department Report at 286.
[502] Hearings Part 3 at 269.
[503] Justice Department Report at 286.
[504] The delivery systems mounted on the CEV's were Protecto-jet Model 5 Tear Gas Delivery Systems manufactured by ISPRA, Ltd., an Israeli company. The systems were sold to the FBI by Advanced Materials Laboratories, Inc. of Forrest Hills, NY. The Justice Department Report refers to the systems as Mark V systems. *See* Justice Department Report at 287. The subcommittees investigation indicates that while the Mark V system does exist, there is no evidence that it was used at Waco. The evidence indicates that only the Protecto-jet Model 5 system was mounted on the CEV's furnished to the FBI by the Defense Department. The references to the Mark V system in the Justice Department Report appear to be in error.
[505] The Protecto-jet Model 5 system consists of a cylinder approximately 27 inches long, 4⅛ inches in diameter, weighing approximately 16 lbs., which is connected to a hose with a nozzle. The device uses carbon dioxide to propel a chemical agent, such as CS, mixed in a suspension of methylene chloride, into the air. The range of the device is 15–20 yards in still air. The device can be used to shoot 13–17 1-second bursts or a continuous burst for up to 15 seconds.

disbursant to propel a stream of CS agent, suspended in methylene chloride, horizontally into the air. Once the CS stream is fired, the carbon dioxide quickly evaporates and the methylene chloride gas disperses the CS evenly through a room, until the methylene chloride itself evaporates. The CS agent, which is a fine powder, then slowly falls to the floor, where it remains. The capacity of each delivery system on the CEV's was 30 grams of CS agent.

The insertion of CS agent into the Branch Davidian residence was performed in four phases. The first two phases employed two CEV's. On one CEV was mounted two CS delivery systems, while four systems were mounted on the second CEV. The CEV's were operated in tandem, each inserting the entire contents of the six CS agent delivery systems during the first two phases of the operation, at 6 a.m. and again at approximately 8 a.m. In each of the first two phases, a total of 180 grams of CS was delivered. The third and fourth phases, also 2 hours apart, involved only one CEV, as the second CEV had experienced mechanical difficulties and no longer operated. Four cylinders of CS were delivered in each of these two phases, for a total 120 grams of CS inserted into the residence. Thus, over the entire 6 hours of the operation, a total of 600 grams of CS agent was inserted into the Branch Davidian residence.

During the standoff with the Davidians, FBI agents used unarmed Bradley Fighting Vehicles as a means of transportation while guarding the perimeter of the residence. The FBI's overall operational plan for April 19 provided for the Bradleys to be used in a contingency plan to be implemented in the event the Davidians began to fire on the CEV's. If that occurred, agents in Bradleys who had maneuvered close to the building and were standing ready were to insert additional quantities of CS agent into all parts of the building. Agents in the Bradleys were to fire Ferret round projectiles into the residence. Ferret rounds[506] resemble large plastic bullets, and are fired from hand-held grenade launchers. Each projectile carries 3.7 grams of CS agent, mixed in a suspension of methylene chloride.

Once the Davidians began firing on the CEV's Rogers gave the order to implement the contingency plan. The agents in the Bradleys then maneuvered close to the Branch Davidian residence and began to fire the Ferret round projectiles through the windows of the building. During the 6-hour operation, 400 Ferret round projectiles were fired at the Branch Davidian residence, a number of projectiles struck the side of the building and did not enter the building. Estimates of the number of projectiles that actually entered the residence range from 300 to 380. Had all 400 projectiles fired at the residence actually entered the residence, however, the total quantity of CS agent delivered by the Ferret round projectiles would have been 1,480 grams.

[506] Ferret Rounds are 37, 38, and 40 millimeter projectiles which can be fired from hand-held grenade launchers. Each projectile carries 3.7 grams of CS riot control agent, mixed in a suspension of methylene chloride.

D. OVERVIEW OF THE USE OF CS CHEMICAL AGENT

1. Introduction

Chlorobenzylidene malononitrile, commonly called CS, is one of a family of approximately 15 chemical compounds used to control civilian populations during periods of disturbance and unrest. These "riot-control agents" cause acute irritation to the eyes, mouth, nose, and upper respiratory tract, that is relatively brief and not usually accompanied by permanent toxic effects. Exposure to riot-control agents renders the victim temporarily incapacitated, but the symptoms typically persist for only a few minutes after cessation of exposure.[507]

The first riot control agent was developed in the early 1900's.[508] In 1928, two chemists, Corson and Stoughton, developed 2-chlorobenzylidene malononitrile, code named CS. However, CS was not developed as riot-control agent until the 1950's, when the British War Office began to search for a chemical that was more potent than either CA or CN.[509] By the 1960's, CS had replaced CN as the preferred tear gas among police authorities around the world. Its popularity stemmed from the fact that it was shown to be a more potent irritant than CN, and appeared to cause less long-term injury, particularly to the eye.[510] Military forces also saw CS as a potent weapon for particular operations. Large quantities of CS were used by the United States during the Vietnam War. CN is no longer used by the U.S. military operations, but it is still used by some civil authorities, and by individuals for self-defense. Among civilian law enforcement agencies CS is, by far, the most widely-used riot control agent.

[507] F.W. Beswick, *Chemical Agents Used in Riot-Control and Warfare,* 2 Hum. Toxicology 247–256.

[508] The first riot-control agent may have been ethyl bromacetate, which was used by the Paris police in a hand grenade to disable criminal gangs. The German chemical industry that produced many lethal chemical weapons during World War I (e.g., nerve gases) also developed new tear gases. For example, xylyl bromide was packed in 150-mm artillery shells and used during the battle against the Russians at Bolimow in January 1915. This early military use of a tear gas was not judged to be a success, owing to the failure of the chemical to vaporize in the subzero temperatures on the battlefield. However, it provided an early indication of the importance of weather conditions to the effectiveness of these agents. By 1918, the French had developed bromobenzylcyanide, known by the military code CA, and the British and Americans had developed chloroacetophenone, known by the military code CN, which became the most effective and widely used tear gas. In the postwar period, the urban crime wave and emergence of gangsters in the 1920's in the United States spurred renewed efforts to develop riot-control agents. By the mid-1920's, small explosive cartridges containing CN were available over the counter for personal protection. CN rapidly became the tear gas of choice for law-enforcement authorities. Howard Hu, *Toxicodynamics of Riot-Control Agents (Lacriminators)* 271, 273 in Chemical Warfare Agents (Satu M. Somani ed., 1992).

[509] J. Cookson and J. Nottingham, A Survey of Chemical and Biological Warfare (1969).

[510] Hu, *supra* note 508.

2. Concerns over use of CS

CS has gained wide acceptance as a means of controlling and subduing riotous crowds. However, its widespread use has raised questions about its safety. Most published studies have concluded that, if used correctly, the irritant effects of exposure are short-lived and do not cause permanent damage.[511] However, there have been isolated reports of fatalities from the use of riot control agents. The most common reports involve deaths attributed to the use of riot control agents by American miltary personnel in Vietnam.[512] Additionally, other reports involve injury and death from the use of CS in Chile, Panama, South Korea, and the Gaza Strip and West Bank of Israel.[513] It has been unclear from these reports, however, whether the riot control agent used was CS or another, more toxic, agent.[514] Of particular concern, however, has been the indiscriminate use of riot control agents in enclosed and indoor spaces where it is feared that resulting high concentrations may have resulted in harmful levels of exposure. Severe injuries from exploding tear gas grenades as well as deaths from the toxicity of riot control agents used in confined, indoor spaces have been reported.

Critics of the use of these agents argue that the available toxicological data is insufficient to describe with any confidence the potential for long-term pulmonary, carcinogenic, and reproductive effects. One recently published review of the toxicological data on riot control agents concluded that relatively little has been published in the mainstream medical literature and that epidemiologic studies following tear gas use under actual field conditions are almost nonexistent. The author of this review wrote:

> There is clearly a great need for openly conducted research illuminating the full health consequences of exposure to riot-control agents including outcomes such as tumor formation, reproductive effects, and pulmonary disease. Consideration must be given to the possible effects of these agents on the young, the elderly, and other persons who might have increased susceptibility.[515]

E. CLINICAL EFFECTS AND TOXICITY OF CS

1. Common effects of exposure to CS

All riot control agents, including CS, produce intense sensory irritation even in the most minute concentrations. For most of these agents, the eye is the most sensitive organ, with pain arising rapidly, accompanied by conjunctivitis, excessive tearing, and uncontrolled blinking. The inside of the mouth and nose experience a stinging or burning sensation, and there is usually excessive discharge of nasal mucus. Chest tightness and burning are accompanied by coughing, sneezing, and increased secretions from the respiratory passageways. A burning sensation is felt on the skin, often followed by inflammation and redness, and in some cases, actual burning of the skin occurs. Tear gas exposure may also irritate the stomach, leading to vomiting and possibly diarrhea. In addition to the physical symptoms, panic and severe agitation are common among those individuals with no prior experience of exposure to tear gas.[516]

Most of the symptoms are felt within 10 to 30 seconds after exposure to the agent. After cessation of exposure, however, most symptoms continue to persist for a period of minutes before subsiding and disappearing.[517] The effects of expose vary among individuals. Additionally, weather conditions, such as temperature and humidity, can heighten the potency of these agents.[518]

[511] The most thorough study of the use of CS agent against humans is the Himsworth Report, which investigated the use of CS agent in Northern Ireland in 1969. It concluded that exposure to CS did not produce long-term injury or death in humans. Home Office, report of the enquiry into the Medical and Toxicological aspects of CS (Orthochlorobenzylidene malononitrile), Part II: Inquiry into Toxicological Aspects of CS and its use for Civil Purposes (1971) [hereinafter Himsworth Report]. A recent study of the use of CS on 1,500 persons in a confined area space made the same findings. P.J. Anderson et al., *Acute effects of the potent lacrimator o-chlorobenzylidene malonitrile (CS) tear gas*, 15 Hum. & Experimental Toxicology 461, 464–465 (1996).

[512] The United States used large amounts of CS during the Vietnam War in both offensive and defensive military operations. The basic doctrine for the use of CS weapons by U.S. sources is summarized in the following passage taken from a 1969 Army training circular:

The employment of riot-control agents (CS, CN) in Counter guerilla operations is most feasible in tactical situations characterized by close combat in which rapidly responding systems are essential and permanent effects are undesirable. Riot-control munitions can be used tactically to temporarily disable hostile troops, to suppress their fire, or to cause them to abandon their position. Offensively, riot-control agents can be used to "flush out" unprotected enemy troops from concealed positions or to reduce their ability to maneuver or use their weapons. Defensively, riot-control munitions can be integrated into defensive perimeters to provide rapid CS delivery in case of enemy attack.

CS was employed for defensive purposes such as in the event of a surprise attack from superior enemy forces, and to help secure helicopter extractions of combat units or downed airman. It was used extensively in area-denial operations to render terrain uninhabitable by the enemy. CS was also used routinely in direct engagement of the enemy during offensive combat operations.

U.S. forces were issued gas masks to protect themselves against use of CS and other tear gases by the enemy. According to one U.S. evaluation, the North Vietnamese had only a limited supply of tear gas, but they used it to good effect. During the conflict, the general service respirator was replaced by a lighter mask, which went through a number of further modifications. The protection which it conferred was adequate but not complete, because dense CS aerosols can have a strong irritant effect on bare skin, especially in hot and humid conditions when the skin is moist.

[513] *See generally*, H. Jack Geiger & Robert M. Cook-Deegan, *The Role of Physicians in Conflicts and Humanitarian Crises, Case Studies from the Field Missions of Physicians for Human Rights, 1988 to 1993*, 270 JAMA 616 (1993).

[514] In a 1989 report, the General Accounting Office noted that the group Physicians for Human Rights had conducted a fact-finding trip to investigate allegations of deaths from the use of CS in the occupied territories but that the members of the group could not confirm that any of the reported deaths were attributable to tear gas inhalation. *See e.g.,* U.S. General Accounting Office, Isreal: Use of U.S.—Manufactured Tear Gas in the Occupied Territories 3 (1989) (citing Physicians for Human Rights, "The Casualties of Conflict: Medical Care and Human Rights in the West Bank and Gaza Strip," Report of a Medical Fact Finding Mission by Physicians for Human Rights (1988)). The GAO report also noted that while Amnesty International had reported concerns over a "pattern of death [that] appeared to follow expose to high concentrations of tear gas" they also stated that "Amnesty International noted that it was in no position to verify the exact cause of death in every case." *Id.* at 4.

[515] Hu, *supra* note 508, at 284–285.

[516] *See generally Id.* at 276; Anderson, *supra* note 511, at 461.

[517] Hu, *supra* note 508, at 276.

[518] *Id.* at 277.

2. Toxicity of CS

A review of the scientific literature concerning the use of CS indicates that limited conclusions as to the toxicity and lethality of CS are known. It seems generally accepted by the scientific community that the concentration of CS agent which is noticeable by humans and which will provoke physical responses in humans is 4 milligrams per cubic meter (4 mg/m^3).[519] While no studies on humans have been conducted concerning the lethality of CS, several studies have projected the concentrations at which CS is lethal to humans from the effects of studies performed on animals. Those studies estimate that the concentration of CS agent which would prove lethal to 50 percent of any given human population ranges from as low as 25,000[520] to as high as 150,000 mg-min/m^3.[521] Recent estimates by the U.S. military, however, estimate that the lethal concentration for humans is 61,000 mg-min/m^3.[522] That study projects that the concentrations which would be injurious to the health of approximately 50 percent of any human population range from between 10–20 mg-min/m^3.[523]

It is important to note, however, that there are no published studies which find that any human death has been caused by exposure to CS agent. While a number of unverified reports of human deaths can be found in the literature, in all of these reports it is unclear precisely whether CS or some other, more toxic, riot control agent was used or whether some other circumstance could have caused the deaths. The most extensive study of the use of CS agent on humans, by United Kingdom forces in Northern Ireland in the late 1960's, found that no deaths (and no long-term injuries) resulted from the widespread use of CS agent there.[524] The only other documented study of the effects of CS used on a large number of humans confirms this finding.[525]

Some people may find curious the fact that all of these studies (and similar studies on the effects of chemical agents) uniformly give estimates of the level at which CS is lethal or injurious to 50 percent of a given population of humans. It appears from the literature that the effect of CS on humans (and on other animals) is not "linear," i.e., that proportionately greater concentrations do not have equally proportionate increases in effect. While scientists can estimate the levels which would prove lethal to 50 percent of a given population, it would be incorrect to presume that half of that quantity would kill 25 percent of that population. In fact, the most well-known study of the effects of CS on humans estimates that the likelihood of death after exposure to a dose of CS that is one-tenth the estimated lethal does is less than 1 in 100,000.[526] Accordingly, any analysis of the lethality of the CS agent used in the concentrations that resulted on April 19 can only be performed in light of the 50 percent lethality estimates.

Even when the quantities of CS riot control agent used do not reach lethal toxic levels, there are, nevertheless, significant physical consequences that occur from exposure to CS, and often severe emotional reactions caused by the symptoms brought on from exposure to CS. As discussed above, one recent study of the use of large quantities of CS against a population unable to leave the area in which the CS was used indicated that first, second, and even third degree burns are possible when skin is exposed to CS.[527] Additionally, some studies have shown that exposure to CS can cause allergic contact dermatitis.[528] Other studies have shown that when CS can cause severe gastroenteritis when ingested, whether directly or as a result of ingesting mucus secretions containing CS from oral inhalation.[529]

Additionally, some studies on animals have suggested that exposure to CS might cause cancer and genetic abnormalities.[530] Some studies have stated that exposure to high concentrations of CS for prolong periods could result in inflammatory changes in the respiratory tract that might be conducive to secondary respiratory infection.[531] And it is believed that CS may exacerbate existing medical conditions of persons with bronchitis or asthma, although no reports of death from these conditions exist.

F. EFFECT OF THE CS AND METHYLENE CHLORIDE IN THE QUANTITIES USED ON APRIL 19TH

1. Lethality of CS as used at Waco

Testimony before the subcommittees presented contradictory evidence on the effects of CS riot control agent. The published literature described above, however, is more consistent in the conclusions drawn. While it cannot be concluded with certainty, it is unlikely that the CS riot control agent, in the quantities used by the FBI, reached lethal toxic levels. The evidence presented to the subcommittees does indicate, however, that CS insertion into the enclosed bunker at a time when women and children were assembled inside that enclosed space could have been a proximate cause of or directly resulted in some or all of the deaths attributed to asphyxiation in the autopsy reports.

[519] Bryan Ballantyne, Riot Control Agents, Biomedical and Health Aspects of the Use of Chemicals in Civil Disturbances 27 (1977); Hu, *supra* note 508, at 279.
[520] Dow Chemical Co., Material Data Safety Sheet (1988); Ballantyne, *supra* note 519.
[521] *Id.*
[522] Headquarters, Departments of the Army, Navy, and the Air Force, Potential Military Chemical/Biological Agents and Compounds 59 (1989).
[523] *Id.*
[524] Himsworth Report, *supra* note 511, at 23–25.
[525] Anderson, *supra* note 511, at 464–465.
[526] Himsworth Report, *supra* note 511, at 55–56; Ballantyne, *supra* note 519, at 30.
[527] Anderson, *supra* note 511, at 463–464.
[528] Hu, *supra* note 508, at 280.
[529] *Id.*
[530] *Id.*
[531] Ballantyne, *supra* note 519, at 30.

In order to answer the question of whether the quantities of CS agent inserted into the residence might have reached lethal levels, the subcommittees attempted to determine the concentrations that were present in the residence under the "worst-case" circumstances. To make this determination, a number of assumptions must be made. Many of these assumptions were overstated solely for the purpose of calculation in order to place the greatest scrutiny on the government's actions.

In each of the first two phases of insertion into the Branch Davidian residence, a total of 180 grams (180,000 mgs) of CS was delivered.[532] For the purposes of analysis, the subcommittees assumed an "extreme case" scenario, where all 180 grams were delivered into the building by the two CEV's at the same instant, and that one-quarter of the Ferret rounds fired at the residence were fired at the precise moment that the CS delivered by the CEV's entered the residence.[533] If so, then during the first and second phases of the CS operation, 550 grams (550,000 mgs) of CS were delivered to the residence.[534] During the first and second phases, therefore, the total concentration of CS delivered into the compound was 108.92 mgs/m^3.[535] During the third and fourth phases, due to the mechanical failure of the second CEV, only 490 grams (490,000 mgs) of CS agent was delivered into the residence.[536] During each of the third and fourth phases the total concentration at the (assumed) moment of insertion was 97.04 mgs/m^3.[537]

Assuming the Branch Davidian residence been air-tight, so that none of the CS agent escaped the building (which was not the case), the total amount of CS agent delivered present in the building would have been 411.92 mgs/m^3.[538] This concentration is far below the 61,000 mgs/m^3 amount projected to be lethal to 50 percent of a given population of humans. Stated in another way, it would take a concentration of CS 148 times greater than the greatest amount that could have been present at the Branch Davidian residence on April 19 to reach that lethal level.

In reality, the concentrations of CS inside the Branch Davidian residence did not reach even these levels. The Branch Davidian residence was a poorly constructed structure which allowed for air to move in and out of the residence continuously. The air circulation carried some of the CS agent out of the building. Adding to the air circulation inside the Davidians residence that day was the fact that the FBI began to use the CEV's to ram openings into the building, ostensibly to create a means of escape for the Davidians and, later, to "deconstruct" portions of the structure in an effort to prevent the Davidians from occupying those areas of the residence. These actions greatly enhanced the circulation into the residence and further depleted the concentration of CS agent inside the residence. Additionally, on April 19th, the winds were gusting up to 25 mph.[539] This fact greatly enhanced the air circulation inside the residence, adding to the dissipation of the concentration of CS agent in the residence. Thus, the actual levels of CS inside the Davidian residence were less than those calculated above.

Some who have contacted the subcommittees have suggested that the above analysis is flawed because it does not allow for the possibility that some CS agent was concentrated in certain areas of the residence rather than being evenly distributed throughout the entire structure. The subcommittees believe that it is important to address that possibility.

Because the largest group of bodies recovered after the fire was found in the area of the residence commonly known as the gun room or bunker[540] consideration was given to the concentrations of CS in that area.[541] The bunker was a solid concrete room inside the Davidian residence. It had no windows or other access to the outside of the building, but did open into a hallway inside the residence. It appears that there was little opportunity for CS to have been directly sprayed into the bunker and that any CS that was present in the bunker likely drifted into that room after it was sprayed into one or more of the rooms along the outside of the structure. The subcommittees note, however, that the videotape of the insertion of CS on April 19 indicates that one of the CEV's drove into the structure near the bunker during the fourth phase of the CS insertion. If the door to the bunker had been open at that time, it is possible that CS might have been injected directly into the bunker.

Based on this possibility the subcommittees attempted to determine, as a worst case scenario, the concentration of CS that would have been present in that room had the CEV emptied the entire contents of one of its CS containers into the bunker. It appears, however, that even in that

[532] CEV–1 emptied its four 30-gram cylinders while CEV–2 emptied the contents of its two 30-gram cylinders. The total delivered was thus (4 x 30) + (2 x 30) = 180 grams.

[533] Each Ferret round carried 3.7 grams of CS agent. A total of 400 Ferret rounds were fired at the residence. Thus, the total quantity of CS agent in one quarter of the Ferret rounds used was 370 grams (3.7 x 100).

[534] On each of the first two phases, 180 grams of CS agent was delivered by the CEV's and approximately 370 grams was delivered by Ferret Rounds. This totals 550 grams, or 550,000 milligrams.

[535] The Branch Davidian residence contained approximately 178,310 cubic feet of living area. Converted into meters, the volume of the residence was 5,049.7 cubic meters. The concentration inside the building, therefore, was 108.92 mgs/m^3 (550,000 mgs/5,049.7m^3 = 108.92 mgs/m^3).

[536] The 180 grams from CEV–1 and the approximately 370 grams from 100 of the Ferret Rounds totals 490 grams, or 490,000 milligrams.

[537] 490,000 mgs/5049.7 m^3 = 97.04 mgs/m^3.

[538] The concentration inside the building, therefore, was 108.92 mgs/m^3 + 108.92 mgs/m^3 + 97.04 mgs/m^3 + 97.04 mgs/m^3 = 411.92 mgs/m^3).

[539] The National Oceanic and Atmospheric Administration recorded high winds beginning at noon on April 18, 1993. The winds continued through April 19. At 11:52 a.m. on April 19, winds were recorded at 25 mph with gusts to 30 mph.

[540] See Justice Documents at the Appendix for a diagram of the floorplan of the Branch Davidian residence.

[541] It should be noted, however, that none of the autopsies of the persons found in the bunker indicate the cause of death was from exposure to CS.

event the concentration of CS would not have reached lethal levels.

The volume of the bunker room was approximately 44.40 cubic meters. Assuming that an entire cylinder (30 grams) of CS was injected into the room, the concentration at that moment would have been 675.67 mgs/m^3.[542] As discussed above, the concentration level estimated to be lethal to humans is 61,000 mgs-min/m^3. Even had the CEV which was mounted with four containers of CS inserted the contents of all four containers into the bunker, the resulting concentration would have been 2,702.70 mgs/m^3.[543] Again, this figure is well below the concentration level estimated to be lethal to humans.

Another worse case scenario considered by the subcommittees was the possibility that one of the CEV's might have delivered the entire contents of one of its cylinders of CS agent into one of the smallest rooms of the residence, and that that room was inhabited at the time. It still appears that the concentration of CS would not have reached lethal levels. The smallest rooms in the structure were the women's quarters located on the second floor of the residence. The smallest of these had a total volume of 16.17 cubic meters. Assuming that an entire cylinder of CS had been injected into this room, the concentration at that moment would have been 1855.29 mgs/m^3.[544] Assuming further that a number of Ferret rounds also happened to be fired into the room at the exact moment that the CS was injected by the CEV (assume an impossible event such as 20 rounds entering the room at the same instant), the concentration at that instant would have been 6,431.66 mgs/m^3.[545] Again, these figures fall far below the concentrations estimated to be lethal to humans.

While concluding that it is unlikely that the CS reached toxic levels, the subcommittees note the level of exposure to CS experienced by an individual Davidian cannot be determined. It is possible that a person near one of the CEV's injecting the CS may have been subject to a level of CS that was high enough to cause death. Additionally, 10 of the autopsies indicate asphyxiation as the cause of death, but do not indicate whether CS or other factors may have lead to this. The subcommittees are unable to conclude that CS did not play a part in the deaths of these persons.

2. Lethality of methylene chloride used with CS at Waco

During the gassing operation, each cylinder of the CS riot control agent introduced into the Branch Davidian residence by the CEV's was mixed with approximately 1,070 grams of methylene chloride. This suspension was then dispersed into the structure by carbon dioxide, which almost immediately evaporated, leaving the suspension of CS and methylene chloride. Additionally, each of the Ferret round projectiles contained 33 grams of methylene chloride as the dispersant medium for the CS agent.

The four phases of insertion of CS agent into the Branch Davidian residence were conducted approximately 2 hours apart. During the first and second phases six cylinders of CS agent were inserted into the residence, delivering approximately 6,420 grams of methylene chloride in each phase.[546] During the third and fourth insertions only four cylinders of CS agent were inserted, accounting for approximately 4,280 grams of methylene chloride during each insertion. Assuming a worse case scenario of all of the CS insertions in one phase occurring at the same moment and approximately ¼ of the Ferret round projectiles entering the building at that same time, thus adding an additional 3,300 grams of methylene chloride in each phase,[547] the total concentration of methylene chloride delivered into the building during the first and second insertions was 1,924.87 mgs/m^3.[548]

A review of the scientific literature concerning CS agent has located no estimates of the concentration of methylene chloride which would prove harmful or lethal to humans. The only estimates which do exist are with respect to mice and rats. For example, the concentration that would prove lethal to 50 percent of a rat population is estimated to be 2,640,000 mgs-min/m^3.[549] As can be seen from the above figures, therefore, the total concentrations of methylene chloride at the Davidian residence on that day were less than the concentrations that would prove lethal to even rats.[550] It appears, therefore, that the methylene chloride used with the CS agent could not have caused the death of any of the Davidians.

As in the case with CS, the subcommittees considered the possibility that some methylene chloride was concentrated in certain areas of the residence rather than being evenly distributed throughout the entire structure. Because the largest group of bodies recovered after the fire was found in the area of the residence commonly

[542] Each cylinder of CS contained 30 grams, or 30,000 milligrams, of CS. 30,000 mgs/44.40 m^3 = 675.67 mgs/m^3.

[543] 120,000 mgs/44.4 m^3 = 2,702.70 mgs/m^3.

[544] Each cylinder of CS agent contained 30 grams, or 30,000 milligrams. 30,000 mgs/16.17 m^3 = 185.52 mgs/m^3.

[545] 30 grams of CS agent from a CEV plus 74 grams of CS agent from 20 Ferret rounds is a total of 104 grams (30 + (3.7 x 20) = 104), or 104,000 milligrams. 104,000 mgs/16.17 m^3 = 6,431.66 mgs/m^3.

[546] Each cylinder contained 1,070 grams of methelyene chloride. Six cylinders totaled 9,720 grams.

[547] Each Ferret round contained 33 grams of methylene chloride. One hundred Ferret rounds thus inserted 3,300 grams of the chemical into the building.

[548] In the first two phases the total quantity of methylene chloride delivered was 9,720 grams ((6 x 1,070) + (100 x 33)) or 9,720,000 milligrams. Divided by the cubic footage of the building (5,049.7 m^3) the distribution of the substance throughout the building in these phases was 1,924.87 mgs/m^3. In the third and fourth two phases the total quantity of methylene chloride delivered was 7,580 grams ((4 x 1,070) + (100 x 33)) or 7,580,000 milligrams. Divided by the cubic footage of the building (5,049.7 m^3) the distribution of the substance throughout the building in these phases was 1,501.08 mgs/m^3.

[549] *See generally* Mallinckrodt, Inc., Material Data Safety Sheet 2 (1989); Dow Chemical, Inc., Material Data Safety Sheet 3 (1988).

[550] The total quantities from each of the four insertions of CS agent was only 5,356.74 mgs/m^3. ((2 x 1,924.87) + (2 x 1,501.08) = 5,356.74).

known as the gun room or bunker, consideration was given to the concentrations of methylene chloride in that area.[551] As discussed above, the bunker was a solid concrete room with no windows or other access to the outside of the building, but did open into a hallway inside the residence. Again, it appears that there was little opportunity for the methylene chloride carrying the CS agent to have been directly sprayed into the bunker and that any methylene chloride that was present in the bunker likely drifted into that room after it was sprayed into one or more of the rooms along the outside of the structure. But the subcommittees again note that the videotape of the insertion of CS on April 19 indicates that one of the CEV's drove into the structure near the bunker during the fourth phase of the CS insertion. If the door to the bunker had been open at that time, it is possible that methylene chloride carrying the CS agent might have been injected directly into the bunker.

Based on this possibility the subcommittees attempted to determine, as a worst case scenario, the concentration of methylene chloride that would have been present in that room had the CEV emptied the entire contents of one of its CS containers into the bunker. It appears, however, that even in that event the concentration of CS would not have reached lethal levels.

The volume of the bunker room was approximately 44.40 cubic meters. Assuming that an entire cylinder of CS (with 1,070 grams of methylene chloride as a disbursant) was injected into the room, the concentration at that moment would have been 24,099 mgs/m^3.[552] Even if the CEV that was mounted with four cylinders of CS inserted the contents of all four containers into the bunker, the resulting concentration would have been 96,396 mgs/m^3.[553] Both of these figures are well below the concentrations estimated to be lethal to rats.[554]

Another worse case scenario considered by the subcommittees was the possibility that one of the CEV's might have delivered the entire contents of one of its cylinders of CS agent into one of the smallest rooms of the residence, and that that room was inhabited at the time. It still appears that the concentration of methylene chloride would not have reached lethal levels. The smallest rooms in the structure were the women's quarters located on the second floor of the residence. The smallest of these had a total volume of 16.17 cubic meters. Assuming that an entire cylinder of CS had been injected into this room, the concentration of methylene chloride at that moment would have been 66,171.93 mgs/m^3.[555] Assuming further that a number of Ferret rounds also happened to be fired into the room at the exact moment that the CS was injected by the CEV (assume, for example, an event as unlikely as 20 rounds entering the room at the same instant), the concentration at that instant would have been 106,988 mgs/m^3.[556] Again, these figures fall far below the concentrations estimated to be lethal to rats.

3. Other possible effects of methylene chloride used with CS at Waco

While the subcommittees conclude that the levels of methylene chloride did not reach lethal toxic levels, the subcommittees also considered whether the levels of methylene chloride may have affected the Davidians in other ways. At levels over 1,000 parts per million (ppm) anaesthetic effects begin to occur in humans.[557] At levels above 2,300 ppm, exposure to methylene chloride may cause dizziness.[558]

Because methylene chloride evaporates rapidly when released into the air, the subcommittees considered separately the concentrations of methylene chloride during each of the four phases of the CS agent insertion. The levels of methylene chloride were greatest during the first two phases (because one of the CEV's was unable to inject the CS agent/methylene chloride mixture during the third and fourth phase).

During the first and second phases, six cylinders of CS agent were inserted into the residence, delivering approximately 6,420 grams of methylene chloride in each phase.[559] Assuming that all of the CS inserted by the CEV's during one phase was inserted at a single moment, and that approximately ¼ of the Ferret round projectiles used during the entire operation also entering the building at that same time (thus adding an additional 3,300 grams of methylene chloride in each phase[560]), and that the Davidian residence was airtight, the concentration of methylene chloride during each of the first two phases would have been 548 ppm.[561]

[551] It should be noted, however, that none of the autopsies of the persons found in the bunker indicate the cause of death was from exposure to methylene chloride.

[552] Each cylinder of CS contained 1,070 grams, or 1,070,000 milligrams, of methylene chloride. 1,070,000 mgs/ 44.40 m^3 = 214,099 mgs/ m^3.

[553] 4,280,000 mgs/ 44.40 m^3 = 96,396 mgs/m^3.

[554] As stated, there are no studies estimating the lethal concentration levels to humans of exposure to methylene chloride.

[555] Each cylinder of CS agent contained 1,070 grams of methylene chloride, or 1,070,000 milligrams. 1,070,000 mgs/ 16.17 m^3 = 66,171 mgs/ m^3.

[556] 1,070 grams of methylene chloride from a CEV plus 660 grams of methylene chloride from 20 Ferret rounds is a total of 1,730 grams (1,070 + (33 x 20) = 1,730), or 1,730,000 milligrams. 1,730,000 mgs/ 16.17 m^3 = 106,988 mgs/m^3.

[557] 2 G. Clayton & F. Clayton, Patty's Industrial Hygiene and Toxicology 3449–3455 (1981); R. Stewart et al., Methylene Chloride: Development of a Biological Standard for Industrial Workers by Breath Analysis (1974).

[558] *Id.*

[559] Each cylinder contained 1,070 grams of methylene chloride. Six cylinders totaled 9,720 grams.

[560] Each Ferret round contained 33 grams of methylene chloride. One hundred Ferret rounds thus inserted 3,300 grams of the chemical into the building.

[561] The molecular weight of methylene chloride gas is 85. One mole of methylene chloride gas is 24.2 liters. 9,720g MC/ 85 = 114 moles. 114 moles x 24.2 liters/mole = 2758 liters of MC. There was 5,049,700 liters of volume in the Davidian residence (5.049.7 m^3 x 1000 liters/m^3 = 5,049,700). Thus 2767.34/ 5,049,700 x 10^6 = 548 ppm.

At this concentration, studies have shown no observable effects in humans.[562]

In considering the possibility that some methylene chloride was concentrated in certain areas of the residence, rather than being evenly distributed throughout the entire structure, the subcommittees found that it was possible that the levels of methylene chloride reached concentrations that might have caused levels that produced an anaesthetic effects in humans.

Again, the subcommittees considered the possible concentration in the bunker, as the largest group of bodies recovered after the fire was found there. The volume of the bunker room was approximately 44.40 cubic meters. Assuming that an entire cylinder of CS (with 1,070 grams of methylene chloride as a disbursant) was injected into the room, the concentration at that moment would have been 6,861 ppm.[563] This concentration was sufficient to induce dizziness and other anaesthetic effects in humans.

As stated, however, the evidence is not determinative as to whether one of the CEV's did, in fact, insert CS directly into the bunker. Additionally, it is unknown if the bunker door was open or closed, a factor that would have significantly affected the concentration levels inside the room. Finally, the air circulation inside the building would have affected the levels of methylene chloride present at any one time. The subcommittees conclude, however, that it is possible that the levels of methylene chloride in the bunker were such that the chemical impaired the Davidians' ability to escape the room. Additionally, the possibility cannot be dismissed that other Davidians, in other areas of the residence, might have been similarly adversely affected if they were directly exposed to an insertion of an entire cylinder of the CS agent/methylene chloride mixture. Thus, the levels of methylene chloride that were present in the Davidian residence as a result of the use of the CS riot control agent might have impaired the ability of some of the Davidians to be able to leave the residence had they otherwise wished to do so.

G. ANALYSIS OF THE ATTORNEY GENERAL'S DECISION TO END THE STANDOFF ON APRIL 19, 1993

1. The decision not to storm the residence

The subcommittees received testimony concerning the FBI's decision not to storm the residence in order to end the standoff. Additionally, the Justice Department Report on these events also discusses the factors that went into this decision. According to that report, FBI tactical experts believed that there was a substantial likelihood of significant casualties to FBI agents if a frontal assault on the residence was attempted. The FBI believed that the Davidians had fortified the residence and were ready to offer resistance equal to or perhaps even greater than that they had showed during the failed February 28 assault on the residence by the ATF. The FBI was also concerned about the possibility of suicide by the Davidians in the event of such an assault.[564]

Experts on tactics testified before the subcommittees that a frontal assault is one of the riskiest types of tactical operations.[565] That risk was even greater in this situation given the large size of the structure and the wide-open areas around the structure with the resulting lack of cover for any approach to the residence.

The FBI's decision to pursue options other than a frontal assault in order to end the standoff was a wise one. It seems clear that a raid, even one better planned than that of the ATF of February 28, was of unacceptably high risk. It is likely that FBI agents would have sustained casualties in such an assault. Any assault on the Branch Davidian residence also risked the lives of the Davidians. Additionally, the FBI appropriately considered the possibility of suicide by the Davidians in the event of an assault.

2. The reasons asserted for ending the standoff on day 51

a. The situation would not soon be resolved

One of the key factors influencing the FBI's decision to recommend to the Attorney General that the standoff be ended on day 51 was the belief by FBI officials that continuing to negotiate with the Davidians would not lead to their peaceful surrender. At the hearings held by the subcommittees, FBI chief negotiator Byron Sage testified that he believed that further negotiations would not be fruitful.[566] Tactical commander Jeffrey Jamar testified that he was skeptical that negotiations would end the stand-off, and that he became even more skeptical after Koresh reneged on a promise to come out on March 2.[567] Documentary evidence reviewed by the subcommittees indicated, however, that some of the FBI's behavioral experts believed that there were further steps that could be taken through negotiations. Additionally, at the subcommittees' hearings, testimony was received from the attorneys for the Davidians that they believed further negotiations could have led to the Davidians' peaceful surrender.[568]

Sage's view was that Koresh had broken many of the promises he had made throughout the standoff. After a experiencing a number of these broken promises, Sage and the other FBI com-

[562] U.S. Dept. Of Commerce, Agency for Toxic Substances and Disease Registry, Toxicological Profile for Methylene Chloride (1993).

[563] 1,070 g MC/ 85 = 12.59 moles. 12.59 moles x 24.2 liters/mole = 304.63 liters of MC. There was 44,400 liters of volume in the bunker (44.40 m^3 x 1000 liters/m^3 = 44,400). Thus 304.63/ 44,400 x 10^6 = 6,861 ppm.

[564] Justice Department Report at 259.

[565] Hearings Part 2 at 315, 318 (statement of Donald A. Bassett).

[566] "I never abandoned the concept or the hope that negotiations could successfully and peacefully resolve this matter. My statement to [Hubbell] at the time . . . was that I felt that negotiations were at an impasse . . . ." Hearings Part 2 at 345 (statement of Byron Sage).

[567] Hearings Part 2 at 306–307.

[568] *See* section VI E of this report.

manders believed that they could not rely on Koresh's assurances.

Another factor that may have affected the FBI commanders' view of the situation, but which was given little emphasis in the Justice Department Report, is mental and emotional fatigue affecting the FBI decisionmakers. Sage was one of the first FBI agents on the scene on February 28. He worked every day, all day, of the 51 day standoff, and only returned to his home in Austin for a short period of time on 1 day to gather more clothes. Jamar and the other senior FBI commanders were also on site for almost the entire time of the standoff. It seems only natural then, that physical and mental fatigue would begin to set in and that dealing with Koresh's rhetoric and disingenuousness would lead to emotional fatigue as well. Indeed, the Justice Department Report indicates that the law enforcement personnel present were tired and that their "tempers were fraying." [569]

Nevertheless, FBI commanders to become firmly convinced that nothing more would come from further negotiations with Koresh. That belief was communicated by Sage to Associate Attorney General Webster Hubbell during a 2-hour telephone conversation on April 15.[570] This belief played a crucial role in influencing Attorney General Reno's decision to end the standoff on April 19.[571]

During the hearings, however, the subcommittees received testimony from the Davidians' attorneys that Koresh was hard at work writing his interpretation of the Seven Seals discussed in the Book of Revelation in the Bible. They believe that Koresh was willing to surrender when he finished his writing.

The FBI's commanders knew of Koresh's desire to write this manuscript but did not believe he was actually working on it. It appears that fatigue and frustration at the lack of achieving success in obtaining the release of additional Davidians may have led the negotiators to be less than receptive to this information. That the negotiators were not open to this new information, and did not pass it on to their superiors, played a part in the Attorney General's decision to end the standoff on April 19 and in the manner chosen to end it.

b. The Davidians might attempt a breakout, possibly using the children as shields

Another factor that went into the FBI's recommendation to the Attorney General to end the standoff on day 51 was the fear that the Davidians might attempt to breakout of the residence using the children as human shields. According to the Justice Department Report, "some [unnamed] experts" had suggested this possibility and that to combat this possibility, the FBI had to be certain that its best trained troops (the Hostage Rescue Team members) would be on the scene.[572] There was some doubt as to how much longer the HRT could remain at the residence.

There was little evidence to support this fear. At no time did Koresh or Schneider threaten that the Davidians might attempt to break out of the residence or take any other offensive action. In fact, from February 28 to April 19 all of the Davidians' actions could be viewed as defensive in nature—defending what they believed to be sacred ground, their residence. Given the Davidians' professed devotion to their residence, it is difficult to understand why the FBI thought the Davidians would try to leave. Given that the FBI also knew that the Davidians were very much aware of the perimeter security around the residence it is difficult to understand why the FBI thought the Davidians believed they could escape. In short, there appears to have been little support for the FBI's concern that the Davidians would try to break out of the residence. To the extent it played a part in the FBI's decision to recommend that the standoff be ended on April 19, this unfounded fear contributed to the tragic results of that day. The Attorney General knew or should have known that the fear of breakout argument was unfounded.

c. The FBI Hostage Rescue Team needed rest and retraining

According to the Justice Department Report, another important factor that played a part in the Attorney General's decision to end the standoff on April 19 was concern over the continuing readiness of the Hostage Rescue Team.[573] It is unquestioned that the HRT possesses more skills and skills that are more highly developed that any other civilian tactical unit within the Federal Government. These skills need constant use in order to be retained, much as a superior athlete must train each day to maintain his or her level of athletic skill. Without that training, these skills begin to deteriorate.

According to the Justice Department Report and testimony presented to the subcommittees, the concern about the possible deterioration in HRT skills was raised at a meeting of Justice Department and FBI officials with the Attorney General on April 14, 1993.[574] By that date, the HRT members had been present at the Branch Davidian center for almost 7 weeks without the opportunity for the type of training that they otherwise would be pursuing every day. Also present at that meeting were several military officers. As a Defense De-

[569] Justice Department Report at 271.
[570] *Id.* at 270.
[571] *Id.*

[572] *Id.* at 261.
[573] The FBI's HRT is comprised of FBI special agents selected through a rigorous screening program. Unique in Federal law enforcement, the HRT trains 5 days a week, all year in tactics related to its mission to take control of and end hostage and barricade situations without loss of life to any innocent persons who may be involved. Unlike the several FBI SWAT teams or ATF SRT teams, HRT members do not carry an investigative case load in addition to their tactical duties. Thus, they train each working day, whereas the SWAT and SRT members conduct tactical training only a few days each month.
[574] Justice Department Report at 268.

partment witness testified before the subcommittees, the officers explained that they were present at the April 14, 1993 meeting at the invitation of FBI officials in order to answer any questions that the Attorney General might pose to them about ending the standoff. The officers had been selected because of their special tactical training and experience. During the meeting, one of the officers advised the Attorney General that if the HRT were military troops under his command he would recommend pulling them away from the Branch Davidian center for rest and retraining.[575]

According to the Justice Department report, HRT commander Dick Rogers informed the Attorney General that the HRT members "were not too fatigued to perform in top capacity in any tactical operation at that time" but that if the standoff continued for any extended period of time he would recommend that they "stand down" for rest and retraining.[576] At the subcommittees' hearings Mr. Rogers and Floyd Clarke, Deputy Director of the FBI in early 1993, each testified that they believed the HRT could have remained on site for at least 2 additional weeks before he would have recommended that they "stand down."[577]

The point at which the deterioration of HRT members skills becomes unacceptable is not a fact which appears to be readily quantifiable, but rather is a matter of informed judgment. Nothing in the evidence presented to the subcommittees leads to the conclusion that the HRT members' skills were not deteriorating or that the recommendation of the military officers and the HRT commander to remove the HRT members for rest and retraining was not well-informed. But this observation does not answer the questions of what weight this fact should have played in the Attorney General's decision to end the standoff on day 51.

The Justice Department Report states that the Attorney General discussed with the FBI the possibility of using FBI SWAT teams to relieve the HRT for a time so that the HRT could be pulled from the scene, rested, and retrained but that the FBI discouraged that option and took the position that it should be used only as a last resort. At the hearings before the subcommittees, however, Floyd Clarke, Deputy Director of the FBI in early 1993, testified that the FBI was formulating plans to use FBI SWAT teams in place of the HRT teams if the Attorney General did not approve the plan to end the standoff in mid-April.[578]

The FBI testified that the qualification of its several SWAT teams do not equal that of the HRT. What must be considered, however, is the actual task for which the SWAT teams would have been used. It would not have been an attempt to enter and take control of the residence. As the Justice Department Report and hearing testimony made clear, during the 51 day standoff the HRT was used only for perimeter security—keeping the Davidians in and outsiders out of the residence. Had the HRT had been relieved by SWAT teams, they would have been assigned to the same task. In short, while HRT capabilities exceed SWAT capabilities, the HRT's additional capabilities are not those essential to the task of securing the perimeter of a crime scene.

Given that the threat of a Branch Davidian breakout was minimal at most, it appears that the FBI was overcautious in informing the Attorney General that its own SWAT teams were not capable of securing the residence perimeter.[579] While the HRT might best have done the job of securing the residence, nothing in the record suggests that the SWAT teams could not have done that job adequately for a short time. Indeed, had the Attorney General not approved the plan to end the standoff in mid-April, the FBI was planning to use its SWAT teams to relieve the HRT. It does not appear that the FBI informed the Attorney General of this fact, however.

Representatives of the Texas Rangers testified before the subcommittees that they believed that State police SWAT teams could have relieved the FBI HRT and maintained the perimeter while the HRT was rested.[580] Representatives of the Texas Rangers interviewed by subcommittees' staff stated that the Texas State police did offer to assist

[575] Hearings Part 3 at 304, 314 (statement of Allen Holmes, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict).

[576] Justice Department Report at 268.

[577] Hearings Part 2 at 577 (statement of Dick Rogers); Hearings Part 3 at 73 (statement of Floyd Clarke).

[578] Hearings Part 3 at 73 (statement of Floyd Clarke).

[579] For example, the Justice Department points to the fact that HRT members had been training in the maneuvering of the armored vehicles loaned to the FBI by the military, implying that the SWAT teams did not have this training. Yet, even the HRT members had to receive remedial training on the use of these vehicles while at the residence. In fact, at one point, an armored vehicle driven by an HRT member who was being retrained drove over an automobile belonging to a member of the press, destroying the vehicle. Surely it would not have taken much more training to enable the SWAT members to perform their task adequately, even if it were not up to HRT skill levels. It is unclear why the SWAT members could not have received sufficient training to drive these vehicles around the perimeter of the residence.

[580] Mr. McCollum: In your opinion, knowing the Texas officers, you all don't have SWAT teams, do you, the Texas Rangers, but the State police do, don't they?

Mr. Byrnes: Yes, they have a SWAT team.

Mr. McCollum: Either the State police or the local officials in the area, were there SWAT teams or combinations thereof that could have been put together from State law enforcement or local law enforcement that could have maintained that perimeter for a few days or a week or two, if necessary, to let this FBI hostage team regroup had the negotiations continued for another month or something?

Mr. Byrnes: Well, to answer your question, just generically, yes. Frankly, I don't know. And let me say that the HRT team, in my opinion, is probably the most highly trained unit for what they are doing in the world, and I think they were the people to be there.

Mr. McCollum: I don't doubt that for a minute. I am not even questioning that, I am just asking because I know you may not know all of this, but we have looked into it, and it appears that is a factor. We are going to hear more from them.

Mr. Byrnes: I never heard that before.

Mr. McCollum: Whether it is or not, the question I was really asking, just because you are here tonight, you believe that, at least form the standpoint of holding the perimeter—and I would ask that to you as well, Captain Cook—that State police or SWAT teams from local police units could have been mustered if you had been asked and consulted with to do that, even though they wouldn't have been as effective at it perhaps as the FBI's HRT team. Is that right or not?

Mr. Cook: I think it could have been accomplished. I think that is just a basic law enforcement trait, No. 1. We have police officers trained in different areas. Hearings Part 2 at 198.

the FBI in maintaining the perimeter during the standoff but that this offer was rejected.

The FBI's decision to reject outside assistance is consistent with the prevailing FBI attitude of resisting any involvement from other agencies, whether Federal, State, or local. This attitude is counterproductive. While the subcommittees cannot evaluate the capabilities of the Texas State police, and are mindful of the command and control problems that may be encountered when bringing together members for organizations that have had no previous experience together, it appears shortsighted for the FBI to have rejected out of hand the offer of assistance from the State police and, specifically for not considering using State police SWAT teams to help maintain the perimeter around the Branch Davidian residence. Given FBI concerns with the size of the perimeter to be maintained, it would seem that these additional personnel could have been of some assistance to the FBI, even if they were used in a merely supporting role, such as at a secondary perimeter established beyond that maintained by the FBI.

While using FBI SWAT teams to relieve the HRT might not have been the optimal approach to the problem, using them (perhaps augmented by State police teams) would have enabled the FBI to rest and retrain the HRT so that it could have been redeployed to the scene after an appropriate time. The FBI's failure to recommend to the Attorney General that SWAT teams be used to relieve the HRT, or to inform her that the FBI planned to use them for this very purpose had she not approved the plan to end the standoff, limited the options and created an unnecessary sense of urgency about ending the standoff. The Attorney General knew or should have known that the HRT did not need to stand down to rest or retrain for at least 2 more weeks after April 19, and if and when it did stand down, FBI and local law enforcement SWAT teams could have been brought in to maintain the perimeter. If she did not know the true facts it is because she did not ask the questions of the FBI that a reasonably prudent person faced with the decision would have asked. If the Attorney General did ask these questions, someone in the FBI lied to her or was grossly negligent in reporting the facts. If the latter was the case, the responsible party should have been disciplined long ago. The absence of such action leads the subcommittees to conclude that the Attorney General was herself negligent.

d. Conditions inside the residence were deteriorating

Another factor that the Attorney General says played a part in her decision to end the standoff on April 19 was a concern about deteriorating conditions inside the residence. There is little support for this concern and it should not have played any significant part of the decision to end the standoff.

The concern about deteriorating conditions is mentioned in only two places in the Justice Department Report.[581] The report also States, however, that the FBI became convinced that while Koresh was rationing water to ensure discipline he was continuing to replenish the water supply.[582] The report further States that the FBI believed that the Davidians had food to last up to 1 year.

In short, if the concern about conditions inside the residence was a factor in the Attorney General's decision, it could only have been about lack of electricity or the lack of sanitation inside the residence. While electricity to the residence was cut off for the final time on March 12,[583] the Davidians had kerosene lamps inside the residence which they used to illumine the interior. And while the Davidians had no way to cook food, they had ample stores of food that did not need to be cooked. In short, there is no evidence that the lack of electricity resulted in any real harm to the Davidians.

The purported concern over sanitary conditions inside the residence is also exaggerated. Even before the February 28 raid, the Davidians had never had running water or other sanitation inside the residence. Human waste was collected in buckets and other containers each day and taken outside to an designated dumping site for the waste. During the standoff, waste was dumped into the half-finished swimming pool next to the residence. Apart from the odor from the swimming pool, however, there is no evidence that the materials in the pool was leaking or leeching into the residence. At the hearings before the subcommittees, one of the surviving Davidians testified that sanitation "was no worse on the last day than it was throughout the fifty-one days."[584] The assertion in the Justice Department Report that "sanitary conditions had deteriorated significantly" is simply incorrect.

In summary, the conditions inside the residence had changed only slightly from those in which the Davidians lived before February 28. The conditions appear to not have presented any immediate health risk to the adults or children inside the residence. If concerns about these conditions played a role in the Attorney General's decision to end the standoff on April 19, they were unfounded and she knew or should have known this.

e. There was the possibility of on-going physical and sexual child abuse

The Justice Department Report states that during the week of April 12, an (unnamed) individual informed the Attorney General that the FBI had learned that the Davidians were physically abusing the children in the residence and that this abuse had occurred after February 28. The report states, "[T]he Attorney General had no doubt that

[581] Justice Department Report at 269, 275.
[582] *Id.* at 269–270.
[583] *Id.* at 67.
[584] Hearings Part 3 at 195 (statement of Clive Doyle).

the children were living in intolerable conditions." The report goes on to State that the Attorney General had been told that Koresh had sexually abused minors in the past and "continued to have sex while recovering from his wounds."[585] The report does not State on what intelligence these assertions were based.

In another part of the report, however, the Justice Department admits that the FBI had no direct evidence of physical or sexual abuse. As the reports states,

> [T]here was no direct evidence establishing that any children were being either sexually abused of physically abused the February 28 through April 19 time period. There were circumstantial indications, however, that the children were living in a deteriorating environment, and that the prospect of living in a deteriorating environment, and that the prospect of sexual or physical abuse was likely as the standoff continued.[586]

There is little circumstantial evidence revealed in the report as well.

It is clear that Koresh sexually abused minor females at the residence, in addition to having consensual sexual relations with a several of the adult females who lived there. A number of former Davidians provided affidavits detailing these sexual relations, including the sexual abuse involving minors females. Joyce Sparks, an employee of the Texas Children's Protective Services agency provided the FBI with a report of an interview she conducted with a child who lived at the residence detailing an incident of sexual abuse. This child testified about her experience before the subcommittees at the July hearings. Also, during conversation between the FBI and Steve Schneider during the week of April 14, Schneider admitted that he knew of Koresh's sexual abuse of a minor female.[587] While all of these incidents occurred prior to February 28, FBI behavioral expert Dr. Park Dietz, in an April 17 memoranda to the FBI, opined that "Koresh may continue to make sexual use of any minor female children who remain inside."[588]

It also appears certain that Koresh employed severe physical punishments as a means of disciplining the children. A March 26 report of Dr. Bruce Perry, a child psychiatrist who interviewed the children who had been released during the standoff, confirmed that Koresh physically abused children who had misbehaved.[589]

On April 19, the Attorney General made several television statements during which she stated that her concern of on-going child abuse was factor that led her to decide to end the standoff. While the Attorney General's concerns for the children's welfare were real, there was no reliable evidence that conditions inside the compound had worsened substantially from those existing prior to the February raid or that the Davidian children were suffering greater harms than they had in the past. Additionally, as the Justice Department report makes clear, the Attorney General was aware of the potential for extreme danger to the children in pursuing the FBI's assault plan.[590]

Given the lack of evidence that the children inside the compound faced immediate life-threatening harm from the ongoing standoff and the Attorney General's awareness of the extreme risks of an assault, including the potential for serious or even life-threatening injury to the children, the Attorney General's decision to approve the raid based on concerns for the children's welfare was flawed.

While the Justice Department Report tries to downplay this factor by asserting that the Attorney General was more influenced by other factors,[591] the Attorney General's public statements on and after April 19 indicate otherwise. Particularly troublesome is the statement in the Justice Department report that "[u]ltimately, it made no difference whether the children were undergoing contemporaneous abuse, because the environment inside the residence was intolerable in any event."[592] This statement is an attempt to mask the fact that the Attorney General either was misinformed or misunderstood what was happening inside the residence as of the third week of April or intentionally exaggerated the conditions to provide an excuse for approving the plan she knew could likely end in violence and put the children at greater risk.

3. The decision as to how to implement the plan

a. The FBI's mindset—"This is not an assault"

At 5:59 a.m. on April 19, FBI chief negotiator Byron Sage spoke with Steve Schneider by telephone and told him, "[W]e're in the process of putting tear gas into the building. This is not an assault. We will not enter the building."[593] Schneider responded by throwing the telephone out of the residence. Sage then began to broadcast the following message over loudspeakers pointed toward the residence:

> We are in the process of placing tear gas into the building. This is not an assault. We are not entering the building. This is not an assault. Do not fire your

[585] Justice Department Report at 275.
[586] *Id.* at 226.
[587] *Id.* at 222–223.
[588] *Id.* at 223.
[589] *Id.* at 223–224.
[590] The Attorney General ruled out a proposal to end the standoff during the weekend of April 17 because of her concern about the availability of emergency rooms. In addition, during pre-raid approval meetings she questioned the FBI's planned response to the potential threat of individuals carrying children while firing weapons, and to the possibility of children being held up windows and being threatened to be shot. *Id.* at 272–273.
[591] *Id.* at 216.
[592] *Id.* at 217.
[593] *Id.* at 286.

weapons. If you fire, fire will be returned. Do not shoot. This is not an assault. The gas you smell is a non-lethal tear gas. This gas will temporarily render the building uninhabitable. Exit the residence now and follow instructions.

You are not to have anyone in the tower. The tower is off limits. No one is to be in the tower. Anyone observed to be in the tower will be considered to be an act of aggression and will be dealt with accordingly.

If you come out now, you will not be harmed. Follow all instructions. Come out with your hands up. Carry nothing. Come out of the building and walk up the driveway toward the Double-E Ranch Road. Walk toward the large Red Cross flag.

Follow all instructions of the FBI agents in the Bradleys. Follow all instructions.

You are under arrest. This standoff is over.

We do not want to hurt anyone. Follow all instructions. This is not an assault. Do not fire any weapons. We do not want anyone hurt.

Gas will continue to be delivered until everyone is out of the building.[594]

Immediately after Sage spoke with Schneider, two CEV's approached the residence. Both CEV's were fitted with a long triangular boom-like arm on which was fitted a device that would spray CS agent mixed with carbon dioxide. The CEV's were maneuvered close enough to the residence so that the boom could be rammed into and through the wall of the building. The operator then inserted CS agent into the building using the device affixed to the boom of the CEV. Insertions of CS agent by the CEV's occurred in four distinct phases throughout the morning of the April 19.

During this phase of the plan, FBI agents in the Bradleys also maneuvered close to the residence. The agents used hand-held grenade launchers to fire CS agent in projectiles knows as Ferret rounds thorough a firing port in the Bradleys and into the windows of the residence. This activity also went on throughout the morning of the 19th.

As Sage testified at the subcommittees' hearings, the FBI did not consider these actions to be an assault against the residence. To Sage, the fact that the FBI did not plan to enter the residence at any time, and did not enter the residence, was determinative as to whether the operation was an assault. While this distinction may have made complete sense to the FBI, it made sense only because FBI agents, and especially HRT members, deal with these concepts each day as part of their duties.

The FBI assessed the situation only on their terms. They failed to consider how their actions would be perceived by those who were the targets of their actions—the Davidians inside the residence. This failure was a significant error.

b. The FBI's failure to consider the "Reasonable Branch Davidian"

As the FBI implemented its plan to end the stand-off the Branch Davidians were confronted with the sound of military vehicles approaching their home, the vibrations from holes being rammed into the sides of their home, and by the effects of a gas-like substance being sprayed into their home. Most people would consider this to be an attack on them—an "assault" in the simplest terms. If they then saw other military vehicles approaching, from which projectiles were fired through the windows of their home, most people are even more likely to believe that they were under an assault. If those vehicles then began to tear down their home there would be little doubt that they were being attacked. These events are what the Davidians inside the residence experienced on April 19, yet the FBI did not consider their actions an assault.

Compounding this situation is the fact that the Davidians were not "most people." They were a close-knit group with ties to their home stronger than those of most people. The Davidians considered their residence to be sacred ground. Their religious leader led them to believe that one day a group of outsiders, non-believers, most likely in the form of government agents, would come for them. Indeed, they believed that this destiny had been predicted 2,000 years before in Biblical prophecy. Given this mindset, it can hardly be disputed that the Davidians thought they were under assault at 6 a.m. on April 19.

The FBI's failure to consider how the Davidians might respond to their actions was important. The FBI's operations plan called for a systematic insertion of the CS riot control agent at different intervals throughout the day. But the plan also called for a back-up operation if the armored vehicles used in the operation came under fire. This contingency plan involved rapid insertion of CS agent and the eventual "deconstruction" or tearing down of the residence itself. The vehicles came under fire almost immediately after the gas insertion began. The FBI resorted to their fall-back plan as of 6:07 a.m.[595]

As the Justice Department Report makes clear, the majority of the FBI's briefing to the Attorney General involved the main FBI plan involving the deliberate, slow insertion of CS agent. Little discussion apparently took place about the contingency provision in the plan calling for the rapid insertion of CS agent and the deconstruction of the residence.

Curiously, the FBI seemed to know that their principal plan would not govern the way that

[594] *Id.* at 286–287.

[595] *Id.* at 288–289.

events would actually unfold on April 19. The FBI's overall commander, Jeffrey Jamar, testified at the subcommittees' hearings that he had a belief to a 99 percent certainty that the contingency plan would be implemented, as he believed the Davidians would open fire on the CEV's. As he testified before the subcommittees, "I believed it was 99 percent when we approached with the tank they would fire. I believe that. Not all people agree with me on that, but I believed that at the time, yes."[596] Although the Justice Department Report does not mention that Jamar informed his superiors of his belief, it is clear the Attorney General also believed the Davidians would open fire on the FBI. In referenced to firing on the FBI, the Attorney General testified that she "knew what these men would do."[597]

It cannot be known whether the Attorney General would have decided differently had she known that the FBI expected the contingency provisions of the operations plan to be implemented. What is clear is that she never had the opportunity to consider this fact because the FBI believed that their actions did not constitute an attack, based on an incomplete understanding of the Davidians. Had the FBI considered how the Davidians would perceive their actions they might have been able to predict that the fall back plan would be used. If this fact had been communicated to the Attorney General she might have decided things differently.

H. PRESIDENTIAL INVOLVEMENT IN THE EVENTS AT WACO, TX

The involvement of the White House occurred in several ways. According to White House Chief of Staff Mack McLarty, two parallel lines of communication existed—one from Acting Assistant Attorney General Stuart Gerson to McLarty, and the other from Gerson to White House Counsel Bernard Nussbaum. Senior advisor Bruce Lindsey also kept informed on developments in Waco.[598]

No White House officials objected to the plan to end the standoff at an April 13, 1993 meeting between White House and Justice Department officials, including Hubbell, Nussbaum, Lindsey and Deputy White House Counsel Vince Foster. On Sunday, April 18, 1993, Reno called the President to inform him that she had decided to approve the FBI's request to use CS as part of a plan to end the standoff. The President told Reno "it is your decision."[599] Clinton later told the American people, "I was aware [of the plan to insert CS into the residence.] I think the Attorney General made the decision. I knew it was going to be done, but the decisions were entirely theirs."[600]

I. FINDINGS CONCERNING THE PLAN TO END THE STANDOFF

1. The Attorney General's decision to end the standoff on day 51 was premature, wrong, and highly irresponsible. The decision by Attorney General Janet Reno to approve the FBI's plan to end the standoff on April 19 was premature, wrong, and highly irresponsible. In authorizing the CS assault to proceed Attorney General Reno was seriously negligent. The Attorney General knew or should have known that the plan to end the stand-off would endanger the lives of the Davidians inside the residence, including the children. The Attorney General knew or should have known that there was little risk to the FBI agents, society as a whole, or to the Davidians from continuing this standoff and that the possibility of a peaceful resolution continued to exist.

a. The "benefits" of avoiding problems were not properly evaluated. The FBI's belief that the standoff was likely to continue indefinitely was too pessimistic given the advice of behaviorist Dr. Murray Myron and the Davidians' attorneys that Koresh was turning his attention to what he considered to be his principal theological work, his interpretation of the meaning of the Seven Seals. As they believed that no resolution was possible through further negotiations, the FBI wrongly concluded and convinced the Attorney General that there was no alternative to going forward with the plan to end the standoff. The only issue was timing. There was also no need to rush into action on April 19, but having lost patience with the negotiating process and facing an initially reluctant Attorney General, FBI officials manufactured or grossly exaggerated arguments for urgency.

There was never any overt act or even a statement made by Koresh to support the FBI's asserted fear that the Davidians might try a breakout. Using the threat of a breakout as a reason to go forward with the CS assault plan sooner rather than continue the negotiations was wrong. The FBI and the Attorney General knew or should have known there was no remotely imminent threat of such a breakout. Also, there was no reason to go forward on April 19 out of concern that the HRT was exhausted and needed to step down for retraining. According to the HRT's own commander, the HRT could have remained on duty at the residence for at least 2 more weeks. In addition, FBI and local law enforcement SWAT teams could have been brought in to maintain the perimeter if the HRT had to step down for a short time. The FBI and the Attorney General knew or should have known this.

The Attorney General wrongly based her decision to act in part on concerns that the conditions

[596] Hearings Part 2 at 484.

[597] Hearings Part 3 at 367. The Attorney General testified:

"I think it is important that when you consider the use of tanks that they be considered as vehicles providing the armored capacity to prevent the penetration of these—this ammunition that we knew Koresh had. I can't speak to whatever was done prior to the time I took office, but, clearly, with respect to the day of April the 19th, I could not put FBI agents out there exposed *when I knew what these men would do and when they started immediately to fire on the FBI. Id.* [emphasis added].

[598] Justice Department Report at 242.

[599] *Id.*

[600] White House statement, April 19, 1993.

inside the residence were deteriorating and that children were being abused. There was no evidence that sanitary and other living conditions inside the residence, stark at the beginning of the standoff, had deteriorated appreciably during the standoff. Further, while there is no question that physical and sexual abuse of minors occurred prior to February 28 and may have continued thereafter, there is no evidence that minors were being subjected to any greater risk of physical or sexual abuse during the stand-off than prior to February 28. The Attorney General knew or should have known this. In light of the risk to the children from a forced end to the stand-off, and the remaining possibility of a peaceful resolution, it was inappropriate for the Attorney General to have been occupied with apprehending Koresh for violations of State law which were outside her jurisdiction to enforce.

b. The risks of ending the standoff were not fully appreciated. In deciding to end the standoff on April 19, the FBI and the Attorney General failed to properly evaluate the risks to the Davidians of the FBI's operational plan. The FBI's plan was based on an assumption that most reasonable people would flee the residence when CS agent was introduced. The FBI failed to fully appreciate the fact that the Davidians could not be relied upon to act as other reasonable people might. The FBI failed to properly account for the Davidians' resolve, group cohesiveness, and loyalty to what they believed to be sacred ground.

More troubling is the fact that the FBI commanders either knew or should have known that the contingency provisions of the plan presented to the Attorney General would likely be implemented. While the plan as described to the Attorney General called for a slow and deliberate insertion of CS agent in an effort to deny the Davidians access to some areas of the residence and encourage them to exit the residence in specific locations, the contingency provision in the plan called for much larger quantities of CS to be inserted all at once, and in all areas of the residence, if the Davidians opened fire on the agents inside the CEV's. The result of the contingency provision would be much larger quantities of CS being present inside the residence with the attendant greater likelihood that harmful concentrations might be reached, and also the strong likelihood that the all-out assault would cause panic in the people inside the residence.

Jeffrey Jamar, the FBI's overall commander at the residence testified before the subcommittees that he believed there was 99 percent chance that the contingency provision would be implemented because the Davidians would open fire on the FBI against. Clearly, given the Davidians' actions in response to the ATF raid on February 28, it was almost certain that the Davidians would respond to the FBI's actions with gunfire. Yet, Jamar never communicated his opinion to the Attorney General, or apparently to anyone else for that matter. Other senior FBI officials, however, should have realized that the Davidians would respond with gunfire and that the contingency provision of the plan would be quickly implemented. Given this, they should have more fully briefed the Attorney General on this aspect of the plan.

More importantly, however, the Attorney General herself admitted during her testimony before the subcommittees that she expected the Davidians to fire on the tanks, and that she understood that if they did the rapid acceleration of contingency plan would be implemented. It is evident the Attorney General knew or should have known that the contingency provision of the plan would be implemented once the operation began on April 19, that the Davidians would not react by leaving the residence as suggested by the FBI, and that there was a possibility that a violent and perhaps suicidal reaction would occur within the residence. At no time has the Attorney General indicated that she reflected on the consequences of the possibility. At the very least this demonstrates gross negligence on the part of the Attorney General in authorizing the plan to proceed.

3. FBI commanders in Waco prematurely ruled-out the possibility of a negotiated end to the stand-off. After Koresh and the Davidians broke a promise to come out on March 2, FBI tactical commander Jeffrey Jamar viewed all statements of Koresh with extreme skepticism and thought the chances for a negotiated surrender remote. While chief negotiator Byron Sage may have held out hope longer, FBI officials on the ground had effectively ruled out a negotiated end long before April 19 and had closed minds when presented with evidence of a possible negotiated end involving Koresh's work on interpreting the Seven Seals described in the Bible's Book of Revelation.

4. FBI tactical commander Jeffrey Jamar and senior FBI and Justice Department officials acted irresponsibly in advising the Attorney General to go forward with the plan to end the stand-off on April 19. Jamar and senior FBI and Justice Department officials advising the Attorney General knew or should have known that of the reasons given to end negotiations and go forward with the plan to end the stand-off on April 19 lacked merit. To urge these as an excuse to act at the time the Attorney General made the decision to do so was wrong and highly irresponsible.

5. The FBI's refusal to ask for or accept the assistance of other law enforcement agencies during the stand-off demonstrated an institutional bias at the FBI against accepting and utilizing such assistance. Throughout the 51 day stand-off the FBI refused to ask for the assistance of other law enforcement agencies and even refused offers of such assistance. The subcommittees find that there is an institutional bias inside the FBI against allowing other agencies to partici-

pate in FBI operations. Such bias is short-sighted and, in this case, proved to be counter-productive in that the failure to seek or accept assistance added to the pressure to end the stand-off on April 19.

6. It is unlikely that the CS riot control agents used by the FBI reached toxic levels, however, in the manner in which the CS was used the FBI failed to demonstrate sufficient concern for the presence of young children, pregnant women, the elderly, and those with respiratory conditions. CS riot control agent is capable of causing immediate, acute and severe physical distress to exposed individuals, especially young children, pregnant women, the elderly, and those with respiratory conditions. In some cases, severe or extended exposure can lead to incapacitation. Evidence presented to the subcommittees show that in enclosed spaces, such as the bunker, the use of CS riot control agent significantly increases the possibility that lethal levels will be reached, and the possibility of harm significantly increases. In view of the risks posed by insertion of CS into enclosed spaces, particularly the bunker, the FBI failed to demonstrate sufficient concern for the presence of young children, pregnant women, the elderly, and those with respiratory conditions. While it cannot be concluded with certainty, it is unlikely that the CS riot control agent, in the quantities used by the FBI, reached lethal toxic levels. The presented evidence does indicate that CS insertion into the enclosed bunker, at a time when women and children were assembled inside that enclosed space (i.e., during the fourth CS riot control agent insertion), could have been a proximate cause of or directly resulted in some or all of the deaths attributed to asphyxiation in the autopsy reports.

It is clear from the testimony at the hearings that the FBI expected the adult members of the community to care for the children by removing them from exposure to the CS agent by coming out of the residence with them. This presumption was flawed. As the Defense Department's witness testified before the subcommittees, one of the two senior military officers who attended the meeting with the Attorney General on April 14, told the Attorney General that during the use of CS mothers might "run off and leave their children." Yet the Attorney General failed to appreciate the fact that this possibility was in direct contravention to a key assumption of the plan's provision for the use of the CS agent—that the adult members of the community would care for the children.

The FBI failed to properly inform the Attorney General of the risks of using CS agent on children by not appreciating the military officer's warning that parents might abandon their children and by not fully apprising the Attorney General that there was little scientific information on the effects of CS on children. While the Attorney General cannot be faulted for relying on the advice given her by persons whose job it was to be fully informed about the use of CS, it appears that the Attorney General failed to fully consider the flawed assumption in the FBI's plan once it should have become obvious to her.

7. There is no evidence that the FBI discharged firearms on April 19.

8. Following the FBI's April 19 assault on the Branch Davidian compound, Attorney General Reno offered her resignation. In light of her ultimate responsibility for the disastrous assault and its resulting deaths the President should have accepted it.

J. RECOMMENDATIONS

1. Federal law enforcement agencies should take steps to foster greater understanding of the target under investigation. The subcommittees feel strongly that government officials failed to fully appreciate the philosophy or mindset of the Davidians. If they had, those officials might have been better able to predict how the Davidians would react to the plans to raid the residence on February 28 and the plan to end the standoff on April 19. If so, perhaps many of the errors made on February 28 and during the standoff could have been avoided.

The subcommittees found troublesome the fact that many of the ATF and FBI officials involved in this matter seemed uninterested in understanding the Davidians' goals and belief system. The views of these officials ranged from assumptions that the Branch Davidian were rational people likely to respond to authorities as would most citizens to a belief that the Davidians were a "cult" which could not be dealt with in any way other than by force. Seldom did these officials seem interested in actually trying to understand this group of people and their motivations. This attitude was shortsighted and contributed to several of the mistakes that the government officials made at different points from February 28 through April 19.

This change in organizational culture can only result if senior officials in the Federal law enforcement agencies implement changes in training and operational procedures. The benefits of these changes will not only protect the targets of government action but, by making it more likely that Federal law enforcement officials will carry out their mission in the manner most likely to succeed, will help to protect the safety of the law enforcement officers as well.

2. Federal law enforcement agencies should revise policies and training to encourage the acceptance of assistance from other law enforcement agencies, where possible. The subcommittees recommend that FBI officials take steps to change the prevailing FBI culture that leads agents to believe that only the FBI knows best how to handle a situation. While agency pride is appropriate, and deserving in the case of the FBI, this pride appears to have caused the agents

to have been foreclosed to other possibilities of dealing with the situation at hand, such as by allowing other persons whom the Davidians trusted to become more involved in negotiations or using other law enforcement agency forces to maintain the Branch Davidian center perimeter and thus relieve pressure on the HRT. The FBI could have been open to these possibilities while maintaining its ultimate control of the situation. The FBI needs to take steps now to ensure that this close-mindedness does not occur in the future.

3. The government should further study and analyze the effects of CS riot control agent on children, persons with respiratory conditions, pregnant women, and the elderly. The subcommittees recommend that the FBI and Department of Defense investigate further the effects of exposure to CS on children, pregnant women, the elderly, and persons with respiratory problems. Until such time as more is learned about the actual effects of exposure to this agent, the subcommittees recommend that CS not be used when children, persons with respiratory conditions, pregnant women, and the elderly are present.

4. The FBI should expand the size of the Hostage Rescue Team. One of the pressures that led the FBI to recommend to the Attorney General that the standoff be ended on April 19 was the need to rest and retrain the HRT. There were not sufficient numbers of HRT members to both guard the perimeter of the residence and to relieve members on the line periodically. Given this limitation, the subcommittees also note that if another hostage or barricade situation had developed involving a Federal law enforcement agency while the standoff with the Davidians was continuing, the FBI would have been faced with the choice of not responding to that situation or pulling the HRT out of Waco and moving them to the new location.

Both of these scenarios suggest the need to enlarge the size of the HRT. While the subcommittees are aware that the FBI has increased the size of the HRT from the 48 "operator" agents on the team as of early 1993 to 78 operators as of July 1996, the subcommittees recommend that further consideration be given to this issue. As the subcommittees have concluded that the government should have waited beyond April 19 and continued to negotiate with the Davidians, inherent in that recommendation was that the HRT or some other tactical force should have remained at the residence. The FBI should ensure that the HRT is large enough to maintain a long standoff in the future, should the need arise, while also having the capacity to respond to another hostage or barricade situation elsewhere in the country during the standoff.

VIII. The Fire

At 12:07 p.m., Central Standard Time, more than 6 hours after the FBI began to implement the plan to end the standoff, fire was detected inside the Branch Davidian residence. Within a period of 2 minutes, two additional fires were detected in two other parts of the structure. In less than 8 minutes the fire had spread throughout the structure. By the end of the afternoon, the structure was completely destroyed.

The subcommittees received testimony from the leader of a team of fire experts called together by the Texas Rangers to investigate the origins of the fire,[601] a fire expert retained by the Justice Department to join with the team assembled by the Texas Rangers,[602] and an independent arson investigator.

During the testimony of these witnesses, the subcommittees also reviewed videotape recordings of the development and spread of the fire. Included in this review was a videotape using "forward looking infrared" (FLIR) technology, which was taken from an FBI observation plane circling the Branch Davidian residence throughout the morning and afternoon of April 19. The FLIR type of video, also called a Thermal Imaging System, is a type of video photography which images thermal heat sources. Because of its sensitivity to changes in the quantity of heat given off by an object the FLIR videotape showed the beginning of the fires within the Branch Davidian residence prior to the point at which was the flames were visible to persons on the outside of the structure. Time lapse indicators on the video tape recordings were used by the witnesses to establish the times at which each fire within the Branch Davidian residence began.

A. Summary of the Development of the Fire

During the hearings, James Quintiere, professor of Fire Protection Engineering at the University of Maryland and one of two fire experts retained by the Justice Department to join the fire review team assembled by the Texas Rangers, used the FLIR video tape to demonstrate the development of the fire on April 19. Dr. Quintiere's responsibilities as a part of the Review Team were to analyze the development of the fire and draw interpretations and conclusions from that analysis.[603] In addition to reviewing the FLIR video, the fire investigation team reviewed television coverage of the fire by the Canadian Broadcasting Corp., which was also time dated, and television coverage of the fire by a local Waco television station. The team also reviewed aerial photographs and other materials. During his testimony to the subcommittees, Dr. Quintiere played a video tape that simultaneously played each of the three video tapes of the fire synchronized to the same time.

The videotape demonstration showed that the first fire began at 12:07:42 p.m. As part of his tes-

[601] U.S. Dept. of Justice, Report to the Deputy Attorney General on the Events at Waco, Texas 329 (1993) [hereinafter Justice Department Report].

[602] These individuals visited the scene of the fire on April 22–24, 1993. Hearings Part 3 at 119 (statement of James Quintiere).

[603] *Id.*

timony to the subcommittees, Dr. Quintiere narrated the videotape demonstration. As the first fire developed, Dr. Quintiere testified,

> If you look at this point here, you will see this window begin to turn slightly grayish, it does right now. Nine seconds later the window on the opposite side right here is going to also show an illumination which is due to this temperature rise, and in my opinion that is due to smoke being transported from the fire started at one end of the room to the other end of the room. . . . The room was a second floor room approximately 16 x 11 in dimensions and about 8 feet high, which is presumed to have been a bedroom. One minute later the second fire begins on the first floor at the rear of the dining room.[604]

Dr. Quintiere then described the development of the second fire.

> We are looking at the development of the fire in that bedroom area, the second floor right tower. What we are going to see here at 12:09:42, we will see an event known to people who investigate and study fire. That event is called flashover, and that is a point when we have a transition in this fire in which the fire goes from a discrete object that you could discern very readily burning in a room such as this to a point where flames now fill the room, and that transition can occur in seconds. It is known as flashover. Before that time the room might be survivable.
>
> After that time it is definitely not, and now the fire is a threat to spreading to other rooms.[605]

Finally, Dr. Quintiere described the inception of the third fire, which occurred on the first floor in the chapel area.[606] He also noted that 38 seconds later there emerged hot gases at a point 45 feet away from the point where the third fire began. He testified that this could have been a separately set, fourth fire, but that the development of this fire was consistent with someone placing a trail of gasoline or other liquid fuel between those two points and allowing the third fire to spread over that trail.[607]

As Dr. Quintiere summarized his conclusions:

> If we can just pause at this point, you can see the fire here, the first fire. A minute later, a fire began in the dining room area, and a minute after that a fire began in this chapel. It has not burned through the roof yet, but the ignition in the debris area because of the wind has now propagated significantly over that debris area. These are three distinct fires.
>
> From this information I can conclude that these three fires that occurred nearly 1 minute apart were intentionally set from within the compound. Also, you have the time periods involved and the very discrete different locations. None of these three fires could have caused any of the others because their growth rates would not provide sufficient heating to cause such remote ignitions.[608]

The experts testified that they believed the fires were intentionally set by Branch Davidian members in order to destroy the structure.[609] Supporting this conclusion is that fact that the fire review team found that a number of accelerants were present in the structure and on the clothing of some of the surviving Davidians, including gasoline, kerosene, Coleman fuel, and other accelerants.[610] As Dr. Quintiere testified,

> Although normal furnishings and interior construction characteristics would provide a means for fire propagation, the more than usual rapid spread of these fires, especially in the dining room and the chapel areas, indicates to me that some form of accelerant was used to encourage to the rapid spread of these fires.[611]

B. OTHER THEORIES CONCERNING THE DEVELOPMENT OF THE FIRE

1. Whether the methylene chloride in the CS riot control agent used by the FBI caused the fire

One of the theories forwarded to the subcommittees concerning the origin of the fire is that methylene chloride, a chemical used as a dispersant to carry the CS riot control agent injected into the Branch Davidian residence, may have ignited and started the fire. During the hearings Dr. Quintiere testified that it was his opinion that the methylene chloride in the CS agent neither caused nor contributed to the spread of the fire.

According to Dr. Quintiere, methylene chloride, when a vapor in air, is flammable at ambient air levels of 12 percent or greater.[612] This conclusion is supported by information provided by the manufacturers of methylene chloride.[613] The subcommittees review of the evidence presented indicates that the levels of methylene chloride present in

[604] Hearings Part 3 at 135.
[605] *Id.* at 136.
[606] *Id.*
[607] *Id.* at 136–137.
[608] *Id.* at 138.
[609] *Id.* at 138, 191 ("I don't discount that the fires were started inside by the people inside.") (statement of Rick Sherrow).
[610] *Id.* at 166, 187–188 (statement of Paul Grey).
[611] *Id.* at 138.
[612] *Id.* at 140.
[613] Letter from Peter Voytek, executive director, Halogenated Solvents Industry Alliance, Inc. to Glenn R. Schmitt, counsel to the Subcommittee on Crime (July 25, 1995). *See also generally* Mallinckrodt, Inc., Material Data Safety Sheet 1 (1989); Dow Chemical, Inc., Material Data Safety Sheet 1 (1988).

the residence on April 19 was far below this concentration.[614] Additionally, a spark, flame, or other source of heat is necessary for methylene chloride to ignite and a fireball-like event would have resulted. As Dr. Quintiere testified,

> In other words, anything above 12 percent to approximately 20 percent, it would be in the flammable range, and if we had a spark or a small match and if we had conditions like that, we would have a fire propagating through the atmosphere much like a fireball. There was no observation like that made for this fire.[615]

The only fireball which did occur took place well after the fires had engulfed the building, and was most likely due to the explosion of a canister of propane gas.[616] Accordingly, because there was no explosion prior to the beginning of the fire, there is no evidence that methylene chloride vapor present in the air caused the outbreak of the fire.

Dr. Quintiere also noted that methylene chloride is generally in a liquid state and that as the methylene chloride vapor condensed and fell in droplets to the floor of the structure after the CS was inserted the methylene chloride generally would have evaporated. In some instances, however, the chemical could have collected in a puddle. He testified that such a puddle would have been difficult to ignite due to the presence of chlorine in the chemical. He testified that "in some sense [methylene chloride] acts like an inhibitor."[617] He further testified that he conducted experiments using methylene chloride as a "wetting" agent by depositing it on wood, paper, and other flammable objects that might have been found in the structure in an effort to determine whether the methylene chloride might have burned along with these items. As a result of these experiments, he concluded "that the methylene chloride had no enhancement effect on the fires spread over the room furnishings and other things that burned in the compound."[618]

2. Whether the irritant chemical in the CS riot control agent used by the FBI caused or contributed to the spread of the fire

At the hearings Dr. Quintiere testified that he had reviewed the literature concerning the ignition point of the chemical irritant in CS agent and noted that the temperature at which that chemical would ignite was comparable "to what we would find from most fuels around us."[619] Based upon his review of the literature, Dr. Quintiere testified that it was his opinion that the CS powder that is an active irritant in the riot control agent did not enhance the spread of the fire.[620]

3. Whether the combat engineering vehicles used by the FBI on April 19 started the fire

Some theories concerning the origin of the fire involve an explanation that one of the combat engineering vehicles used by the FBI to inject CS chemical agent and to demolish portions of the Branch Davidian residence may have actually caused the fire, either intentionally or unintentionally.

At one point in the video record of the operation on April 19, a combat engineering vehicle is seen driving into a portion of the residence. The first fire begins in that same location shortly thereafter. Some have suggested that the CEV might have overturned a lighted kerosene lantern inside the residence, causing the fire to begin. The fire that begins in that area, however, is not discernable in the FLIR video until 1[621] During the hearings, Dr. Quintiere was questioned on the significance of this fact.

> Mr. SCHIFF: Well, if there were lanterns in use and if you had, either through vibrations of tanks hitting walls or through a number of people, panicking inside at what they might have perceived was an assault, notwithstanding the FBI broadcast going to them, couldn't either or both of those factors easily overturned lanterns inside the compound?
>
> Dr. QUINTIERE: Well, the only evidence of a tank being in the vicinity of one of the fires is the first fire, and that tank has not left 1½ minutes after the fire has begun. If that tank knocked over a lantern and the lantern were lit, we would have seen it in that FLIR video because it would have been sensitive enough to see that. If the tank had spilled a lantern and there was no flame there to ignite it, that's possible, but somebody would have to come in and put a flame in that.[622]

Some citizens have contacted the subcommittees to suggest that the combat engineering vehicles used by the FBI at Waco carried flame throwing devices which were used to intentionally set the fires inside the Branch Davidian residence. During the hearings, the fire experts were questioned about this theory.

> Mr. SCHUMER: Another theory we have heard mentioned is that a flame thrower from the tanks started the fire. Now as I understand it, we would have to have seen on the FLIR a hot streak going from

[614] *See* section VII F of this report.
[615] Hearings Part 3 at 140.
[616] "[T]he explosion happened well after the building was totally destroyed. It was very unlikely that that explosion was anything other than a propane cylinder. . . . There was, in fact, a hundred pound propane cylinder with a piece of the top blown out about the size of a football exactly where that explosion occurred, and I have no doubt that that is what the big explosion is. . . ." *Id.* at 175–176 (statement of Paul Gray).
[617] *Id.* at 140.
[618] *Id.*
[619] *Id.*
[620] *Id.*
[621] *Id.* at 135 (statement of James Quintiere).
[622] *Id.* at 143.

the tank to the building for that to happen.

Dr. QUINTIERE: Absolutely.

Mr. SCHUMER: And we did not; is that correct?

Dr. QUINTIERE: Absolutely.

Mr. SCHUMER: So you are saying a flame thrower from the tanks starting the fire—is that consistent—is that theory consistent with what we saw on the tape?

Dr. QUINTIERE: No, indeed. There was no such thing as a flame thrower on those vehicles.[623]

On another day of the hearings, a Defense Department witness testified that all of the military vehicles loaned by the Defense Department to the Department of Justice and used at Waco were unarmed.[624] Additionally, the subcommittees' interviews with other persons present at the Branch Davidian residence on April 19 confirms that none of these vehicles was armed.

C. WHETHER THE DAVIDIANS COULD HAVE LEFT THEIR RESIDENCE AFTER THE FIRE BEGAN

Throughout the morning of April 19, none of the Davidians left their residence. After the fire broke out, however, nine persons left the building.[625] This indicates that at least some opportunity existed for the Davidians to safely leave the structure had they wanted to do so. One of those who escaped the fire left the residence almost 21 minutes after the outbreak of the first fire.[626] Clearly, some means of escape from the residence existed for a significant period of time after the fire broke out.

An important question, however, is whether the Davidians might have been overcome by smoke and prevented from leaving the residence. The autopsies of the Davidians indicate that deaths from smoke inhalation or asphyxiation from carbon monoxide poisoning accounted for only half of the Davidians who died in the residence. The other causes of death were gunshot wounds, burns, or other trauma. Thus, even after the fires began to consume the structure, at least half of the Davidians were not so affected by the smoke and fumes from the fire that they were physically unable to leave the structure.

Additionally, the location of the bodies of the Davidians indicates that few of the Davidians actually attempted to escape the building. Many of the bodies were huddled together in locations in the center of the building.[627] Few of the bodies were located at points of exit from the building, and autopsies indicates that the cause of death of several of the bodies at exit points were self-inflicted gunshot wounds or gunshots from very close range.

At the hearings before the subcommittees, Dr. Quintiere testified as to his opinion as to whether the Davidians could have left the structure. He testified,

> I've estimated . . . that the occupants would have had sufficient warning in no doubt [sic] that the fire occurred, and this would have enabled them to escape for up to five minutes from the start of that first fire or perhaps as many as 20 minutes in some protected areas of the building.
>
> So between and interval of five minutes after the fire started and maybe as much as 20 minutes, a person could have escaped from some parts of the building.[628]

Paul Gray, Assistant Chief of the Houston Fire Department and leader of the fire review team assembled by the Texas Rangers, agreed with this opinion, "I would take an educated guess of about 20 to 22 minutes from the inception of the fire, from the first ignition that there may have been some viable conditions inside the building."[629] As the report of the team led by Gray summarized,

> [A] great many of the occupants could have escaped to the outside of the compound even as the building burned. . . . [C]onsidering the observable means of exit available, we must assume that many of the occupants were either denied escape from within or refused to leave until escape was not an option.[630]

In light of this evidence, the subcommittees conclude that there was a period of time after the fires began within which the Davidians could have escaped the residence. The evidence presented to the subcommittees indicates that the Davidians did not attempt to leave the building during the fire. In light of the Davidians' religious beliefs that fire would play a part in the end of their worldly lives, the subcommittees conclude that most of the Davidians either did not attempt to leave their residence during the fire or were prevented from escaping by other Davidians. Had they made such an attempt and not been hindered in the attempt, however, conditions were such that for sufficient period of time after the fires broke out many of the Davidians could have survived.

D. THE FBI'S PLANNING FOR THE FIRE

According to the Justice Department Report, at a meeting in early April, one of the government attorneys raised the possibility of fire at the compound and suggested to the FBI that "fire

[623] *Id.* at 144. *See also Id.* at 172 ("The flame-throwing tank absolutely did not happen.") (statement of Rick Sherrow).

[624] *Id.* at 314 (statement of Allen Holmes, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict).

[625] Justice Department Report at 298. Two of these persons, Clive Doyle and David Thibodeau testified before the subcommittees at the hearings.

[626] Hearings Part 3 at 139 (statement of James Quintiere).

[627] A chart indicating the location of the bodies found after the fire in the remains of residence is contained in the Appendix.

[628] Hearings Part 3 at 139.

[629] *Id.* at 183.

[630] Justice Department Report at 335.

fighting equipment be placed on standby on the scene."[631] Additionally, the Medical Annex to the operations plan for April 19, which listed the locations of "primary" and "secondary" hospitals in the area noted that local hospitals should not be used to treat major burns but that one of the secondary hospitals was "primary for major burns."

According to the Justice Department Report, the FBI decided to not have fire fighting equipment at the scene "for fear that they would be fired upon by Koresh and his followers."[632] Yet shortly after the reports of fire, the FBI command post requested fire fighting assistance be requested. The first fire fighting vehicles arrived in the vicinity 20 minutes later and, at 12:41 p.m., approached the structure. In total, the fire crews did not reach the structure until 31 minutes after the fire had first been reported.[633] The report also asserts that Jeffrey Jamar, the FBI's on-scene commander at Waco, stated to Justice Department officials during the their internal investigation of the incident that "even if the fire fighters had arrived at the compound earlier he would not have permitted them to enter due to the great risk to their lives."[634]

The subcommittees do not dispute the Justice Department's position that at the outbreak of the fire it would have been dangerous for fire fighters to approach the structure. Yet, the subcommittees find it troubling that even though the government clearly believed there existed a strong possibility of fire, no provision was made for fire fighting units to be on hand, even as a precaution. If, as the Justice Department's Report implies, the government had decided in advance that it would not attempt to fight any fire that occurred (and thus did not make provision for fire fighting units to be present at the compound), it is difficult to understand why the FBI placed a call for fire fighting units to be summoned to the scene immediately upon the commencement of the fire.

E. FINDINGS CONCERNING THE FIRE

1. The evidence indicates that some of the Davidians intentionally set the fires inside the Davidian residence. While the evidence is not dispositive, the evidence presented to the subcommittees suggests that some of the Davidians set the fires that destroyed their residence. The evidence demonstrated that three distinct fires began in three separate parts of the Branch Davidian residence within a 2 minute period on April 19. Additionally, the fire review team found that a number of accelerants were present in the structure, including gasoline, kerosene, and Coleman fuel, and that in at least one instance these accelerants contributed to the spread of the fire in a manner that indicates an intention to spread the fire.

2. The methylene chloride in the CS riot control agent used by the FBI did not cause the fire. There is no evidence that methylene chloride vapor in the air in the residence, present as the result of its use as a disbursant for the CS riot control agent, caused the outbreak of the fire. The evidence presented to the subcommittees indicated that for the methylene chloride to have burned some spark must have ignited the methylene chloride vapor and that a fireball would have resulted. Because no fireball was observed until well after the fire had become established, the subcommittees conclude that methylene chloride did not cause the fire.

3. The subcommittees conclude that Federal law enforcement agents did not intentionally set the fire. The evidence before the subcommittees clearly demonstrates that no fire began at or near the time when any of the combat engineering vehicles used by the FBI came into contact with the structure. Had a flamethrower or similar device been installed on one of the CEV's and used to start the fire its use would have been observable in the infrared videotape of the fire. No such use is recorded on the that videotape. Accordingly, the subcommittees conclude that the FBI did not use any of the CEV's intentionally to cause the fire.

4. The subcommittees conclude that Federal law enforcement agents did not unintentionally cause the fire. The evidence presented to the subcommittees suggests that it is highly unlikely that Federal law enforcement officials unintentionally caused the fires to occur. The evidence demonstrates that the fires broke out at points in time when no vehicle used by the FBI was in contact with the structure or had been in contact with the structure immediately prior to those points. Because this would have been the case had these vehicles inadvertently caused the fires to break out by disturbing flammable materials inside the Davidian residence, the subcommittees conclude that it is highly unlikely that the vehicles inadvertently caused the fires to occur.

5. The FBI should have made better preparations to fight the fire. While it may have been too dangerous to fight the fire when it initially erupted, it remains unknown as to whether it might have been safe for fire fighters to approach the building at some point earlier than the half hour later when they were allowed access. While fire fighting efforts might not have extinguished the fire, they could have delayed the spread of the fire or provided additional safe means of escape for some of the Davidians. It also does not appear as though the FBI considered obtaining armored fire-fighting vehicles from the military. In any event, given the government's strong belief that a fire might take place, and its action in summoning fire fighting units to the

[631] *Id.* at 302.
[632] *Id.*
[633] *Id.*
[634] *Id.*

scene, the subcommittees conclude that the FBI should have made better provision for the presence of fire fighting equipment as part of its overall plan to end the standoff.

6. The Davidians could have escaped the residence even after the fire began. After the fire broke out on April 19, nine persons left the Davidian residence. This indicates that at least some opportunity existed for the Davidians to safely leave the structure had they wanted to do so. As one person left the structure 21 minutes after the outbreak of the first fire, some means of escape from the residence existed for a significant period of time after the fire broke out. The autopsies of the Davidians indicate that many of the Davidians were not so affected by the smoke and fumes from the fire that they were physically unable to leave the structure. Additionally, the location of the bodies of the Davidians indicates that few of the Davidians actually attempted to escape the building. In light of this evidence, the subcommittees conclude that there was a period of time after the fires began within which the Davidians could have escaped the residence.

ADDITIONAL VIEWS OF HON. ILEANA ROS-LEHTINEN

For the record, while I agree with the Waco-specific conclusions in the report, I want to note that Janet Reno has had a distinguished career in public service beginning in 1971 with the Judiciary Committee of the Florida House of Representatives. Her record of service and history of public integrity is long and worthy of additional comment. From the Florida House, she held positions with a State Senate committee, Dade County State Attorney's Office, was eventually appointed State Attorney for Dade County and elected to the position for five consecutive terms, culminating in her present position as Attorney General of the United States.

Ms. Reno is widely respected as a woman of integrity and a selfless public servant. Indicative of her sincerity, she took complete responsibility and offered her resignation for the actions of Federal agencies toward the Branch Davidians near Waco, TX in 1993, after serving only a month as Attorney General. Ms. Reno has endeavored to improve the U.S. Justice System as shown by her recent and complementary handling of the Montana Siege which ended in a peaceful resolution. Her leadership in the Department of Justice has, in my view, since Waco been of considerable benefit to the citizens of the United States.

HON. ILEANA ROS-LEHTINEN.

ADDITIONAL VIEWS OF HON. WILLIAM H. ZELIFF, JR.

In response to concerns raised by two members of the minority at the committee mark-up, I want to set the record straight regarding the extensive majority efforts to cooperate with the minority throughout the entire investigative process.

First, the subcommittees made an unprecedented attempt at genuine accommodation in holding 10 days of investigative hearings. In a concession that had no apparent precedent during prior Congresses, the majority accepted 90% of the witnesses suggested by the Democrats.

Second, minority members were invited on key fact-finding trips, such as to Waco itself.

Third, the majority shared all available documents, set up a document room accessible to all staff, and shared all indexes received to those documents; by contrast the majority subsequently learned that the minority staff received and intentionally withheld from majority staff the key Treasury Department index to tens of thousands of documents. This minority tactic led to the unnecessary expenditure of tens of hours of indexing by the majority prior to being able to use the documents they received. As another indication of the difficulties the majority facted, two Democrat staffers apparently met secretly with the Texas Rangers and told them that they should not or did not need to honor subpoenas issued by the majority; these kinds of obfuscatory tactics during and prior to the hearings did not enhance majority-minority cooperation.

Fourth, the appendix to this report consists largely of documents that are in the public domain from the hearings, or are otherwise available to the minority; we have never had a request to see these documents, and we know that most were separately sent to the minority staff by the departments themselves; accordingly, complaints about not seeing the appendix ring hollow.

Fifth, the 10 footnotes missing from the distributed draft are either in documents the minority already have or are merely ids or ibids to documents already once cited elsewhere in the report's other 600 footnotes.

Sixth, the post-hearing investigation consisted largely of asking for documents that the majority had already asked for on June 5, 1995, and never received from the departments; interrogatories that pertained to unanswered hearing questions; and issues first raised at the hearings or interviews. There were no surprises in these requests.

Seventh, the press conference held on the day the report was distributed to Members simply made available the recommendations of the two subcommittee chairmen to the respective subcommittees and committees, and the summary—well within the House Rules—was made available to the minority at the same time. Ironically, the week prior to the business meeting, one of my staffers received a call from the Justice Department in which the Department indicated that they had received—presumably from a minority staff member or member—a copy of the whole Waco report. For the record, that is a clear and unequivocal violation of Rule 4, if any majority member had wished raise it—and when asked for a chance to correct facts that might be unclear or wrong, the department made no such proffer. In fact, they never sent any corrections whatsoever, despite five follow-up telephone calls to get fact corrections.

Eighth, cooperation with the departments was, frankly, an exercise in extreme patience; the majority even had to suffer having the Secretary of Treasury calling Democrats and telling them not to ask any embarrassing questions at the hearings. Surely, that is not the proper reaction to congressional oversight, and it is not consistent with President Clinton's promises of full cooperation. In a further example of unjustifiable manipulation, the Treasury Department also flew the Texas Rangers who were going to testify to Washington ahead of time and at taxpayer expense—to brief them for 2 days on what they should say. In my view, there can be little question that that action was patently offensive to both the word and spirit of cooperation.

Ninth, the majority has actually allowed the minority four times the amount of time normally allowed—and under House rules required—to review a report prior to a business meeting. On balance, I believe the record will show clearly that the entire investigative process was conducted not only patiently, inclusively, exhaustively and with an extraordinary emphasis on cooperation, but with an incontrovertible premium on fairness. In fact, I know of no set of investigative hearings or report that has ever been conducted with this level of inclusiveness, cooperation, or fairness.

HON. WILLIAM H. ZELIFF, JR.

THE SUBMISSION BY HON. STEVEN SCHIFF, OF THE SUBCOMMITTEE ON NATIONAL SECURITY, INTERNATIONAL AFFAIRS, AND CRIMINAL JUSTICE OF THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT, OF EXTRANEOUS MATERIAL PROVIDED TO HIM BY HON. BOB BARR, OF THE SUBCOMMITTEE ON CRIME OF THE COMMITTEE ON THE JUDICIARY

The hearings into the 1993 Waco tragedy, conducted jointly in June 1995 by the Crime Subcommittee of the House Committee on the Judiciary and the Subcommittee on National Security, International Affairs, and Criminal Justice, of the House Committee on Government Reform and Oversight, was a painful expose of perhaps the greatest law enforcement tragedy in American history. Yet, it was a necessary exercise, because it gave those of us on the subcommittees, and all Americans, the opportunity to examine why it happened and to at least begin to implement steps to avoid a recurrence of the tragedy. It would not be a significant overstatement to describe the Waco operation from the Government's standpoint, as one in which if something could go wrong, it did. The true tragedy is, virtually all of those mistakes could have been avoided.

After nearly 2 weeks of hearings, the subcommittees closed down the proceedings, and moved on to other business. Now, over a year later, we have a report. While the report contains many conclusions that I believe are accurate and appropriate, along with several important recommendations, it fails to address several extremely important matters that came to light during the hearings and which deserve far more scrutiny than accorded heretofore.

I would hope that in the next Congress, followup hearings are held, and legislative measures introduced and passed. Avoiding tragedies such as Waco ought to be a top priority for the Congress and the administration.

Rather than repeat all the conclusions and recommendations of the report, many of which I agree with (especially those concerning the ATF, the Treasury Department failure to monitor, and the decisionmaking at the FBI and the top levels of the Justice Department), I will note those with which I have serious disagreement, from my perspective as a Crime Subcommittee member, as a former U.S. attorney, and as a citizen deeply concerned with the militarization of domestic law enforcement and the lack of accountability by Federal law enforcement.

MILITARIZATION OF LAW ENFORCEMENT

Law enforcement officials have long been required to abide by the Bill of Rights, enshrined in our Constitution. These principles underlie virtually everything they do in their capacity as officers sworn to protect our citizens; and they limit what they can do in fulfilling their specific responsibilities.

However, with the phenomenal growth in the power of the Federal Government, touching virtually every facet of our lives—personal, business, educational, government, religious, recreational, etc.—there has developed a mentality on the part of law enforcement that they can do anything and not be held accountable for it. Along with this we have witnessed the development of a militaristic approach to domestic law enforcement, in everything from dress (black military uniforms and helmets), to equipment (armored vehicles and military surplus helicopters), to outlook, to execution.

Our armed forces, in carrying out their mission to protect and project our national interests abroad, are not bound by the constitutional restraints placed on domestic law enforcement. This reflects the significant differences between conducting domestic law enforcement operations, and conducting warfare overseas. In a war situation, our armed forces do not and should not have to give "Miranda" warnings before shooting the enemy; they need not have "probable cause" before an attack. Domestically, our law enforcement officers must do these things.

Unfortunately, we saw in the Waco tragedy one logical result of the blurring of lines between domestic law enforcement and military operations: an operation carried out pursuant to a strategy designed to demolish an "enemy," utilizing tactics designed to cut off avenues of escape, drive an enemy out, and run roughshod over the "niceties" of caring for the rights of those involved. The protestations of the Attorney General to the contrary, that she authorized the injection of debilitating CS gas into closed interior quarters with no ventilation where dozens of women and children were concentrated, out of concern for the children do not match the Government's actions. While the report reflects this view to some extent, I believe very firm steps must be taken to "demilitarize" Federal domestic law enforcement, through substantive legislation and funding restrictions.

POSSE COMITATUS AND MILITARY INVOLVEMENT

While the report touches on the issue of military involvement in this operation, focusing primarily on disingenuous steps taken by the civilian law enforcement agencies in order to obtain military assistance without paying for it, my concerns go deeper.

I seriously question the role of military officers being involved in strategy sessions, on sight "observers" and the presence of foreign military personnel, and the use of military equipment such as armored vehicles. Contrary to the conclusion of the report, I am not convinced that the separation between military operations and domestic law enforcement, codified in the U.S. Code's "Posse Comitatus" provisions, was not violated in the Waco operation.

Hostage Rescue Teams

During the questioning of Attorney General Reno on the last day of the hearings, I asked her what specific steps had been taken by the Government to ensure that another Waco would not recur. The only specific step the Attorney General cited to me in response to my question, was that the "Hostage Rescue Teams" (HRT's) had been expanded. The report agrees that HRT's should be expanded. I disagree.

In my view, based on the Waco incident (and others), part of the problem is the HRT's themselves; they are relied on too heavily, and are used in circumstances in which no hostages are present, or which do not lend themselves to HRT tactics. Rather than expanding the size and use of HRT's, I believe they ought to be more carefully circumscribed, controlled and scaled back.

FLIR Tapes and What They Show

Forward Looking Infrared Radar (FLIR) was used by the Government, in cameras aboard helicopters and planes flying over the Branch Davidian compound on the day of the final assault. Portions of the FLIR tapes were shown at the hearings; these were under the control of the Government. Of course, the Government used the tapes to buttress its arguments that no shots were fired on April 19 (the day of the assault on the compound) from outside the compound into the compound, and that the fire that destroyed the compound was not started from the outside or by the Government vehicles.

Given the severe limitations on questioning by subcommittee members, and the inability to truly review and analyze the Government's evidence, I do not agree with the conclusions in the report that the evidence clearly establishes the Government's position on these issues.

On further examination of FLIR tapes, after the hearings, and in discussions with private parties who have reviewed the tapes, I believe sufficient questions have been raised to warrant further study of these two issues: were there shots fired from outside the compound into the compound on April 19th, and were the fires started—intentionally or unintentionally—by the armored military vehicles or personnel therein?

Unlike the report, I do not dismiss out of hand the civilian analyses of these tapes and other evidence. (On a related issue, I also believe further study ought to be made, and additional evidence examined, concerning the cause of the explosion that occurred during the fire on April 19.)

Use of CS Gas

The Government's use of CS gas in the manner it did, that is, clearly designed to incapacitate men, women and children in a confined, unventilated space, after avenues of escape had been deliberately cut off, was unconscionable; as was the cursory manner in which the Government, and especially Attorney General Reno "bought into" the conclusory and simplistic analyses that the use of CS gas posed an "acceptable" level of risk.

The fact is, while experts may—and did—differ over the precise effects of CS gas on children, or how and in what ways the use of CS gas might act as a catalyst for a fire, no rational person can conclude that the use of CS gas under any circumstances against children, would do anything other than cause extreme physical problems and possibly death.

For the Government of this country to consciously use CS gas in the way it did on April 19, 1993 in Waco is utterly indefensible and should never be allowed to be repeated. I believe the deaths of dozens of men, women and children can be directly and indirectly attributable to the use of this gas in the way it was injected by the FBI.

I would go further than the report, and call for a prohibition on the use of CS gas in situations in which children or the elderly are present or are the targets.

The Fire

While the report concludes that the evidence clearly establishes that the fire that eventually consumed the Branch Davidian structure was started inside by the Davidians, I think that the most that can be said is that the fire may have been started inside, and even if it did, the evidence that it was deliberately set is inconclusive. I believe there is also the possibility that the fire, or at least some of the fires, may have been caused as a result of the demolishing efforts of the armored military vehicles. While there is no direct evidence that the fire was started from the outside, further study (of the FLIR tapes, for example) ought to be conducted.

Escape

The report concludes that there was opportunity for the Davidians to escape. While obviously this is true—a handful did escape the maelstrom—I conclude there was no opportunity for the vast majority of the Davidians to have any hope of escape, because of the Government's tactics the morning of the 19th of April.

Essentially, the use of the armored vehicles, methodically smashing down portions of the building, cutting off avenues of escape (for example, smashing the walls down to cover the "escape" hatch to the tunnel out of the main building), intimidated the inhabitants into seeking "safety" in the one secure part of the structure (the concrete "bunker" in the center). With massive quantities of CS gas pumped into this area, it virtually guaranteed that most inhabitants would be incapacitated; which they were, and they died in the ensuing fire because of the incapacitating effects of the CS gas and the cutting off of escape routes.

Breach of Ethics and Possible Obstruction

One area of inquiry which I pursued during the hearings involved what clearly are breaches of ethics, and possible obstruction of justice by Government attorneys and investigators. This aspect of the hearings is completely overlooked by the report. Government documents clearly show deliberate efforts by Government attorneys to stop the collection of evidence and possibly cover up evidence the Government did not want to be available later on. While the Department of Justice went so far as to issue a news release during the hearings, to refute my conclusions, I consider it extremely serious; especially when considered with evidence that two of the ATF agents first disciplined and fired and then later reinstated and records sealed, to raise very troubling questions of ethical violations at best and obstruction at worst. Attorneys who testified at the hearings also raised serious concerns about the attitude and policies reflected in these documents.

Documents explicitly showed that "DOJ [Department of Justice] does not want Treasury to conduct any interviews . . . [that might] generate . . . material or oral statements which could be used for impeachment" of Government witnesses, and that hopefully if such material is not gathered, "the passage of time will dim memories." (Memorandum from Treasury Assistant General Counsel for Enforcement, dated April 14, 1993.)

Earlier, on March 1, 1993, in interview notes, the ATF's initial "shooting review" of the February 28, 1993 initial assault at which time ATF agents fired their weapons, the ATF is advised to "stop the ATF shooting review because ATF was creating Brady material." (Note: "Brady" material is evidence that would tend to establish innocence or which could be used in mitigation of guilt.)

In handwritten notes, taken at some point during the siege, Government attorney Ray Jahn directs that interviews are to stop because exculpatory statements may be generated.

This pattern of activity to deliberately avoid collection of relevant evidence, because it might tend to establish a person's innocence, or, as is apparent from other documents, might embarrass the ATF, raises very troubling questions to say the least, about the interests of the Government in establishing the truth and in seeing that justice is done. Neither goal would be met under the circumstances evidenced by these documents. That the Department of Justice casually dismisses these concerns should be of concern to the Congress and to the people of this country.

Committee Rules and Restrictions

The procedures under which these hearings were conducted did not lend themselves to adequate inquiry. Important evidence was not available because of tactics by the Government and minority members of the subcommittees to keep evidence out of our hands; such as the weapons taken by the Government from the burned Davidian compound. We were never able to test the weapons to establish whether they were in fact unlawful weapons as the Government charged (which provided a primary justification for the Government's initial action against Koresh and the Branch Davidians).

The method of questioning employed—in 5-minute increments, alternating back and forth between majority and minority—with no comity from the minority to provide both sides with longer periods within which to question, lent itself to a scenario whereby savvy witness (most Government witnesses are very familiar with how to answer questions and stall so as to use up large segments of the questioner's time) were able, time and again, to minimize or completely neutralize the member's ability to obtain answers to questions.

Starting out at the mercy of the minority to control and minimize the majority's ability to effectively question and elicit timely, forthcoming and nondilatory responses, set the stage for hearings much less productive than these could have been. Some exploration of instituting other methods of conducting investigative hearings ought to be explored. Moreover, many witnesses who simply did not answer members' questions, were allowed to escape with dilatory or nonresponsive tactics; which again limited the productivity of the hearings.

CONCLUSIONS

Despite the severe limitations in procedure, and the other matters noted above, these hearings were extremely valuable; perhaps historic. They resulted in very important evidence which, if properly followed-up, can help establish, through laws, regulations, and procedures, more effective and more accountable Federal law enforcement. However, that follow up has not yet occurred, and many troubling questions, some going to the very integrity of the Government's actions and personnel, remain. These hearings in June 1995 should be viewed not as the conclusion of the efforts by the Congress to get to the bottom of the Waco tragedy, but the beginning of that process.

HON. STEVEN SCHIFF.

ADDITIONAL VIEWS OF HON. TOM LANTOS

I welcome the dissenting views on the majority report, which I have signed with a large number of my colleagues. That statement points out clearly the many serious deficiencies of the majority report.

One issue, which is completely ignored in the majority report but which was raised at the time of the original hearings and which is raised in the dissenting views which I have signed, is the issue of the highly questionable involvement of an outside interest group—the National Rifle Association—in the investigation which preceded the hearing.

It is my view that this issue deserves greater attention and investigation. The active involvement of an outside organization in a subcommittee investigation raises the most fundamental questions about the integrity of the entire investigation, and the failure to address this important matter is a fundamental flaw of the majority report.

The outside organization—the National Rifle Association (NRA)—is not a disinterested third party. That organization and its leaders have made it clear that they had a particular point of view on the matters being considered by the subcommittee. Members of the subcommittee repeatedly urged the chairman of the subcommittee to investigate these matters, and the chairman has repeatedly refused to do so. In the interest of fairness and integrity, it is important that these issues be made part of this report.

The first matter is the subcommittee majority's use of outside "experts" to test firearms. These "experts" were contracted for and paid for (at a cost of some $25,000) by the National Rifle Association. Furthermore, the chairman of the subcommittee and members of the majority staff initially tried to cover-up the involvement of the National Rifle Association, and majority staff even refused to identify to officials of the U.S. Department of Justice the name of the outside advocacy group which selected and paid for the outside experts. Furthermore, in conversation with Justice Department officials, majority staff admitted that the so-called "experts" in fact had no expertise whatsoever in firearms testing. Later, during the course of the hearings the involvement of the National Rifle Association in this case did become public.

The second issue is the matter of an employee of the National Rifle Association identifying herself as a member of the subcommittee staff to at least one individual who was called to testify before the subcommittee. Furthermore, two witnesses testified under oath during the hearings that they were contacted by an employee of the National Rifle Association prior to testifying at the hearing. This raises serious questions about witness tampering. Again this issue was not investigated by the subcommittee chairman and is not dealt with in the majority report.

Both of these instances regarding the involvement of the National Rifle Association in the congressional hearing and investigative process not only raise questions about the ethical behavior of the majority staff, but also may be a violation of the law. This issue was raised in a July 17, 1995, letter from Congressman John Conyers, Jr., and Congressman Charles E. Schumer to the chairman of the Judiciary Committee and the chairman of the Government Reform and Oversight Committee. The instances of the National Rifle Association providing valuable services to the subcommittee may have violated the law and the Rules of the House. This issue should have been investigated and resolved. It was not.

The refusal of the subcommittee chairman and the majority to investigate these issues fully and openly—despite repeated requests by me and other Members who participated in the hearings—raises the most fundamental questions about the integrity of the majority report as well as the hearing and investigation conducted by the subcommittee.

HON. TOM LANTOS.

DISSENTING VIEWS OF HON. CARDISS COLLINS, HON. KAREN L. THURMAN, HON. HENRY A. WAXMAN, HON. TOM LANTOS, HON. ROBERT E. WISE, JR., HON. MAJOR R. OWENS, HON. EDOLPHUS TOWNS, HON. LOUISE M. SLAUGHTER, HON. PAUL E. KANJORSKI, HON. CAROLYN B. MALONEY, HON. THOMAS M. BARRETT, HON. BARBARA-ROSE COLLINS, HON. ELEANOR HOLMES NORTON, HON. JAMES P. MORAN, HON. CARRIE P. MEEK, HON. CHAKA FATTAH, AND HON. ELIJAH E. CUMMINGS

The text of the majority report entitled "Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians" is based on 10 days of hearings (July 19–August 2, 1995) jointly held by the Committee on Government Reform and Oversight's Subcommittee on National Security, Criminal Justice, and International Affairs and the Committee on the Judiciary's Subcommittee on Crime. During those hearings, the committees heard testimony from over 90 witnesses and viewed voluminous photographic, video and documentary exhibits concerning the events at Waco.

Throughout those hearings, the minority repeatedly insisted that no new facts or evidence emerged as a result of this extensive investigation. The majority report proves that basic point.

The text of the report agrees with recommendations and positions taken as a result of the 1993 Department of Justice and the 1993 Department of the Treasury investigations of the Waco incident. The report agrees that the tragedy at Waco would not have occurred but for the criminal conduct and aberrational behavior of David Koresh. The report also confirms a number of other important points emphasized by the minority during the hearings: that there was probable cause to issue warrants to search the premises and arrest David Koresh; that the military assistance received by ATF did not violate Posse Comitatus; that planning and intelligence operations prior to the raid were inadequate; that the Branch Davidians started the fire on April 19, 1993; that Koresh and his followers had ample time to leave the compound after the fire started; and that the amount of tear gas the FBI used was far below the quantities that would have been required to cause injury or death. These are not new discoveries revealed as a result of the majority's investigation, but previously known findings which the majority has finally accepted.

While we accept those findings in the majority report that are largely duplicative of the recommendations contained in previous Department of Treasury and Department of Justice investigations, we reject the false assumptions and unfounded allegations raised by the majority's report. The report is fundamentally flawed in a number of important areas. In an effort to correct those flaws and provide clarity to facts obfuscated by the majority report, we in the minority file these Dissenting Views to address basic factual errors, resolve internal contradictions, meliorate certain deficiencies and express our disagreement with certain original recommendations made by the majority report. Additionally, we wish to express strong disagreement with the majority's unfair criticism of Treasury Secretary Bentsen and their call for the resignation of Attorney General Reno.

The majority report suffers from several deficiencies. First, the findings reached are not supported by the hearing record or other evidence. The text of the report states that the Davidians started the fire, however the findings conclude that the evidence is not dispositive on the question of who started the fire.

Second, the report is internally inconsistent. For example, while critical of the FBI for failing to consult those outside of its control during the negotiations, it then commends the FBI for allowing lawyers representing the Davidians to enter the compound and conduct several hours of discussions with their clients. Clearly, these attorneys were not controlled or directed by the FBI. Their efforts to end the standoff were discussed by the majority report.

Third, the report omits important evidence from the hearings. At no point does the report discuss the allegations of child physical and sexual abuse perpetrated by David Koresh. Additionally, the report fails to mention the riveting testimony of Kiri Jewell who testified at the hearings concerning Koresh' sexual molestation of her when she was 10 years old. Instead the report dismisses the criminal conduct of David Koresh by summarily stating the Koresh was not subject to congressional oversight.

Fourth, the report reflects a willingness to believe Koresh over Federal law enforcement officers and personnel. For instance, the report asserts that Koresh's lawyers negotiated a credible surrender agreement. However, Federal law enforcement personnel on the advice of psychiatric and linguis-

tic experts determined that the "agreement" was a continuation of prior manipulative stalling tactics. The report ignores no fewer than four prior instances in which Koresh reneged on promises that he and his followers would leave the compound. Moreover, the report ignores that Koresh did not state a time certain for surrender and had not allowed anyone to leave the compound for 3 weeks prior to the "agreement" or 5 days following the agreement.

The majority report criticizes Secretary Bentsen for failing to take an active role in preraid planning but ignores testimony and evidence presented at the hearing which conclusively showed that under the structure that existed at the time, the ATF exercised independence in planning and implementation of enforcement actions. This structure existed under several administrations. Secretary Bentsen's post-Waco order changed the structure to require additional oversight by main Treasury.

Additionally, the majority report calls for Attorney General Janet Reno's resignation because of her decision to allow the insertion of CS tear gas. Attorney General Reno stated during the hearings that the decision to use tear gas was a difficult one but all those consulted who had personal knowledge or professional expertise agreed that the use of tear gas was the only way to compel the Branch Davidians to leave the compound without use of force or loss of life. Evidence and testimony during the hearing clearly indicated that the CS tear gas was not direct, or proximate cause of the ignition or acceleration of the fire. Evidence conclusively found that the Branch Davidians started the fire. Therefore, the deaths of the Davidians who remained in the compound should not be laid at Attorney General Reno's feet. This finding of the majority squarely contradicts their finding that Koresh was the author of the events at Waco.

I. Committee Procedural Issues

During and following the Waco Hearings, certain procedural issues arose which need to be addressed and remedied by the majority of this committee.

Prior to the hearings, the majority conducted a series of interviews in Waco, TX. Apparently, these interviews involved surviving members of the Branch Davidians and other residents of Waco. The minority was not informed of these interviews, invited to participate or allowed to review interview notes. The minority first learned of these interviews from the majority report. During this pre-hearing phase, the minority was not allowed to participate in the formation of the document request to the Federal agencies involved. Moreover, contrary to the implications in the majority report, the majority of this committee did not willingly grant the witness requests of the minority. In fact, our early witness requests were summarily rebuffed. The minority of this committee was only able to obtain witnesses by working with the minority staff of the Judiciary Committee.

During the hearing, at least two witnesses acknowledged under oath, that they were contacted by representatives of an outside interest group prior to their appearance before the panel. One witness testified that in at least one instance, an employee of the interest group identified herself as a congressional staffer. We believe that this raises serious questions of witness tampering by an outside group with congressional proceedings. During the hearings, we requested that the majority investigate whether this outside group was operating with the knowledge or at the behest of the majority staff. To date, the majority has refused further investigation of these instances of improper witness tampering.

After the hearings, these practices of exclusion continued. At the conclusion of the hearings, the majority conducted extensive investigations and interviews without the knowledge or participation of the minority. This fact did not come to light until the release of the report.

Finally, one year after the hearings nothing had changed. On July 11, 1996, the majority released a summary of this report to the press. This press summary was substantially similar if not identical to the executive summary contained in the report and contained all recommendations made by the majority report. On July 12, 1996, Members and staff of the minority obtained a copy of the report.

This pattern of exclusion of the minority members of this committee from the production of something that purports to be a committee document should not be allowed. This practice is a serious departure from prior practice and from the respect that members of this committee have held for each other in the past. It serves as dangerous precedent that should not continue.

II. Factual Background

On February 28, 1993 agents from the Bureau of Alcohol, Tobacco and Firearms (ATF) attempted to serve an arrest warrant on David Koresh and a search warrant on the Branch Davidian compound outside of Waco, TX. While executing these lawful warrants, the agents were met with a hale of gunfire. ATF agents Conway C. LeBleu, Todd W. McKeehan, Robert J. Williams and Steven D. Willis died as a result of gunshot wounds inflicted during the ambush. In addition to those agents who were killed, 20 ATF agents were wounded by hostile fire emanating from the compound. After negotiating a cease fire with the Branch Davidians, the agents were allowed to remove the bodies of their fallen comrades.

Within hours of the initial shooting, the Bureau of Alcohol, Tobacco and Firearms requested assistance from the Federal Bureau of Investigation's Hostage Rescue Team. The FBI arrived on the scene of the shooting within 24 hours. A 51-day standoff between Federal law enforcement agents

and the Branch Davidians led by David Koresh followed. Between the time of their arrival and the tragic conclusion of the events, the FBI conducted several hundred hours of negotiations with Koresh and others within the Branch Davidian Compound. Despite these efforts, only 14 children and 21 adults left the compound as of March 23.

Between March 23 and April 12, negotiations continued but no one left the compound. During that period, the FBI held a conversation with a 6-year-old girl who identified herself as Melissa Morrison. The FBI negotiator asked Melissa whether she would like to leave the compound. She replied in the affirmative. The FBI negotiator asked her why she did not leave. Her response was that she could not leave because "David won't let me." Melissa died in the fire.

On April 12, the FBI presented its tear gas proposal to Attorney General Reno. Between April 12 and April 17, the Attorney General conducted no fewer than eight meetings with military and civilian tear gas experts to debate the tear gas plan, advantages and disadvantages of using tear gas in a barricade situation, the properties of the tear gas chosen and the medical and scientific information concerning the toxicity and flammability of the type of tear gas proposed and the effects of tear gas on vulnerable populations such as children, the elderly and pregnant women. On April 17, the Attorney General approved the tear gas insertion plan and informed the President of her decision.

On April 19, 1993 the Federal Bureau of Investigation began to insert tear gas via combat engineering vehicles into the Branch Davidian compound. However, instead of advising his followers to leave, David Koresh and other unknown members of the Branch Davidians spread highly flammable liquids throughout the compound and set fire to the entire building. Because of the poor construction of the building and the use of chemical accelerants, the entire compound was engulfed in flames and completely destroyed within 15 minutes.

In the aftermath of the fire, the bodies of over 70 Branch Davidians were recovered. According to autopsy reports by the Tarrant County (TX) Coroner, 30 people died of asphyxiation due to smoke inhalation, 2 people died of injuries resulting from blunt force trauma and 20 people, including David Koresh and a 20-month-old infant, died of gunshot wounds inflicted at close range by themselves or others within the compound. Of the nine Branch Davidians who survived the fire, seven escaped through openings in the walls and windows of the compound created by the combat engineering vehicles. The shoes and clothing of several of those who escaped contained concentrations of gasoline, kerosene and other flammable liquids.

After the siege, the Texas Rangers conducted an extensive search of the Branch Davidian compound. They discovered 48 illegal machine guns, seven illegal explosives of various types, nine illegal silencers and over 200,000 rounds of ammunition.

A series of indictments were returned against 10 Branch Davidians between March 30 and July 20, 1993. The indictments contained charges relating to the ambush of ATF officers on February 28 and various firearms violations committed between February 1992 and February 1993. On August 6, 1993, the U.S. Attorney's office in Waco obtained another superseding indictment from the grand jury combining all previous indictments into one and added two additional defendants.

On September 9, 1993, Kathryn Schroeder entered a guilty plea to one count of armed resistance of a Federal law enforcement officer. As a part of her plea agreement, she agreed to testify against the other 11 defendants. A Texas jury convicted 8 of the 11 Branch Davidian defendants of various firearm offenses. The convicted defendants received sentences ranging from 3 to 40 years with 7 of the 8 defendants serving sentences of 40 years imprisonment.

Several congressional hearings were held which solely or predominantly addressed the events at the Branch Davidian compound. The President instructed the Department of the Treasury to conduct a review of the actions of the Bureau of Alcohol, Tobacco and Firearms at Waco. That report, entitled "Report of the ATF Investigation of Vernon Wayne Howell, a.k.a. David Koresh" was released to the public on September 30, 1993. Additionally, the President ordered the Department of Justice to conduct a review of the Federal Bureau of Investigation's actions at Waco. That report, entitled "Report to the Deputy Attorney General on the Events at Waco, TX, February 28 to April 19, 1993" was released to the public on October 8, 1993.

Two years after the conclusion of the events at Waco, the Committee on Government Reform and Oversight, Subcommittee on National Security, International Affairs, and Criminal Justice and the Committee on Judiciary, Subcommittee on Crime held extensive hearings on "Matters involving the Branch Davidians at Waco, TX." These hearings began on July 19 and ended on August 2, 1995. During those hearings, the committees heard testimony from over 90 witnesses and viewed voluminous photographic, video and documentary exhibits concerning the events at Waco. Despite the comprehensive nature of this examination, we believe that no new facts emerged. However, we believe that there are certain indisputable conclusions which can be reached by reasonable minds regarding the events that transpired at the Branch Davidian complex in Waco, TX between February 28, 1993 and April 19, 1993.

III. David Koresh was the Author of the Events at WACO

We agree with the majority's conclusion that the criminal conduct and aberrational behavior of

David Koresh and other Branch Davidians led to the tragedies that occurred in Waco. We share their judgment that David Koresh bore the ultimate responsibility for the deaths of 4 Federal law enforcement agents and 80 of his Branch Davidian followers. Additionally, we note that Koresh should also be held responsible for the serious gunshot and shrapnel wounds of 20 Federal law enforcement officers and the nonfirearm associated injuries suffered by 11 Federal officers.

IV. The Arrest and Search Warrants Were Legally Sufficient

We agree with the majority's finding that the ATF had probable cause to obtain an arrest warrant for David Koresh and search warrants for the Branch Davidian compound and the facility known as the "Mag Bag." However, we disagree with the majority's assertion that the affidavit filed in support of the warrant contained false statements.

The ATF began its investigation of Koresh after receiving complaints from the McLennan County (TX) Sheriff's Department in May 1992. A deputy sheriff asked ATF to investigate following a report from a concerned United Parcel Service driver. The driver relayed his concern about a recent delivery. In delivering the package, the container in which it was shipped broke open and revealed suspicious materials including grenade casings and a substantial quantity of black powder. The driver relayed that this was not the first package he had delivered to the compound that caused him concern. Following this conversation, the deputy learned from neighbors of the compound and other members of the community that the residents of the compound were constructing what appeared to be a barracks-type cinder block structure; had buried a school bus to serve as both a firing range and a bunker; and apparently were stockpiling arms and other weapons.

Before opening a formal investigation, the ATF agent spoke with local officials, interviewed gun dealers and searched national firearms registries to determine if any resident of the compound was licensed as a firearms manufacturer or dealer. Additionally, the agent searched the national registry to determine if any resident of the compound was licensed to own a fully automatic weapon. These searches revealed that no resident of the compound had registered to manufacture or sell weapons. Moreover, no resident of the compound was licensed to own a fully automatic weapon. During these discussions, the ATF agent learned of the delivery of grenade casings, black powder and large shipments of firearms.

While initially focusing on the paper trail generated by the weapons and explosives purchased by Koresh and his followers, the agent determined that an Arms company had recently shipped a substantial quantity of AR–15 parts to the "Mag Bag." Although not within the compound, the "Mag Bag" was an automotive repair facility operated by the Branch Davidians which was situated less than a mile away from the compound, on the grounds owned by the Branch Davidians. He also learned that a gun dealer had sold more than a dozen AR–15 lower receivers to Koresh a few months earlier. As the agent knew from previous investigations, someone with access to metal milling machines and lathes and the knowledge to use them could readily convert AR–15 semiautomatic rifles into fully automatic machine guns (similar to M–16 machine guns), by obtaining legally available parts. Additionally, the agent learned that 36 weapons had been sold to Vernon Howell (a.k.a. David Koresh) and additional weapons had been sold to other persons the agent knew to reside on the Branch Davidian compound. Moreover, the agent learned that approximately 65 AR–15 lower receivers reflected in a local gun dealers records were not present in the inventory. When questioned about this discrepancy, the dealer claimed that the firearms were being stored at the house of David Koresh.

The agent obtained further evidence by speaking with one of Koresh's neighbors who had served in an army artillery unit. The neighbor reported that since 1992 he had frequently heard spurts of weapons fire coming from the compound at night, including .50 caliber and automatic weapons fire. In mid-November a deputy sheriff reported that while on patrol a few days earlier he had heard a loud explosion at the compound accompanied by large clouds of gray smoke.

In an attempt to gain additional information about the manufacture and possession of illegal weapons at the compound, the agent spoke with several former followers. They confirmed seeing numerous weapons including grenades, pump shotguns, and AK–47 machine guns. Additionally, they provided information on the extent that Koresh dominated the lives of the residents of the compound. Branch Davidians had not only surrendered monetary assets to Koresh but allowed him to administer corporal punishment to children as young as 8 months old which often led to bleeding and severe bruising; permitted him to dictate the dissolution of marriages; empowered him to forbid married couples to engage in sexual relations; and authorized him to engage in sexual relations with all female members of the Davidians including girls as young as 10 years old.

In January 1993, the agent spoke with David Block, who had been a Branch Davidian from 1981 through 1992. Block relayed that he had seen two other Branch Davidians using a metal milling machine and metal lathe to produce weapons and which can be used to convert legal weapons to illegal automatic weapons. Block described an arsenal

that included .50 caliber rifles, AR–15s AK–47s, several 9mm pistols and three "streetsweepers".[1]

The findings of this extensive investigation formed the basis of the agent's statements contained in the affidavit in support of an arrest warrant for Koresh and a search warrant for the compound and the "Mag Bag." This affidavit was presented by an Assistant U.S. Attorney to a Federal Magistrate who determined that the information contained therein was credible and sufficiently current to issue warrants.

Therefore, while assertions contained in the underlying affidavits concerning the physical and sexual abuse of children may have been beyond the scope of the ATF's jurisdiction, it is abundantly clear that probable cause existed to obtain an arrest warrant for David Koresh and search warrants for the Mount Carmel compound and the facility known as the "Mag Bag."

Any doubts Koresh or others may have had about the validity of the warrants should have been expressed through lawful means. However, instead of challenging the validity of the warrants through the judicial system, Koresh chose to instruct his followers to open fire on Federal agents in the lawful execution of their duties

It should be remembered that at the criminal trial of the 11 Branch Davidians, none of the defense lawyers challenged the validity of the warrants. A successful challenge by any of the defense attorneys at trial would have excluded evidence of the firearms and would have been a major step in acquitting the defendants of the firearms violations. Therefore, it seems incomprehensible that had such a challenge been possible, it would not have been mounted by one of the many able attorneys representing the 11 Branch Davidians. However, no attorney questioned the validity of the warrants.

Additionally, it should be noted that evidence obtained from the scene after the fire, conclusively proved that Koresh amassed a huge cache of weapons and materials to manufacture illegal weapons. Although much evidence may have been destroyed by the April 19 fire set by the Davidians, at least 47 fully automatic weapons, which are illegal under Federal law, were recovered along with seven illegal explosives, several grenade casings, nine illegal silencers and 200,000 rounds of ammunition.

In its attack on the validity of the warrants, the majority does not present any facts that would undermine the integrity of the core paragraphs of the ATF affidavits establishing probable cause. Instead of providing testimonial or documentary evidence to challenge the validity of the warrants, the majority raises the unsupportable implication that a Federal law enforcement officer made false statements in securing the warrants. Such an unwarranted and unsupported attack on the credibility of a Federal law enforcement officer is simply irresponsible.

V. Accelerated Service of the Warrants

We disagree with the majority's assertion that there was no compelling reason to serve warrants on February 28. After a year long investigation the ATF had probable cause to believe that Koresh had amassed a substantial cache of illegal weapons and materials necessary to manufacture additional illegal weapons. While the particular date is not significant, it would have been extremely imprudent to wait long enough for him to amass, manufacture and potentially distribute additional illegal weapons. Additionally, we should note that the original raid was planned for March 1. However, on February 27, a local newspaper began a highly critical seven-part series of articles focusing on Koresh and the Branch Davidians. The series detailed several allegations against Koresh of child physical and sexual abuse which could have potentially exposed him to serious State criminal charges. Therefore, there was reason to believe that Koresh would expect a heightened interest from State or Federal authorities following the conclusion of the series and may have destroyed evidence of the illegal weapons in anticipation of a search. The date of the raid was moved from March 1 to February 28.

VI. Military Assistance Did Not Violate Posse Comitatus

We agree with the majority's conclusion that Posse Comitatus was not violated and share their concerns over the implementation of formal guidelines and criteria in the nonreimbursable use of Department of Defense resources in drug cases. However, we are concerned that the implementation of such a litmus test could result in the denial of needed assistance in the fight against the importation, production, distribution and use of illegal drugs. Therefore, although we understand this concern, we cannot support a recommendation for such guidelines and criteria when there is no objective evidence to believe that the military has failed in its role to accurately and appropriately gage the need of domestic law enforcement agencies for nonreimbursable assistance. However, it would be appropriate and would not hamper the fight against illegal drugs if the Department of Defense, the National Guard and Federal law enforcement agencies developed operational parameters for determining when a drug nexus is sufficient to justify nonreimbursable assistance.

Posse comitatus is the statute that limits military participation in civilian law enforcement. Military personnel may provide training to Federal, State and local civilians law enforcement officials, as long as it is not "large scale or elaborate."

[1] A "streetsweeper" is a 12 gauge, 12 shot, shotgun with a spring driven drum magazine and folding buttstock. Each time the trigger is released after firing a shot, the magazine rotates to position the next shot for firing.

Such assistance may not involve DOD personnel in a direct role in law enforcement operations, except in specific and narrowly drawn circumstances.

The Department of Defense provided minor nonreimbursable assistance to the ATF in connection with the events at Waco. Under 10 U.S.C. 371 and 32 U.S.C. 112, the Secretary of Defense is authorized to provide military support to law enforcement agencies engaged in counter drug operations. The Secretary of Defense is authorized to pay for the support pursuant to Section 1004 of P.L. 101–510, Section 1088 of P.L. 102–190, and Section 1041 of P.L. 102–484. If a drug nexus does not exist, the Economy Act requires that as a general matter, reimbursement is required when equipment or services are provided to agencies outside the Department of Defense. An exception may be made if there is some training value to the DOD personnel involved.

In the planning stages of the raid, the ATF requested Special Forces assistance from the Department of Defense. This request was forwarded through Operation Alliance and Joint Task Force 6. The initial request raised legal questions with Special Forces attorneys regarding the permissible scope of assistance. Specifically, Special Forces Attorneys were concerned with the proposal for DoD to review the ATF raid plan and perform on-site medical emergency services. Acceding to such a request would have clearly violated the Posse Comitatus Act's mandate prohibiting the military's "participation" in civilian law enforcement activities. Therefore, the initial request was significantly scaled back and limited to the facilitation of ATF training. The military did not offer any training involving the specific details of the raid plan or any advice concerning the accomplishment of the mission. Special forces provided assistance limited to facilitating ATF training at Fort Hood. This included helping to construct models of the doors and windows of the compound; creating a schematic prototype of the compound's exterior; operating firing ranges for weapons practice and providing limited training in emergency medial assistance. Additionally, it should be noted that there is no evidence to suggest that Department of Defense personnel were present at the time of the raid or at any time during the siege.

Federal courts have concluded that the National Guard is a State force which is not subject to the restrictions of the Posse Comitatus Act, except when called into Federal service, (*United States* v. *Benish*, 5 F.3d 20 (1993). While in State militia status, the range of permissible activities are governed by the laws and constitutions of the respective States. However, it is possible for a National Guard unit to become a Federal law enforcement entity. A State National Guard Unit is "federalized" when it is called into service by the President to suppress domestic violence or insurrection against a State government or the authority of the United States (10 U.S.C. 331–333). When a State guard unit is "federalized," law enforcement actions taken pursuant to that status are governed by the provisions of the Posse Comitatus Act.

The Texas and Alabama Air National Guard units provided pre-raid assistance by conducting aerial reconnaissance to photograph the compound. They conducted six flights over the compound and the facility known as the "Mag Bag" from January 6 through February 25, 1993. In addition to the reconnaissance flights, the Texas National Guard supplied three helicopters for training exercises on February 27 and for the raid on the following day.

In sum, there is no evidence to suggest that the Posse Comitatus Act was violated by the Department of Defense. Additionally, the National Guard units utilized by the ATF were not in a "federalized" status and therefore were not subject to the proscriptions of the act.

VII. Despite Inadequate Intelligence Operations, ATF did not Prematurely Reject the Siege Option

We disagree with the majority's findings that the primary reason that the dynamic entry route was chosen was because ATF did not have the experience, negotiators or capability to conduct a siege of any significant duration.

Once ATF agents concluded that there was probable cause to obtain warrants to search the premises and arrest Koresh, attention turned to the execution of those warrants. Three options were considered (1) arrest Koresh away from the compound and then serve the warrants; (2) place the compound under siege and (3) serve the warrants by "dynamic entry or raid."

The first option to arrest Koresh away from the compound followed by a subsequent service of warrants was rejected after careful consideration. Contrary to the majority's assertion, the ATF explored the possibility of arresting Koresh away from the compound. However, there are two problems with this assertion. The first problem is that it ignores the fact that a lawful search warrant had to be served for the premises. There is no reason to believe that the Davidians in the compound would not have reacted in the same manner had the search warrant been served without Koresh on the premises or attempted to destroy evidence if time elapsed between Koresh's arrest and the execution of the search warrant. Second, as of February 1993 the ATF had conducted several hundred raids of this kind. There had only been one case involving prolonged armed resistance. Moreover, Koresh had previous encounters with the State officials, police authorities and the judicial system. During these previous encounters, Koresh did not react violently to searches or service of process. Therefore, neither the agency's history nor Koresh's personal history yielded any information that would tend to indicate a violent reaction. It is pure speculation for

the majority to argue that Koresh could have been arrested away from the compound.

As acknowledged in the Treasury report, ATF failed to collect sufficient information to determine whether an off-premises arrest of Koresh could have been achieved. The ATF raid planners made serious mistakes in the intelligence gathering operations conducted prior to the raid. Successful intelligence operations require the development of adequate and accurate information. That information must be distributed to persons in the organizational hierarchy who are able to recognize the meaning and limitations of that information.

On January 11, 1993, the ATF began an undercover operation in a house across the road from the Branch Davidian compound. The agents involved were given the cover of being students at a local technical college. However, from the beginning several neighbors became suspicious of the their activities because the agents appeared too old to attend the college and the cars they drove were too new to belong to students. However, even if the "cover stories" used by the agents had been successful, the operations of the undercover investigation itself were abysmal. They failed to keep accurate logs and failed to turn over the available logs to raid planners. However, it should be noted that the agents were given little if any meaningful direction from the raid planners (Sarabyn and Chojnacki). Therefore, without adequate guidance from their superiors, the agents were almost destined to fail. Although Agent Rodrigues obtained a good deal of relevant and reliable information about Koresh and the Davidians, those agents charged with the responsibility of surveillance were poorly served by raid planners Sarabyn and Chojanacki.

Because of this inadequate supervision, the surveillance operation was not able to determine the frequency of Koresh's departures from the compound, the routine activities within the compound or other information that might have been useful in deciding the optimal time, place and manner to effect service of the warrants.

However, based on the scant information possessed at the time, the agents concluded that such an arrest was not a viable alternative. They knew that Koresh's infrequent departures from the compound were unpredictable. A social worker who had visited the compound to investigate the health and safety of children present, had informed the case agent that she thought Koresh did not leave the compound very often. On February 17, Koresh told the undercover agent that he did not often leave the compound. Further, it should be noted that after April 19, all reports of Koresh having been seen off the compound were thoroughly investigated by the Treasury Review. The reviewers were able to document only isolated trips off the compound, most occurring long before the time of the raid.

Additionally, it should be noted that prior to the hearing, majority subcommittee staff spent several days in Waco to gather facts and interview prospective witnesses. It should be noted that in hearings that lasted 10 days and had over 90 witnesses, no witnesses who were not members of the Branch Davidians or lawyers for the Branch Davidians were produced to testify supporting the majority's present contention that Koresh left the compound with sufficient frequency to affect an arrest away from the premises.

As noted in the Treasury report and by several witnesses, a siege was rejected because of a belief that any protracted encounter with a heavily armed and philosophically isolated and insular group would not be likely to produce an optimal result. The majority incorrectly concludes that the dynamic entry approach was prematurely abandoned. The decision to pursue a dynamic entry was made during a meeting that took place between January 27–29, 1993 after surveillance and undercover operations had begun. Prior to that meeting a siege option was under active consideration as was the possibility of luring Koresh off the compound. The Treasury report noted that the surveillance operations could have been better coordinated and intelligence better utilized in making this tactical decision. While the Treasury report concluded that the process used to decide that a dynamic entry should be undertaken was flawed, a siege option presented its own risks of failure. Four of the five independent reviewers who addressed the issue found that the dynamic entry plan could have been successful if surprise had not been lost.

VIII. Treasury Department Officials Should Have Taken a More Active Role in Raid Planning

We disagree with the majority's assertion that officials at the Treasury Department should have taken a more active role in pre-raid planning. The majority seems to forget that prior to President Clinton and Secretary Bentsen's order, the Bureau of Alcohol, Tobacco and Firearms exercised independence in planning and implementation of enforcement actions. Prior to this failed raid, there was no practice, history or reason to believe that additional oversight was necessary.

The Treasury Secretary is responsible for the actions of over 165,000 people and numerous bureaus and offices. During his first month in office, Secretary Bentsen relied on the Department's existing organizational and operational structure. This structure had been used by the previous Republican and Democratic administrations. In the enforcement area, this organizational structure included a chain of command from the law enforcement bureau head through the Assistant Secretary of the Treasury for Enforcement to the Deputy Secretary and then to the Secretary of the Treasury. This structure placed responsibility on the

law enforcement bureau head for bringing significant matters to the attention of his or her immediate supervisor. It is unfair, inaccurate and irresponsible to castigate Secretary Bentsen for the adoption of an organizational structure and operational approach that had been in place for years.

Under the structure that existed at that time, then ATF Director Steven Higgins' immediate supervisor was Deputy Assistant Secretary John Simpson, a career civil servant who had served at Treasury for many years. Mr. Simpson was carrying out the duties of the Assistant Secretary for Enforcement, pending the confirmation of an Assistant Secretary for Enforcement designee Ronald Noble. Having been ATF's Director for approximately 10 years, Mr. Higgins was very familiar with the reporting process.

The suggestion that a meeting between Secretary Bentsen and ATF Director Higgins would have led to earlier notification of ATF's planned raid of the Branch Davidian compound is pure conjecture. In fact Director Higgins did not tell his immediate supervisor in Treasury of the planned raid until 2 days before its planned execution.

IX. The Raid Should Have Been Aborted When the Undercover Agent Reported That Koresh Knew the Raid Was About to Occur

The majority report errs in concluding that Treasury officials failed to clearly communicate the conditions under which the raid was to be aborted. In fact, the Treasury Report and ATF Director Higgins' testimony before Congress on several occasions made it clear that the ATF knew it was supposed to call off the raid if Koresh learned that the ATF had planned a law enforcement operation against them. Director Higgins never questioned the clarity of his message from the Treasury Department. He testified that he told his subordinates if anything looked unusual, the raid should be called off. Consistent with the ATF's plan, Agent Rodrigues clearly communicated Koresh's awareness of an impending ATF law enforcement operation to his field supervisors. Unfortunately, Mr. Sarabyn and Chojnacki failed to heed this clearly communicated warning. All six of the independent tactical operations experts who analyzed the ATF's failed raid concluded that based on Mr. Rodrigues' information, the raid commanders should have called off the raid.

We concur with the majority's finding that despite their contrary testimony before this committee, evidence clearly shows that Agents-in-Charge Sarabyn and Chojnacki understood yet consciously chose to disregard warnings by Undercover Agent Rodrigues on the morning of the raid. Rodrigues advised Sarabyn and Chojnacki that the ATF's operations had been compromised and the element of surprise had been lost. The most significant mistake was the decision of the on-site raid commander to proceed after he had been informed by an undercover agent that Koresh was aware that a raid was about to occur. This error in judgment allowed Koresh to have an estimated 30–45 minute preparation time prior to the arrival of the agents. Koresh used this opportunity to arm himself and his followers. Despite the majority's assertions to the contrary, Treasury acknowledged in its report that the raid commander was questioned by the Washington commanders and knew or should have known that the raid should not have proceeded if secrecy or surprise had been lost or compromised.

X. The FBI Negotiations and Tactical Operations Were Sometimes Contradictory

The Department of Justice has acknowledged that there could have been better coordination and communication between the officials responsible for tactical decision and the negotiators. Alternating tactics of negotiating, granting demands and then using tactical operations such as cutting off electricity to punish Koresh for reneging on agreements, may have allowed Koresh to increase his hold on his followers.

In an effort to improve coordination and communication between negotiators and tactical command in the future, the Department of Justice has created that Critical Incident Response Group. As a part of this team, negotiators and tactical personnel train together to facilitate improved coordination of operations.

However, the majority's main criticism of the FBI involves its alleged reluctance to use outside experts. This criticism is not valid. Following the suggestions of behavioral experts, FBI negotiators repeatedly stressed to Koresh that if he left the compound, he would have every opportunity to spread his message to a worldwide audience, that he would be presumed innocent of any wrongdoing with respect to the ATF raid, and that the judicial process would provide him with an opportunity to tell his side of the conflict. The FBI negotiated with Koresh for 51 days. During that course of time, over 36 demands by the Davidians were documented and granted by the FBI. Contrary to the majority's assertion, there is no indication that FBI negotiators were adversely affected by physical or emotional fatigue.

We disagree with the majority's assertions that on the 46th day of the siege, the FBI should have believed the representations of Koresh's attorney who relayed Koresh's representation that he and his followers would leave the compound if Koresh were allowed to write his exposition on the Seven Seals of the Biblical Book of Revelations. Early in the siege, Koresh was allowed to speak to religious scholars concerning his interpretation. In response to a promise to surrender, an audiotape containing his interpretation of the First Seal was played on a radio broadcast. However, Koresh did not surrender at that time. FBI behavioralist Murray Miron believed that this latest attempt was merely another stalling tactic. Therefore, based on his

prior behavior and manipulative personality, it was not unreasonable for negotiators to conclude that Koresh would not honor this latest promise. We would note that had Koresh been interested in surrendering to authorities, he could have done so at any time during the 51-day siege. During the same period, 37 of his followers surrendered and called into the compound to inform Koresh and others that they were being treated well and had not been hurt. Therefore, whatever compelled Koresh to remain in the compound and prevented other followers from leaving was not something that a deal involving Koresh's composition of the written exposition of his religious tenets would have resolved.

XI. Law Enforcement Officers Could Benefit From Future Use of Outside Behavioral and Psychological Experts

We disagree with the majority's assertion that the FBI should have developed a thorough understanding of the religious tenets of the Davidians. During the course of the negotiations, the FBI attempted this approach and abandoned it because it became clear that the tenets were based on Koresh's personal thoughts and rapidly changed to suit the occasion. Therefore, this would not only have been futile but would have pushed back the time of the service of the warrants thereby allowing Koresh to amass even more illegal weapons.

We disagree with the majority assertion that the FBI negotiators did not appear to recognize the potential benefit of using religious experts in working with Koresh. We refer the majority to the Department of Justice report which listed the opinions of independent religious experts and FBI behavioral experts consulted during the siege. The FBI solicited and received input from various experts in many fields including psychology, psychiatry, psycho linguistics, religion and theology, cult theory and negotiation techniques. Religious experts and theologians consulted by the FBI included Dr. Philip Arnold of the Reunion Institute; Dr. Bill Austin, chaplain, Baylor University; Jeriel Bingham, vice president, Davidian Seventh Day Adventist Association; Reverend Trevor Delafield, Seventh Day Adventist Church; Dr. Robert Wallace and Dr. John Fredericks, Lighthouse Mission; Dr. Michael Haynes, Doctor of Theology and Psychology and Dr. Glenn Hilburn, Dean, Department of Religion, Baylor University. Additionally, the majority of those experts concluded that Koresh was manipulative and likely to deceive. All the experts agreed that Koresh would not leave the compound voluntarily. Therefore the FBI negotiators tactics which focused on Koresh as a manipulative and deceitful individual were precisely in accord with the viewpoint of the religious experts and psychological experts and with the experience of those negotiators who spent over 400 hours talking to Koresh and his followers.

XII. The Use of Tear Gas Was Unfortunate But Necessary

The majority report suggests that the decision to use gas was not the only option available to compel the Branch Davidians to leave the compound. In support of their theory that additional time would have yielded a nonviolent surrender, the majority report points to the release of 21 children between February 28 and March 3 as an indication that continued negotiations would have eventually secured the release of the remaining 80 adults and children within the compound. They argue that other options including expansion of and continuation of the negotiation strategy, waiting for the depletion of food and water supplies, or waiting for Koresh to complete his written exposition on the meaning of the Biblical Seven Seals prophesy were prematurely rejected in an effort to end the confrontation.

However, after March 23, additional releases had not been obtained. Koresh repeatedly reneged following the FBI's performance of agreed upon terms. Repeatedly, Koresh would explain his decision to remain in the compound by saying that God had not yet told him it was time to leave. Additionally, it should be noted that the "regular" conditions within the compounds were austere (no running water or plumbing) and there was a vast supply of military style MRE's (meals-ready to eat) and an artesian well with water storage tank housed within the compound.

Because the FBI decided not to fire any shots during the standoff, the Davidians walked outside of the building on several occasions to smoke cigarettes, empty chamber pots, feed chickens and gather water from rain water runoff. Finally, the large amount of firearms and ammunition (200,000 rounds) found within the compound, and the gathering of other interested and potentially dangerous individuals (para-military and Militia groups) contributed to their concern about the continued degradation of the situation and their ability to adequately secure the perimeter of the compound.

In fact, during the standoff two people, not people previously affiliated with the Davidians, infiltrated the perimeter and entered the compound. The FBI was concerned that failing to end the standoff would allow others (particularly paramilitary militia groups) who had begun to descend upon the compound to enter the perimeter. Threats posed by gathering militia and para-military groups in the area increased security problems and underscored the need for a quick resolution to the situation. There was a genuine concern as to whether these groups had gathered as observers or sought to engage in the standoff.

On April 12, the FBI presented its tear gas plan to Attorney General Reno. Over the ensuing days, several meetings were held to debate the tear gas plan, the properties of the gas chosen and the ef-

fects of gas on vulnerable populations such as pregnant women and children. Between the initial presentation of the plan on April 12 and the Attorney General's April 17 decision to use tear gas, Reno attended no fewer than eight meetings to discuss the tear gas option. Those meetings were attended by military and tactical experts who briefed the Attorney General on the advantages and disadvantages of the use of tear gas in a barricade situation as well as the available medical and scientific information concerning the toxicity and flammability of CS tear gas.

CS tear gas is a common riot control agent used in the United States and Europe. The purpose of tear gas is to cause irritation of the eyes, skin and respiratory system sufficient to encourage an individual to leave the premises or any open area. CS is considered the least toxic agent in the family of chemical tear gas irritants. In order to reach a level which would be lethal to fifty per cent of the population, CS must be in concentrations of 25–150 thousand milligrams per minute, cubed. The CS gas used at the Davidian compound was significantly less concentrated than the lethal level. The CS gas used was in a concentration which would only reach 16,000 milligrams per minute (cubed) if all of the gas used had been released at the same time, in a single closed room and the residents of that room had been exposed continuously for 10 minutes. At Waco, CS tear gas was released throughout different areas of the building while openings were created in the windows and walls. The CS gas was inserted for a total of 5 minutes over a 6-hour period. A total of twenty CS canisters were deployed on April 19. Additionally, several commentators discuss the fact that the wind velocity reached 35 knots during the tear gas delivery. Therefore, given the amount of tear gas used, the presence of high winds, building ventilation and the delivery of gas to different areas of the compound, it is highly unlikely that anything close to the fifty percent lethality rate was reached.

There are no documented cases in which the use of CS gas caused death. Reports that Amnesty International linked use of the gas to deaths of Palestinians in the occupied territories, is an extremely biased reading of the report. Released in June 1988, the report discussed the use of two kinds of tear gas, CS and CN. CN gas has proven to be lethal in closed quarters. The overwhelming majority of evidence on ill-effects of CS was anecdotal. Medical care had not been sought or documented. Moreover, because of religious prohibitions autopsies had not been performed. Therefore, there is no reliable scientific data which would lead to the conclusion that CS alone was implicated in any of the deaths. As Physicians for Human Rights found when visiting the occupied territories "we could not confirm the reports of deaths from tear gas inhalations."

The Himsworth Report, issued by the British Government, found that there is no evidence of any special sensitivity of the elderly, children or pregnant women. Additionally, the Himsworth Commission chronicled the effect of CS gas exposure on one infant and found that the child recovered rapidly after removal from the area affected by CS tear gas. This report was supported by a report which appeared in a Medical journal. The author not only set forth a treatment protocol for children exposed to CS tear gas but noted that full recovery was highly likely.

Moreover, the majority report contends that the presence of CS gas may have acted as an accelerant during the fire. That is unlikely. While CS is combustible (it will burn if ignited, much like paper), it is not a chemical accelerant or a flammable agent. Additionally, the method of delivery or the compounds in which the CS particulate was contained (methylene chloride and carbon dioxide) will not burn and will actually inhibit fire ignition.

The original CS. insertion plan required that the tear gas be inserted by CEV's over a course of 2 to 3 days. The theory was that the gas insertion over several days and in different parts of the compound would gradually render the entire compound uninhabitable. However, within 5 minutes of the initiation of the original plan, the insertion of tear gas was dramatically escalated.

The original gas insertion plan provided that in the event that the CEV's or others were fired upon during the insertion of gas, that the insertion would be escalated. The plan vested authority with the SAC Jamar to make the escalation decision. Therefore, when reports of shooting coming from the compound were confirmed and it became clear that the CEV's were being fired upon by the Davidians, Jamar decided to escalate insertion of the tear gas delivery schedule.

We agree with the majority report that it should have been obvious to all concerned that the insertion of CS tear gas would have prompted Koresh to order the vehicles fired upon and that this would have resulted in the acceleration of tear gas insertion. However, the majority fails to recognize that if the vehicles were fired upon, the parties at risk would be the FBI. Following the conclusion of the insertion of tear gas, the building would be uninhabitable and the occupants would have evacuated. Therefore, it seems that this underscores the FBI's determination to compel the occupants to leave without any loss of life inside the compound, despite potential harm to themselves.

XIII. White House Officials Were Informed But Not Involved in the Decision to Use Tear Gas

White House officials were informed but not consulted about the use of tear gas.

On April 18, Web Hubbell, Justice Department White House Liaison, and Attorney General Reno

informed the President about the plan to gradually insert tear gas into the compound over a 2 to 3 day period in an effort to render the compound uninhabitable and compel the occupants to leave. During that conversation, Reno told the President that April 19 was not envisioned as "D–Day" and that the use of the tear gas would not be the beginning of an assault on the compound.

Critics maintain that the White House pressured Reno to end the standoff by any means necessary. They contend that this directive led to the lack of clear decisionmaking and a less than objective examination of the potential hazards concerning the use of CS gas. The majority report implies that had expediency not been a factor, Reno would have continued to wait for the Davidians to surrender. This contention is pure speculation that is not supported by the facts. As noted earlier, Attorney General Reno held eight meetings to discuss various aspects of the tear gas plan with tear gas experts. If speed had been her concern, she would not have consulted with various experts and waited a week between the first proposal of the plan and its implementation.

XIV. The Branch Davidians Started the Fire and Chose to Remain Within the Compound While It Burned

On April 19, approximately 20 minutes after the last tear gas insertion, the Davidian compound erupted in flames. The first indication of fire was seen and noted at 12:07 p.m. By 12:11 p.m., the entire compound was substantially involved.

There is no doubt that the Branch Davidians started the fire. We disagree with the conclusion of the majority report which states that the evidence concerning the origin of the fire is not dispositive. The majority report ignores evidence contained in the arson report which proved three separate ignition points within the compound and conclusively found that chemical accelerants were placed throughout the compound. Additionally, there was eyewitness testimony as well as film footage which chronicled the rapid spreading of the blaze. Moreover, the clothes of surviving Davidians who escaped the compound were laced with gasoline and other flammable materials. Finally, and most poignantly, several surviving Davidians admitted that those within the compound had started the blaze. These statements are supported by recorded statements in which voices are heard asking about the location and timing of fuel pouring and lighting activities. Additionally, it should be noted that an examination of the vehicles involved inserting tear gas was conducted. These vehicles did not have flame throwing equipment and were not of the type that could have been equipped with flamethrowing equipment. All evidence clearly indicates that the fire which destroyed the Branch Davidian compound on April 19 was ignited by individuals inside the compound.

It should be noted that the fire department was called after the blaze began. However, they did not attempt to put out the fire because during the blaze gun shots were heard coming from and within the compound. The safety of any firefighter who approached the compound could not be assured. Therefore, the FBI determined that the local firefighters should not be allowed to approach the compound. However, it should be noted that after the fire began nine survivors exited the compound.

There has been some speculation that the tear gas used may have contributed to the fire. The CS tear gas did not act as an accelerant for the fire. CS is a powdery particulate. When used in a tear gas canister or other tear gas delivery system, CS particulate is suspended in methylchloride and carbon dioxide. Neither CS particulate, methylchloride or carbon dioxide are flammable. They actually inhibit the outbreak of fire. We agree with the majority's conclusion that the use of CS tear gas prior was not a direct, proximate cause or contributing factor to the rapid ignition and expansion of the blaze. The audiotape and forensic evidence clearly indicate that the rapid ignition and spread of the blaze was due to the use of chemical accelerants (including gasoline, kerosene and camp fuel oil) distributed throughout the compound by individuals within the compound. Additionally, the materials used in the construction of the building itself (largely plywood) in conjunction with storage of materials such as hay and propane gas containers and high winds combined to significantly contribute to the rapid combustion of the building.

XV. Recommendations

Finally, the report makes 17 recommendations that are largely duplicative of recommendations made by the extensive internal reviews undertaken by the Department of Treasury and the Department of Justice. Those recommendations and our responses are as follows:

1. Congress should conduct further oversight of the Bureau of Alcohol, Tobacco and Firearms and jurisdiction should be transferred to the Department of Justice. While additional oversight is always proper, it should be noted that the proposal to transfer jurisdiction of ATF first surfaced in the Carter administration and has been rejected several times. Rejections have been based on concerns about placing total enforcement of the firearms laws in one agency. A separation of investigative and prosecutorial functions in separate agencies maintains an important check and balance system.

2. If false statements were made in the affidavit filed in support of the search and arrest warrants, criminal charges should be pursued. There is absolutely no evidence to suggest that the agent in question made false statements. This recommendation is an example of a willingness to disbelieve Federal law enforcement personnel which is manifest throughout this report.

3. Federal law enforcement should verify the credibility and timeliness of the information used in obtaining warrants. An assistant U.S. attorney and a Federal Magistrate reviewed the affidavit and found the information sufficiently fresh to issue warrants. Additionally, in finding that probable cause existed, the majority report implicitly agrees with the determination that the information was not stale.

4. The ATF should revise it National Response Plan to ensure that its best qualified agents are placed in command and control positions. The Treasury Department made this finding in its internal review. The ATF has implemented procedures to comply.

5. Senior officials at ATF should assert greater command and control over significant operations. The Treasury Department made this finding it its internal review. The ATF has implemented procedures to comply.

6. The ATF should be constrained from independently investigating drug-related crimes. This recommendation may lack administrative and operational feasibility.

7. Congress should consider applying the Posse Comitatus Act to the National Guard with respect to situations where a Federal law enforcement entity serves as the lead agency. This recommendation may lack administrative and operational feasibility and may unduly hamper the State's ability to use the guard in domestic law enforcement operations (e.g. drug trafficking patrols, civil disturbance).

8. The Department of Defense should streamline the approval process for military support so that drug nexus controversies are avoided in the future. This recommendation may deprive the Department of Defense of the operational flexibility necessary to provide assistance. The inability to pass a "litmus test" should not preclude the provision of otherwise justifiable assistance.

9. The GAO should audit the military assistance provided to the ATF and to the FBI in connection with their law enforcement activities toward the Branch Davidians. It should be noted that Members of Congress can request GAO audits on any topic at anytime.

10. The GAO should investigate the activities of Operation Alliance in light of the Waco incident. It should be noted that Members of Congress can request GAO audits on any topic at anytime.

11. Federal law enforcement agencies should redesign their negotiation policies and training to avoid the influence of physical and emotional fatigue on course of future negotiations. The FBI has doubled the size of the Hostage Rescue Team.

12. Federal law enforcement agencies should take steps to foster greater understanding of the target under investigation. The Department of Justice and the Department of the Treasury currently consult a wide range of outside experts on various topics.

13. Federal law enforcement agencies should implement changes in operation procedures and training to provide better leadership in future negotiations. Recent successful negotiations with the Viper Militia and the Freemen indicate implementation of successful negotiation policies.

14. Federal law enforcement agencies should revise policies and training to increase the willingness of their agents to consider the advice of outside experts. Recent successful negotiations with the Viper Militia and the Freemen indicate policies evincing a willingness to employ the advice of outside experts.

15. Federal law enforcement agencies should revise policies and training to encourage the acceptance of outside law enforcement assistance, where possible. Federal law enforcement officers currently network within and among officers from Federal, State and local law enforcement entities.

16. The FBI should expand the size of the hostage rescue team. The HRT has been doubled in the 3 years since the events at Waco.

17. The Government should further study and analyze the effects of CS tear gas on children, persons with respiratory problems, pregnant women and the elderly. Numerous studies have concluded that there is no increased toxicity or adverse effect when these populations are exposed to CS tear gas. Currently, data is gathered by exposing new armed forces recruits to tear gas. It seems that there would be a problem in conducting tests on human subjects within the population categories suggested by the majority report. Although traditional tests with control and noncontrol groups would not be possible, persons should be monitored and data collected whenever exposure occurs.

CONCLUSION

The events at Waco were a tragedy. However, the majority investigation, hearing and report add nothing new to the understanding of the tragedy or the prevention of future events similar to Waco.

We live in dangerous times where the threat of domestic terrorism is real. The bombing of the Alfred P. Murrah Federal Building in Oklahoma, more than any other single event, stands as a testament to the possible impact that a few people with illegal weapons and destructive purposes can have on a nation. Groups or individuals bent on undermining the constitutional democracy of this country are a clear and present danger to the rights, liberties and freedoms that every American enjoys.

In such troubling times, it seems irresponsible for the majority report to engage in speculation and unsupported theories and unproven allegations against Federal law enforcement agencies and officers. The agencies involved should be commended for their extensive and unyielding investigations as well as their quick and decisive efforts to take corrective actions to ensure that there is no

reoccurrence of this type of event. It appears that the successful handling of events such as the "Freeman" standoff in Montana and the Viper Militia arrests in Arizona are testament to the determination of these agencies to learn from previous mistakes.

HON. CARDISS COLLINS.
HON. KAREN L. THURMAN.
HON. HENRY A. WAXMAN.
HON. TOM LANTOS.
HON. ROBERT E. WISE, JR.
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