

**MINORITY VIEWS  
REPORT ON  
“THE TRAGEDY AT WACO: NEW EVIDENCE EXAMINED”**

**I. INTRODUCTION**

The Committee’s Waco investigation began as many of the Committee’s other investigations have begun: with a false accusation. In August 1999, after the media reported that the FBI had used pyrotechnic tear gas rounds at Waco, Rep. Dan Burton accused Attorney General Janet Reno of covering up key facts and said that she should be removed from office. On one nationally broadcast radio program, Mr. Burton said that Attorney General Reno “should be summarily removed, either because she’s incompetent, number one, or, number two, she’s blocking for the President and covering things up, which is what I believe.”<sup>1</sup>

In September 1999, Mr. Burton renewed his accusations of a cover-up by asserting that the Justice Department did not provide Congress with documents detailing the FBI’s use of military tear gas rounds near the Branch Davidian compound on April 19, 1993. In particular, he accused the Justice Department of deliberately concealing the 49<sup>th</sup> page of an FBI lab report, which contained a reference to a spent military tear gas round. Prior to conducting any meaningful investigation, Mr. Burton said on national television, “With the 49<sup>th</sup> page of this report not given to Congress, when we were having oversight hearings into the tragedy at Waco, and that was the very definitive piece of paper that could have given us some information, it sure looks like they were withholding information. And she’s responsible.”<sup>2</sup>

Mr. Burton’s allegations turned out to be untrue. Rep. Henry A. Waxman pointed out that the Justice Department had produced documents to the Committee in 1995 that contained numerous explicit references to military tear gas rounds.<sup>3</sup> Former Senator John C. Danforth then thoroughly investigated the matter as Special Counsel. He found that there was no cover-up by the Attorney General. In fact, Sen. Danforth found that the 49<sup>th</sup> page had never been missing at all. According to Sen. Danforth’s report: “[T]he Committees were provided with at least two copies of the lab report in 1995 which did contain the 49<sup>th</sup> page. The Office of Special Counsel easily located these complete copies of the lab report at the Committees’ offices.”<sup>4</sup>

---

<sup>1</sup>*Morning Edition*, NPR (Aug. 31, 1999).

<sup>2</sup>*Fox News Sunday*, Fox News (Sept. 12, 1999).

<sup>3</sup>Letter from Rep. Henry A. Waxman to Sen. John C. Danforth (Sept. 13, 1999) (attached as Exhibit 1).

<sup>4</sup>John C. Danforth, Special Counsel, *Interim Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt. Carmel Complex, Waco, Texas* (July 21, 2000) (hereinafter “Danforth Report”) (attached as Exhibit 2).

This Committee's investigation into Waco should have ended on September 9, 1999, when Attorney General Reno appointed Sen. Danforth to serve as Special Counsel to investigate lingering questions related to the Branch Davidian standoff in 1993. Since that date, Mr. Burton's investigation has been unnecessary, expensive, and fruitless. He has required federal agencies to produce nearly 800,000 pages of documents, called more than 80 witnesses to appear for interviews, and dispatched Committee staff across the country from Puerto Rico to Texas. And despite the duration and cost to the federal treasury, his investigation has contributed virtually nothing to the public's understanding of the Waco tragedy.

On the substance of this investigation, we concur with the major findings of Sen. Danforth and with the findings of fact issued by Judge Walter S. Smith, Jr., of the United States District Court for the Western District of Texas.<sup>5</sup> Sen. Danforth and Judge Smith both concluded that the government did not cause the fire at the Branch Davidian complex and did not direct gunfire at the Branch Davidian complex on April 19, 1993. We also concur with Sen. Danforth's conclusion that the government did not improperly employ U.S. armed forces during the Waco standoff and that senior Justice Department and FBI officials – including Attorney General Janet Reno and FBI Director William Sessions – did not knowingly make false statements about the FBI's use of pyrotechnic tear gas rounds on April 19, 1993.<sup>6</sup>

Although one can with hindsight second guess decisions made at virtually all levels of the FBI and Justice Department, the fact remains that the federal officials involved in the Waco standoff acted lawfully and with great restraint under difficult circumstances. As both Sen. Danforth and Judge Smith concluded, the responsibility for the Waco tragedy lies with certain Branch Davidians and particularly their leader, David Koresh.<sup>7</sup>

## **II. MR. BURTON BEGAN HIS INVESTIGATION WITH ERRONEOUS CHARGES**

Mr. Burton, in a pattern that has become typical of this Committee, first alleged wrongdoing by

---

<sup>5</sup>Amended Findings of Fact and Conclusions of Law, *Andrade v. United States*, No. W-96-CA-139 (W.D. Tex. filed Sept. 27, 2000) (hereinafter "Findings of Fact and Conclusions of Law") (attached as Exhibit 3).

<sup>6</sup>Danforth Report at 51. The minority has no information to substantiate or refute Sen. Danforth's interim findings that a staff attorney for the FBI failed to disclose that an FBI agent used pyrotechnic tear gas rounds and gave conflicting information to Sen. Danforth's investigators. Committee staff interviewed this individual, Jacqueline Brown, on January 7, 2000. The minority staff found her to be cooperative and truthful in her responses to the questions posed by Committee staff.

<sup>7</sup>Danforth Report at 5; Findings of Fact and Conclusions of Law at 10.

a Clinton administration official and then proceeded to investigate.<sup>8</sup> In August 1999, the press reported that pyrotechnic tear gas rounds had been used at Waco, contrary to statements made by Attorney General Reno and other officials that the FBI had only used nonpyrotechnic tear gas rounds.<sup>9</sup> Mr. Burton immediately attacked the Attorney General, stating on one nationally broadcast television program, “I think she either misled Congress and covered this up or she was totally incompetent. . . . [S]he should be removed because she’s just not doing her job.”<sup>10</sup>

Mr. Burton soon renewed his accusations of a cover-up, alleging that the Justice Department failed to provide Congress documents describing the FBI’s use of pyrotechnic tear gas rounds. In particular, Mr. Burton accused the Justice Department of concealing from Congress the 49<sup>th</sup> page of an FBI lab report. This page, the last in the document, contained the following reference to the FBI’s use of a military-style tear gas round: “Specimen Q1237 (B160) is a fired U.S. Military 40 mm shell casing which originally contained a CS gas round.”<sup>11</sup> To a person with specialized knowledge of tear gas projectiles, this would indicate the use of a pyrotechnic projectile, capable of igniting a fire.

Mr. Burton charged that Justice Department officials, including the Attorney General of the United States, were involved in a cover-up. Mr. Burton wrote in a September 10, 1999, letter to Attorney General Reno:

It is difficult for me to believe that the Department had multiple copies of a document, produced only one copy of the document to Congress, and then managed to lose the one critical page of the document mentioning the use of pyrotechnic tear gas. Had page 49 of the FBI report been produced to Congress when it was originally requested years ago, it would have cast doubt onto the testimony of a number of Department officials. The Department’s failure to produce this document when it was originally requested raises more questions about whether this Committee was intentionally misled during the original Waco investigation.<sup>12</sup>

---

<sup>8</sup>A report recently released by Rep. Waxman describes many similar allegations that have occurred over the last six years. *See Unsubstantiated Allegations of Wrongdoing Involving the Clinton Administration*, Minority Staff Report, Committee on Government Reform (Oct. 2000) (attached as Exhibit 4).

<sup>9</sup>*FBI Reverses Its Stand on Waco*, Washington Post (Aug. 26, 1999).

<sup>10</sup>Hannity & Colmes, Fox News (Aug. 30, 1999).

<sup>11</sup>Memorandum from FBI Laboratory to Sergeant James Miller, Texas Rangers (Dec. 6, 1993).

<sup>12</sup>Letter from Rep. Dan Burton to Attorney General Janet Reno (Sept. 10, 1999).

Over the following weekend, Mr. Burton repeated his accusation of a cover-up by the Attorney General, stating on one nationally broadcast television program, “that was the very definitive piece of paper that could have given us some information, it sure looks like they were withholding information. And she’s responsible.”<sup>13</sup>

Mr. Burton’s allegations were not only unsupported by the evidence, they were directly contradicted by information in his own files.

In 1995, a subcommittee of the Government Reform and Oversight Committee and a subcommittee of the House Judiciary Committee conducted an investigation into the activities of federal law enforcement agencies toward the Branch Davidians. As part of that inquiry, the subcommittees issued document requests to the White House and the Departments of Justice, Treasury, and Defense. The records produced in response to these requests were stored in over 40 boxes in congressional archives until August 1999, when they were recalled by Mr. Burton.

At the time Mr. Burton alleged that the Attorney General had withheld information on the use of military-style tear gas rounds, he had documents in his own possession that explicitly discuss the use of military-style tear gas rounds at Waco. Many of these documents were located by Rep. Waxman’s staff in boxes in Mr. Burton’s offices within a few days of Mr. Burton’s allegations.<sup>14</sup> One document provided to Congress in 1995, for example, was a report of an interview of the FBI agent who co-piloted the surveillance aircraft flying above the Branch Davidian compound on the morning of April 19, 1993. According to this document, the pilot reported hearing “a high volume of [Hostage Rescue Team] traffic and Sniper [Tactical Operations Center] instructions regarding ... the insertion of gas by ground units,” including “one conversation relative to utilization of some sort of military round to be used on a concrete bunker.”<sup>15</sup>

Another document produced to Congress in 1995 was a typewritten chart prepared by Justice Department prosecutors in connection with the criminal trial of surviving Branch Davidians. The chart, which summarizes interviews with potential witnesses for the prosecution, identifies each Hostage Rescue Team member interviewed, the name of the interviewer, a summary of significant observations made by the witness, and whether each witness would be placed on the prosecution’s witness list for trial. According to the chart, one witness, who was later identified as Special Agent Dave Corderman, was expected to testify that “smoke on film came from attempt to penetrate bunker w/1 military and 2

---

<sup>13</sup>*Fox News Sunday*, Fox News (Sept. 12, 1999).

<sup>14</sup>Letter from Rep. Henry A. Waxman to Sen. John C. Danforth (Sept. 13, 1999).

<sup>15</sup>Interview of Special Agent R. Wayne Smith, Federal Bureau of Investigation FD-302 (June 9, 1993).

ferret rounds.”<sup>16</sup> In addition, the document indicates that the witness described the appearance of the military round, stating: “Military was grey bubblehead w/ green base.”<sup>17</sup>

Also among the documents produced by the Justice Department to House investigators in 1995 were handwritten notes clearly describing the use of military rounds in the Waco operation and describing that such rounds were “incendiary.” One set of notes read, “Smoke from bunker – came when these guys tried to shoot gas into the bunker. (Military gas round) ... grey bubblehead w/ green base.” The term “military” or “military round” appears twice again in the same paragraph, and an arrow points from the word “military” to the word “incendiary.”<sup>18</sup> Notes on the following page read, “Obj[ective]: to keep people from fleeing into bunker.”<sup>19</sup>

Not only were there numerous references to the use of military tear gas at Waco in Mr. Burton’s own files, but those files also contained the 49<sup>th</sup> page of the FBI lab report that Mr. Burton alleged had never been produced to Congress. After thoroughly investigating this issue, Sen. Danforth found:

Attorneys from the Department of Justice who produced documents to the United States House of Representatives Committee on Government Reform and Oversight and the Committee on the Judiciary in advance of the 1995 hearings have come under public scrutiny for producing the FBI laboratory report containing the reference to the military tear gas round without the 49<sup>th</sup> page, which contains the relevant reference. In fact, however, while one copy of the report did not contain the 49<sup>th</sup> page, the Committees were provided with at least two copies of the lab report in 1995 which did contain the 49<sup>th</sup> page. The Office of Special Counsel easily located these complete copies of the lab report at the Committees’ offices when it reviewed the Committees’ copy of the 1995 Department of Justice document production. . . . The Special Counsel has concluded that the missing page one copy of the lab report provided to the Committees is attributable to an innocent photocopying error and the Office of Special Counsel will not pursue the matter further.<sup>20</sup>

Mr. Burton has never apologized for making these unsubstantiated allegations of a government

---

<sup>16</sup>Unidentified handwritten notes.

<sup>17</sup>*Id.*

<sup>18</sup>Unidentified handwritten notes.

<sup>19</sup>*Id.*

<sup>20</sup>Danforth Report at 54.

cover-up. To the contrary, in the majority's report, he renews the false accusation, suggesting that Justice Department and FBI officials deliberately delayed production of these documents to this Committee in 1995 in order to conceal the truth.<sup>21</sup> The majority writes, "Sadly, the Justice Department did not produce the requested documents until three days before the start of the hearings."<sup>22</sup> In fact, however, the Justice Department received broad document requests six weeks before this Committee held joint hearings with the Judiciary Committee in 1995 and, by agreement with the Committee, produced 250,000 pages on a prioritized basis.<sup>23</sup> The Justice Department produced two complete copies of the FBI lab report to the committees on July 6, 1995.<sup>24</sup> The committees thus received the FBI lab report not three days ahead of the 1995 hearings, but 13 days before the start of the hearings, 26 days before the conclusion of the hearings, and 392 days before the committees issued their joint report on August 2, 1996.

### **III. MR. BURTON'S INVESTIGATION WAS UNNECESSARY AND WASTEFUL**

Since September 1999, the Committee has conducted an unnecessary and wasteful investigation of Waco. Virtually every document the Committee has obtained and virtually every witness interviewed by Committee staff was examined by Sen. Danforth in the course of his detailed Waco investigation.

#### **A. Sen. Danforth Thoroughly Investigated Waco**

Despite a voluminous public record that had been developed on the Waco tragedy between 1993 and 1997, three developments occurring in August and September 1999 generated public interest in whether the government caused or contributed to the deaths of Branch Davidians at Waco and whether government officials had engaged in a cover-up. First, the FBI acknowledged on August 25, 2000, that it used a limited number of pyrotechnic tear gas projectiles on April 19, 1993.<sup>25</sup> Second, on September 2 and 3, 1999, the FBI released videotapes taken the morning of April 19, 1993, by an

---

<sup>21</sup>See Majority Report at 30 n. 106, 31.

<sup>22</sup>*Id.* at 30 n. 106.

<sup>23</sup>See Letter from Kent Marcus, Acting Assistant Attorney General for Legislative Affairs, to Chairman William H. Zeliff, Jr. and Chairman William McCollum (July 6, 1995).

<sup>24</sup>See *id.*; Letter from Jon P. Jennings, Principal Deputy Assistant Attorney General, to Chairman Dan Burton (Oct. 22, 1999).

<sup>25</sup>*Branch Davidian Compound - Waco, Texas*, Press Release, U.S. Department of Justice, Federal Bureau of Investigation (Aug. 25, 1999) (on line at <http://www.fbi.gov/pressrm/pressrel/pressre199/presswaco2.htm>).

FBI surveillance aircraft using Forward Looking Infrared Radar (FLIR).<sup>26</sup> Prior to that time, the FBI and Justice Department had maintained that they only had FLIR tapes beginning later in the morning.<sup>27</sup> Third, news stories around the country reported that the Justice Department had evidence of the use of pyrotechnic tear gas rounds but failed to produce it to Congress in 1995.<sup>28</sup>

These developments caused a number of Republican leaders in the House and Senate to call for investigations, including Rep. Henry Hyde, Rep. Dan Burton, Sen. Orrin Hatch, and Sen. Arlen Specter.<sup>29</sup>

Attorney General Reno quickly responded to concerns raised by members of Congress and by the media. On September 9, 1999, she appointed John Danforth, a highly respected former Republican U.S. Senator, as Special Counsel. As part of his mandate, Sen. Danforth agreed to investigate five principal issues: (1) whether the government caused or contributed to the fire on April 19, 1993; (2) whether the government directed gunfire at the Branch Davidians on April 19, 1993; (3) whether the government used any incendiary or pyrotechnic device on April 19, 1993; (4) whether the government illegally employed the armed forces at Waco; and (5) whether government officials made false statements or concealed information about the events on April 19, 1993.<sup>30</sup> After receiving his appointment, Sen. Danforth said that he planned to conduct an aggressive inquiry into whether there were “bad acts, not whether there was bad judgment.”<sup>31</sup>

Attorney General Reno’s appointment of Sen. Danforth received wide praise. Republican Sen.

---

<sup>26</sup>*FBI Releases Waco Videotape*, Press Release, U.S. Department of Justice, Federal Bureau of Investigation (Sept. 2, 1999) (on line at <http://www.fbi.gov/pressrm/pressrel/pressre199/wacorel.htm>); *FBI Releases Second Waco Videotape*, Press Release, U.S. Department of Justice, Federal Bureau of Investigation (Sept. 3, 1999) (on line at <http://www.fbi.gov/pressrm/pressrel/pressre199/wacorel2.htm>).

<sup>27</sup>Danforth Report at 141.

<sup>28</sup>*E.g. Burton Opens Investigation of Waco Tactics*, CNN.com (Aug. 30, 1999) (on line at: <http://www.cnn.com/allpolitics/stories/1999/08/30/tbi.waco>); *FBI Suggests Outside Probe of Waco Siege*, Washington Times (Sept. 1, 1999); *Marshals Acting on Reno’s Orders Seize FBI Tape*, New York Times (Sept. 2, 1999).

<sup>29</sup>*FBI Admits Using Tear Gas at Waco*, Associated Press (Aug. 25, 1999).

<sup>30</sup>Danforth Report at 2-3.

<sup>31</sup> *Aggressive Waco Probe Is Promised: Danforth Takes Over, Reno Recuses Herself*, Washington Post, (Sept. 10, 1999).

Fred Thompson said that Sen. Danforth “has an excellent reputation and the highest integrity.”<sup>32</sup> House Majority Leader Dick Arme y questioned the need for any congressional hearings and expressed confidence in Sen. Danforth, calling him “a man of impeccable integrity.”<sup>33</sup> Mr. Burton said, “He’s a fine man, and I think Sen. Danforth is going to do a commendable job.”<sup>34</sup>

Sen. Danforth proceeded to conduct a thorough and professional investigation of Waco. He hired over 70 staff to assist him in the investigation. As of July 2000, the Office of Special Counsel had interviewed 849 witnesses, reviewed over two million pages of documents, and examined thousands of pounds of physical evidence.<sup>35</sup>

Sen. Danforth released an interim report on his investigation on July 21, 2000.<sup>36</sup> The report found, among other things, that government agents did not start or spread the fire that consumed the Branch Davidian compound, did not direct gunfire at the Branch Davidians, and did not unlawfully employ U.S. armed forces at Waco. The report was widely regarded as thorough and accurate. An editorial in the *Washington Post* called it “a welcome clarification of the record on this seemingly endless saga” and concluded that it was “time, finally, for Waco to recede into history.”<sup>37</sup>

#### **B. Chairman Burton’s Investigation Duplicated the Danforth Investigation**

Despite the appointment of Sen. Danforth as Special Counsel, Rep. Burton persisted in conducting his own investigation. This investigation was substantial. It involved considerable staff resources, required federal agencies to produce hundreds of thousands of pages of documents, resulted in extensive staff travel, and included many witness interviews. And in almost every respect, it duplicated the work of Sen. Danforth and his staff.

As part of the investigation, Mr. Burton issued subpoenas to the Department of Justice, the FBI, the White House, and the Defense Department. Among the categories of documents required by

---

<sup>32</sup>*Reno Picks Waco Head*, Baltimore Sun (Sept. 9, 1999).

<sup>33</sup>*Arme y Questions Need for New Hearings On Davidian Siege*, Dallas Morning News (Oct. 8, 1999).

<sup>34</sup>*Hannity & Colmes*, Fox News (Oct. 19, 1999).

<sup>35</sup>Danforth Report at 4.

<sup>36</sup>Although Sen. Danforth released his principal findings in his interim report, his investigation of certain issues is ongoing to date.

<sup>37</sup>*Waco: Case Closed*, Washington Post (July 23, 2000).

Committee subpoenas, Mr. Burton demanded all documents related to munitions issued to the Hostage Rescue Team; the various forms of tear gas used at Waco; all briefings given by the FBI during the siege; audio surveillance devices at Waco; contacts between the Department of Justice and the White House; contacts between the FBI and the Department of Defense; infrared imagery and analysis; the use of aircraft, helicopters, or armored vehicles; all photographs of the Branch Davidian compound; military involvement at Waco; military personnel at Waco; and “military personnel who provided advice or assistance of any sort” to the Justice Department, the FBI, or the White House.<sup>38</sup>

To comply with these subpoenas, federal agencies have produced over 795,000 pages of documents. According to Attorney General Janet Reno:

Just on Waco alone we provided 724,169 pages of documents, 12 looseleaf binders of FBI lab reports, 18 diskettes of documents, 101 videotapes, 729 audio tapes, 2,161 photographs, slides, charts, drawings, 8 CD ROMs of color photographs.<sup>39</sup>

This extensive document production was costly and redundant. According to representatives of the Justice Department, the FBI, and the Defense Department familiar with both investigations, the Committee received few, if any, documents that were not also provided to Sen. Danforth and his staff. In an October 19, 2000, letter to Chairman Burton, Assistant Attorney General Robert Raben noted that the Justice Department had made over 80 separate productions of materials to the Committee. He estimated that the cost of producing Waco-related materials to this Committee and other congressional committees exceeded \$800,000.<sup>40</sup>

The Committee’s witness interviews were also duplicative of Sen. Danforth’s efforts. Despite the ongoing efforts of Sen. Danforth, this Committee conducted more than 80 interviews of government employees and private citizens with knowledge on various aspects of the Waco standoff. The majority conducted 77 interviews jointly with the minority staff. Five witnesses appeared for

---

<sup>38</sup>See Subpoena Duces Tecum to Director Louis Freeh, Federal Bureau of Investigation (Sept. 1, 1999); Subpoena Duces Tecum to Attorney General Janet Reno, U.S. Department of Justice (Sept. 1, 1999); Subpoena Duces Tecum to the Executive Office of the President (Sept. 1, 1999); Subpoena Duces Tecum to William S. Cohen, Secretary of Defense (Sept. 1, 1999); Subpoena Duces Tecum to Federal Bureau of Investigation (Sept. 15, 1999); Subpoena Duces Tecum to United States Department of Justice (Feb. 16, 2000).

<sup>39</sup>Interview of Attorney General Reno at 29 (Oct. 5, 2000). By October 19, the number of documents the Justice Department had produced increased to 730,000. Letter from Robert Raben, Assistant Attorney General for Legislative Affairs, to Chairman Dan Burton (Oct. 19, 2000).

<sup>40</sup>Letter from Robert Raben, Assistant Attorney General for Legislative Affairs, to Chairman Dan Burton (Oct. 19, 2000).

interview twice before the minority and majority staff. Two other known witnesses were interviewed outside the presence of minority staff. Most of these interviews lasted two or more hours and required the subject of the interview to leave work and appear at the Committee's offices. On several occasions, Committee staff traveled to conduct interviews outside the District of Columbia, including trips to Florida, New York, North Carolina, Pennsylvania, Puerto Rico, and Texas.

In a September 22, 2000, letter, Rep. Waxman provided a list of joint interviews to Sen. Danforth and asked how many witnesses interviewed by the Committee had been interviewed by the Office of Special Counsel.<sup>41</sup> Sen. Danforth responded on September 26, 2000, and identified only six individuals who were not interviewed by the Office of Special Counsel.<sup>42</sup> These six individuals provided no significant information that is not addressed in Sen. Danforth's report.<sup>43</sup>

### **III. THE INVESTIGATION CONTRIBUTED VIRTUALLY NOTHING TO THE PUBLIC'S UNDERSTANDING OF THE WACO TRAGEDY**

Although the majority report spans 100 pages and includes approximately 1,390 pages of exhibits, it contributes virtually nothing to the public's understanding of Waco. To the extent that the majority's conclusions differ from those of the Office of Special Counsel, they consist largely of unsupported allegations of wrongdoing.

#### **A. The Majority Report Repeats Many of the Conclusions of Sen. Danforth**

Many of the majority report's findings mimic those of Sen. Danforth's report. The Office of Special Counsel concluded that government agents did not direct gunfire at the Branch Davidian compound;<sup>44</sup> that a Hostage Rescue Team (HRT) member fired three pyrotechnic tear gas rounds on April 19, 1993, but those rounds had nothing to do with the fire that consumed the compound;<sup>45</sup> that certain government attorneys and the former commander of the HRT had reason to know about the use

---

<sup>41</sup>Letter from Rep. Henry Waxman to the Honorable John Danforth (Sept. 22, 2000).

<sup>42</sup>These individuals were David Binney, Gregory Johnson, James Lockner, David Margolis, Peter Proach, and Rod Rosenstein.

<sup>43</sup>The six witnesses provided information about the adequacy of the Justice Department's internal investigation and the provision of military assistance at Waco. Both subjects were extensively discussed by Sen. Danforth. *See* Danforth Report at 51-52, 29-41.

<sup>44</sup>*Id.* at 4.

<sup>45</sup>*Id.* at 4-5.

of pyrotechnic tear gas rounds on April 19, 1993, but failed to correct an inaccurate public record;<sup>46</sup> that the Justice Department’s internal review failed adequately to investigate evidence that pyrotechnic rounds had been fired on April 19, 1993;<sup>47</sup> and that the government did not improperly or unlawfully employ the U.S. military as part of its law enforcement operation at Waco.<sup>48</sup>

All these findings are echoed in the majority report. This Committee’s recitation of similar facts and conclusions does not make a meaningful contribution to the public record.

**B. The Majority Report Makes Unsubstantiated Allegations of Wrongdoing**

The majority report departs from Sen. Danforth’s report primarily in its conclusions that Attorney General Reno and certain current and former Justice Department employees engaged in wrongdoing. But, as is discussed below, these conclusions are nothing more than unsupported allegations.

**1. Allegations Involving Attorney General Reno**

In its report, the majority makes several unsubstantiated allegations regarding the Attorney General. The majority concludes that Attorney General Reno was uninterested in learning or disclosing the true facts about Waco, that she “reversed” her decision disapproving of the FBI’s tear gas plan without any basis, and that she misrepresented that the military approved or endorsed the FBI’s tear gas plan. These allegations are unsupported by the facts and have no merit.

**a. Allegation That the Attorney General Was Not Interested in Disclosing the Truth about Waco**

The majority unfairly concludes that the Attorney General and the Justice Department had no interest in learning or disclosing the facts surrounding Waco. The majority writes that “[a]ll of the actions taken by the Justice Department were consistent with an organization that was not eager to learn the full truth about what happened on April 19, 1993.”<sup>49</sup> The majority also states:

It is troubling that the Waco tragedy did not seem to merit a “vigorous and thorough investigation.” President Clinton called for such an inquiry. Attorney General Reno

---

<sup>46</sup>*Id.* at 47, 52-53, 56.

<sup>47</sup>*Id.* at 52.

<sup>48</sup>*Id.* at 29.

<sup>49</sup>Majority Report at 6.

promised such an inquiry would take place. Neither took the steps necessary to make sure it would happen again.<sup>50</sup>

In fact, the Attorney General tried hard to investigate the events at Waco. After the Waco fire on April 19, 1993, Attorney General Reno directed her assistant Richard Scruggs, a career federal prosecutor, to begin an investigation to find out what happened in order to avoid a similar tragedy in the future. According to Mr. Scruggs, the Attorney General did not limit the scope of the inquiry in any way.<sup>51</sup> Moreover, Mr. Scruggs received significant Justice Department resources in conducting this investigation. Mr. Scruggs was assisted by senior Justice Department attorneys and the Assistant Director of the FBI's Inspection Division. According to Mr. Scruggs, the Inspection Division made use of an army of FBI agents from several offices around the country.<sup>52</sup>

In addition, Attorney General Reno asked a distinguished outside attorney, Edward Dennis, Jr., to conduct an independent evaluation of the Justice Department's and FBI's conduct at Waco.<sup>53</sup> Mr. Dennis had served in several senior Justice Department positions, including Acting Deputy Attorney General Assistant Attorney General for the Criminal Division during the Bush administration, and, during the Reagan administration, United States Attorney for the Eastern District of Pennsylvania.<sup>54</sup>

It is true that there were deficiencies in these investigations. For example, the investigations should have discovered and disclosed the FBI's use of pyrotechnic tear gas rounds and indicated that the pyrotechnic tear gas rounds did not contribute to the fire in the Branch Davidian compound. But these deficiencies cannot be fairly attributed to the Attorney General. The Attorney General was not involved in the details of either investigation. In fact, Mr. Scruggs, who was primarily responsible for developing the factual record, made a conscious decision not to report to the Attorney General because she was a fact witness.<sup>55</sup>

Sen. Danforth specifically addressed whether the Attorney General made knowing

---

<sup>50</sup>*Id.* at 27.

<sup>51</sup>Interview of Richard Scruggs (Jan. 5, 2000).

<sup>52</sup>*Id.*

<sup>53</sup>See Edward S. G. Dennis, Jr., *Evaluation of the Handling of the Branch Davidian Stand-Off in Waco, Texas By the United States Department of Justice and the Federal Bureau of Investigation* (Sept. 24, 1993); Interview of Edward S. G. Dennis (Jan. 14, 2000).

<sup>54</sup>Interview of Edward S. G. Dennis, Jr. (Jan. 14, 2000).

<sup>55</sup>Interview of Richard Scruggs (Jan. 5, 2000).

misstatements about the use of pyrotechnic tear gas rounds and whether she took adequate steps to determine the true facts. He concluded that Attorney General Reno was without fault and that she made diligent efforts to learn the truth. In his report, he writes:

The Office of Special Counsel has concluded that Attorney General Reno did not knowingly cover up the use of pyrotechnic tear gas rounds by the FBI. The evidence is overwhelming that, prior to the execution of the gassing plan, she sought and received assurances from the FBI that it would not use pyrotechnic tear gas rounds. The evidence is equally conclusive that the briefing materials and other information she received after the fact stated that the FBI had not used pyrotechnic tear gas rounds at Waco. Any misstatement that she made was inadvertent and occurred after diligent efforts on her part to learn the truth. The Office of Special Counsel has completed its investigation of Attorney General Reno, [and] found her to be without direct fault for any false statements that she may have made.<sup>56</sup>

Attorney General Reno first learned about the use of pyrotechnic tear gas rounds in August 1999. She reacted with surprise and anger to the revelation and acted quickly to determine the facts.<sup>57</sup> By September 9, she had completed a search for an impartial outside investigator and appointed John Danforth, a respected Republican former Senator, as Special Counsel. As is detailed in the Danforth report, the Attorney General gave Sen. Danforth extensive resources and prosecutorial power to determine the truth.<sup>58</sup>

**b. Allegation that the Attorney General Failed to Disclose Her Reasons for Approving the FBI's Tear Gas Plan**

As part of the efforts to end the siege at Waco, the Attorney General approved an FBI plan to insert tear gas into the Branch Davidian compound after initially withholding her approval of the use of tear gas.<sup>59</sup> In another unsubstantiated allegation, the majority asserts that the Attorney General has

---

<sup>56</sup>Danforth Report at 51.

<sup>57</sup>*See, e.g., Waco's New Question: Who Knew? Two Days After Blaze, Information on Grenades Was Withheld or Overlooked*, Washington Post (Sept. 3, 1999).

<sup>58</sup>*See* Danforth Report at 2-3.

<sup>59</sup>The tear gas approved by the Attorney General and used inside the Branch Davidian residence was not delivered by means of a pyrotechnic projectile. Rather, the tear gas used in the residence was sprayed from the nozzle of Model V Projecto-Jet canisters installed on combat engineering vehicles or fired from M-79 grenade launchers in "ferret rounds." Ferret rounds disperse the CS gas on impact, without using a pyrotechnic mixture. *See* Interview of Monty Jett (Feb. 1, 2000).

failed to disclose her reasons for “reversing” herself and allowing the use of the tear gas. The majority states that her purported failure to explain her actions is inconsistent with President Clinton’s directive to make all of the facts public.<sup>60</sup>

In fact, however, Attorney General Reno has explained on numerous occasions why she decided to approve the FBI’s plan to use tear gas.<sup>61</sup> Indeed, the Attorney General has explained her decision at least twice to members of this Committee.<sup>62</sup> As recently as October 5, 2000, Attorney General Reno repeated to Committee members why she decided to approve the FBI’s plan. She said:

We were faced with a dangerous situation that was becoming more dangerous . . . Branch Davidians who had killed four Federal agents had refused to yield to lawful authority for 51 days. The Branch Davidians held children in conditions that were clearly unhealthful and deteriorating. I had reviewed the gas plan carefully and received the advice of the experts that the gas, although uncomfortable, would cause no lasting harmful effects for children or adults. Koresh’s repeated failures to abide by his promises led the negotiators, and ultimately me, to conclude that he would not come out. This conclusion was buttressed by the fact that none of the occupants had come out since March 21<sup>st</sup> and the fact that the Davidians had food and water sufficient to last at least a year. I think this was one of the deciding factors. The HRT was in immediate need of retraining. This need for retraining was so severe that it did not appear that they could continue to control the perimeter for significant time. They then, that day that I gave the authority to go forward, said that . . . the threat of cataclysmic end was there. He had talked about Armageddon, and the conclusion of the FBI was that he could do it at any time, with or without us, . . . and that they were in the best position to control it at this point that they would be [in] for some foreseeable future.<sup>63</sup>

---

<sup>60</sup>Majority Report at 47.

<sup>61</sup>*E.g. Press Conference on Branch Davidian April 19, 1993 Crisis* (Apr. 19, 1993) (Bates Number CNG 3691272 - 300); House Committee on the Judiciary, *Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas*, 103<sup>rd</sup> Cong., 21-39, 48-51, 80-82 (Apr. 28, 1993); Interview of Attorney General Janet Reno, Federal Bureau of Investigation FD-302 (Aug. 2, 1993); Deposition of Attorney General Janet Reno, *Andrade v. Chojnacki*, No. H-94-0923, 89-96 (W.D. Tex).

<sup>62</sup>*See* House Committee on Government Reform and Oversight and House Committee on the Judiciary, *Hearings on Activities of Federal Law Enforcement Agencies Toward the Branch Davidians*, 104<sup>th</sup> Cong., v.3, 371-72 (Aug. 1, 1995) (hereinafter “Joint Hearings”); Interview of Attorney General Janet Reno at 78-83.

<sup>63</sup>Interview of Attorney General Reno at 81-82 (Oct. 5, 2000).

Despite the mystery that the majority attempts to ascribe to the Attorney General's decision making process, it appears that she decided to approve the plan after senior FBI officials persuaded her that the chances for a successful resolution would only diminish with the passage of time.<sup>64</sup> The facts recited by Sen. Danforth support this conclusion. He writes:

After further considering the issue, Attorney General Reno changed her mind. She indicated that she was inclined to approve the plan, but wanted to see an even more detailed discussion of the plan and substantial supporting documentation setting out the conditions inside the complex, the status of negotiations, and the reasoning behind the plan. According to Attorney General Reno, she ultimately changed her mind because she was convinced that the Davidians would not come out voluntarily. She felt that the FBI would eventually have to go forward with some plan, and that it was better to proceed when the FBI was ready and best able to control the situation.<sup>65</sup>

c. **Allegation That the Attorney General and President Clinton Deceived the American Public by Representing That the Military Endorsed the FBI's Tear Gas Plan**

In another unsupported allegation, the majority writes that "President Clinton and Attorney General Reno have deceived the American people for over seven years by misrepresenting that the military endorsed, sanctioned or otherwise approvingly evaluated the [FBI's tear gas] plan."<sup>66</sup> According to the majority, the Attorney General's and President Clinton's statements about the military's opinions stand in "stark contrast" to the recollections of two senior Army officers.<sup>67</sup>

The "stark" differences cited by the majority are largely semantic, however. They reflect a range of subjective impressions of the same meeting. The statements made by the Attorney General are consistent with those of at least three other civilian participants at the meeting and do not differ in any significant factual detail from the recollections of the military officers involved.

After the FBI had proposed the use of tear gas to end the standoff, FBI Director Sessions convened a meeting on April 14, 1993, to address Attorney General Reno's concerns. Among others present were two senior Army officers, who were asked a number of questions about the proposed

---

<sup>64</sup>Joint Hearings at 372.

<sup>65</sup>Danforth Report at 108.

<sup>66</sup>Majority Report at 6-7.

<sup>67</sup>*Id.* at 81.

plan.<sup>68</sup> In statements made after Waco, the Attorney General recalled that the Army officers present at the meeting had viewed the FBI's plan as "excellent" or "sound."<sup>69</sup> In her October 5, 2000, interview, the Attorney General reiterated:

The military representatives stated the plan to introduce tear gas into the compound was reasonable and practical. . . . My sense was that they thought it was a reasonable and practical plan, but they couldn't be the judge and nobody was asking them to be the judge of a law enforcement initiative where rules of engagement would apply that would be different than the military.<sup>70</sup>

President Clinton also made similar comments, stating:

And so I asked if the military had been consulted. The Attorney General said that they had, and that they were in basic agreement that there was only one minor tactical difference of opinion between the FBI and the military – something both sides thought was not of overwhelming significance.<sup>71</sup>

These statements are entirely consistent with the recollections of others who attended the same meeting on April 14, 1993. For example, Mary Incontro, a career Justice Department prosecutor, told the FBI in 1993:

[The Army unit commander] outlined his views of the plan and an overall assessment of the plan appeared to be that it had been carefully and wisely reviewed. The military personnel advised that although the plan utilizing a specialized gas was not similar to any type of military attack, it appeared to be carefully constructed and the highest degree of confidence was given to the Hostage Rescue Team.<sup>72</sup>

Ms. Incontro confirmed this recollection to Committee staff on April 14, 2000. She said that the senior Army officers at the meeting viewed the plan as militarily sound and well conceived. She said

---

<sup>68</sup>Danforth Report at 105.

<sup>69</sup>*60 Minutes* (May 12, 1995); House Committee on the Judiciary, *Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas*, 103<sup>rd</sup> Cong., 15-16 (Apr. 28, 1993).

<sup>70</sup>Interview of Attorney General Janet Reno at 79, 80 (Oct. 5, 2000).

<sup>71</sup>Majority Report at 76 (quoting remarks by President Clinton on April 20, 1993).

<sup>72</sup>Interview of Mary Incontro, Deputy Chief, Terrorism and Violent Crimes Section, Criminal Division, U.S. Department of Justice, Federal Bureau of Investigation FD-302 (July 22, 1993).

that while the military representatives may have said that the military would do it differently, she heard no dissent from the military representatives.<sup>73</sup>

A second individual present at the April 14, 1993, meeting gave an account that is also similar to the account given by Attorney General Reno. Jack Keeney, who was acting Assistant Attorney General for the Criminal Division in 1993, told Committee staff that the military officers present at the meeting said they would do the plan differently if it were a military operation, but the two military officers seemed generally to endorse the FBI plan.<sup>74</sup>

A third Justice Department official had a similar impression that the military officers present at the April 14 meeting had given a positive review of the proposed plan. According to the FBI's record of the interview of Webster Hubbell, then Associate Attorney General, Mr. Hubbell said:

The military representatives stated that the FBI plan to introduce tear gas into the compound was reasonable and practical. The only aspect of the plan that the military would do differently concerned the timing of the gas insertion. . . . Hubbell recalls the military representatives indicated they believed the FBI plan as presented would work and that after the gas was inserted people in the [Branch Davidian Compound] would come out.<sup>75</sup>

The majority's allegation that the Attorney General and the President misrepresented the military role is based on the majority's interpretation of the comments of the two senior Army officers who attended the April 14 meeting. It is true that both recall that they never expressed support for or endorsed the proposed tear gas plan.<sup>76</sup> But the underlying facts described by these Army officers closely resemble the accounts given by Attorney General Reno, Ms. Incontro, Mr. Keeney, and Mr. Hubbell.

In a 1993 memorandum written to his commander, one of the military participants described the meeting. He wrote that he and the other senior Army officer told the group that the proposed FBI

---

<sup>73</sup>Interview of Mary Incontro, Assistant U.S. Attorney (Apr. 14, 2000).

<sup>74</sup>Interview of Jack Keeney, Principal Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice (April 26, 2000).

<sup>75</sup>Interview of Webster Hubbell, Associate Attorney General, Federal Bureau of Investigation FD-302 (Aug. 3, 1993).

<sup>76</sup>Interview of General Peter Schoomaker, Commander in Chief, U.S. Special Operations Command (Jan. 13, 2000); Interview of Special Operations General Officer Number 1 (Jan. 13, 2000).

operation was not and could not be assessed as a military operation.<sup>77</sup> In the same memorandum, he further stated:

The plan which was executed at Waco was an FBI plan which neither [Army officers] helped prepare. At the same time, I did believe that they had a reasonable chance of accomplishing their objective of forcing the occupants out of the building. Their approach was substantially different than anything that I have encountered. ... I did not believe that the FBI and the Attorney General were trying to force us to support or defend the plan. It was my belief that they simply wanted any observations that we felt comfortable providing.<sup>78</sup>

In short, the majority grossly exaggerates the significance of what is largely a difference in semantics and subjective impressions. Attorney General Reno's impressions of the April 14 meeting were shared by at least three others who attended the same meeting. The majority's assertion that she or President Clinton deceived the American public is without any merit.

## **2. Allegations Regarding the Internal Justice Department Review**

The majority criticizes as negligent the internal Justice Department investigation led by Richard Scruggs.<sup>79</sup> Mr. Scruggs was the leader of a team of Justice Department attorneys and FBI inspectors who conducted approximately 950 interviews in the aftermath of Waco and drafted a 368-page report to the Deputy Attorney General.<sup>80</sup> The primary basis for the majority's criticism is that the Justice Department investigation did not discuss the use of pyrotechnic tear gas rounds at Waco.

In hindsight, it is clear that the Justice Department investigation should have disclosed the use of the pyrotechnic tear gas rounds, as well as the fact that the use of these rounds did not contribute to the fatal fire at the Branch Davidian compound. But there is an irony in the majority's criticism. The majority writes:

Had Scruggs and his colleagues thoroughly reviewed all the documents available to them, they would have found references to "military" rounds. Scruggs and his

---

<sup>77</sup>Memorandum from Army Colonel to Commander, U.S. Army Special Operations Command (May 13, 1993).

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 57.

<sup>80</sup>Richard Scruggs, *Report to the Deputy Attorney General on the Events at Waco, Texas, February 28 to April 19, 1993*, 14 (Oct. 8, 1993) (unredacted version) (hereinafter "Scruggs Report")..

colleagues failed to do so. The failure of the Scruggs team to come to an understanding that pyrotechnic rounds were used was, as discovered in 1999, a significant shortcoming.<sup>81</sup>

As was discussed in part II above, the majority had access to these very same documents for five years. Thus, the “significant shortcoming” attributed to the Justice Department’s investigation also applies to the majority’s own investigation. The fact is, like almost everyone else involved in Waco-related investigations, lawsuits, and criminal proceedings, the majority failed to notice the significance of the documents referring to the use of “military” rounds. Indeed, as noted above, the majority did not even know that their own files contained the documents referring to these rounds until Rep. Waxman pointed this out in a September 13, 1999, letter.<sup>82</sup>

The majority also makes the assertion that “[p]ressure from senior Justice Department officials, including then-Deputy Attorney General Phil Heymann, caused the Scruggs team to rush to conclude their investigation and to publish their report, thus failing to uncover and disclose facts.”<sup>83</sup> According to the majority, “the Scruggs investigation . . . was improperly rushed to its conclusion solely for political purposes.”<sup>84</sup>

The record of this investigation, however, contains no support for these assertions of political pressure. Committee staff interviewed Mr. Heymann on July 19, 2000. Mr. Heymann said that he wanted the review completed within six months to prevent the review from becoming a never-ending investigation, a familiar phenomenon in law enforcement. He said that no one complained to him that the investigation was incomplete or inadequate.<sup>85</sup> Not a single witness interviewed by the Committee

---

<sup>81</sup>Majority Report at 60.

<sup>82</sup>The majority attempts to explain its failure to recognize the significance of these documents by suggesting the Justice Department intentionally delayed giving the Committee the key documents three days before the start of hearings in 1995. The majority has pointed to no evidence, however, that supports its assertion that the Justice Department deliberately delayed production of documents to this Committee. For example, as is discussed in part II above, the Justice Department provided the Committee an FBI lab report mentioning the use of military tear gas rounds 13 days before the start of joint committee hearings in 1995, 26 days before the conclusions of those hearings, and 392 days before the committees issued their joint report.

<sup>83</sup>Majority Report at 6.

<sup>84</sup>*Id.* at 5.

<sup>85</sup>Interview of Philip Heymann, Professor of Law, Harvard University Law School (July 19, 2000).

suggested that the Justice Department’s investigation was cut short for political purposes. Sen. Danforth, who was critical of aspects of the Department’s investigation in his interim report, did not find any evidence of pressure to complete the investigation.

### 3. Unsubstantiated Allegations against Marie Hagen

The majority accuses Marie Hagen, a Justice Department trial attorney, of reckless conduct and concludes that if she had “followed up” on a certain request for information to an FBI attorney, “the time consuming investigations started in 1999 would not have been necessary.”<sup>86</sup> But these conclusions are unsupported by any documentary evidence, including the documents cited by the majority, and they directly conflict with the findings of Sen. Danforth. The evidence gathered by this Committee and Sen. Danforth shows that Ms. Hagen took diligent steps to determine the truth and is in no way responsible for this Committee’s Waco investigation.

Ms. Hagen was a trial attorney working on *Andrade v. United States*, a consolidated lawsuit brought by seven groups of Branch Davidians and relatives of deceased Branch Davidians. The plaintiffs in that case alleged that government agents used excessive force, failed to provide adequate emergency services, and intentionally or negligently committed other acts that harmed the Branch Davidians in 1993.<sup>87</sup> In 1996, the plaintiffs in that lawsuit filed the declaration of their fire expert, Richard Sherrow. The Sherrow Declaration alluded to documents the plaintiffs had obtained from the FBI prior to January 1996, which indicated that the FBI had fired at least one military pyrotechnic munition into the Branch Davidian complex.<sup>88</sup>

According to the Office of Special Counsel, Ms. Hagen took several affirmative steps to determine the basis for Mr. Sherrow’s mention of military pyrotechnic munitions. In January 1996, Ms. Hagen asked an FBI attorney, Jacqueline Brown, for help in responding to the Sherrow Declaration.<sup>89</sup> She also forwarded a relevant pleading to Ms. Brown for review before filing it with the court.<sup>90</sup> She took these steps even though numerous Justice Department and FBI officials had, by that time,

---

<sup>86</sup>Majority Report at 56-57.

<sup>87</sup>See Danforth Report at 142.

<sup>88</sup>Declaration of Richard L. Sherrow at 6, *Andrade v. Chojnacki*, No. H-94-0923 (S.D. Tex.) (Jan. 17, 1996) (Majority Exhibit 47).

<sup>89</sup>Danforth Report at 56.

<sup>90</sup>Danforth Report at 57.

concluded that the FBI had used no pyrotechnic munitions at Waco.<sup>91</sup>

According to the Office of Special Counsel, Ms. Brown faxed the Sherrow Declaration to an FBI chemical agent specialist. Someone (possibly Ms. Brown) also faxed the document to Supervisory Special Agent Robert Hickey, a member of the Hostage Rescue Team. On February 15, 1996, Mr. Hickey drafted an internal FBI memorandum that responded in detail to the Sherrow Declaration. Mr. Hickey clearly acknowledged the harmless use of military rounds on April 19, 1993, and wrote, in pertinent part:

Shortly after the operation commenced on 4/19/93, the HRT (Charlie Team) determined, after two (2) or three (3) ferret rounds, that they were unable to penetrate the underground shelter roof which was their first target. Charlie Team then requested to use 40mm military CS rounds in an effort to penetrate the roof. Charlie Team was granted authority to fire the military CS rounds. A total of two (2) or three (3) rounds were fired at the underground shelter roof. These rounds hit the roof, bounced off and landed in the open field well behind the main structure. This occurred shortly after 6:00 am. These were the only military rounds utilized.<sup>92</sup>

According to the Office of Special Counsel, Mr. Hickey faxed his memorandum to Ms. Brown on February 16, 1996, and discussed it with her the same day. Ms. Brown made notations on the section of the memorandum relating to the use of military rounds.<sup>93</sup>

The majority's charges against Ms. Hagen hinge on whether Ms. Brown informed Ms. Hagen about the Hickey memorandum. The majority asserts that Ms. Hagen was informed by Ms. Brown about the use of the military rounds. The Office of Special Counsel, however, specifically concluded that she was not informed.<sup>94</sup>

The evidence supporting the majority's view is scant. Ms. Brown maintains that she provided

---

<sup>91</sup>Sen. Danforth recites a list of statements by various Justice Department and FBI officials indicating that no pyrotechnic munitions were used at Waco. These include statements by FBI Special Agent in Charge Robert Ricks, Attorney General Reno, FBI Director William Sessions, and the Scruggs Report. Danforth Report at 46-47. Ms. Hagen had no reason to know at the time that these reports had overlooked evidence indicating the use of military rounds on April 19, 1993.

<sup>92</sup>Memorandum from Robert Hickey, Supervisory Special Agent, Federal Bureau of Investigation, to Jacqueline F. Brown, Office of General Counsel (Feb. 15, 1996).

<sup>93</sup>Danforth Report at 57.

<sup>94</sup>*Id.* at 57-58.

information on the FBI's use of military rounds to her supervisor and Ms. Hagen.<sup>95</sup> But apart from Ms. Brown's assertion that she provided the Hickey Memorandum to Ms. Hagen, the Committee has no documentary or other evidence that Ms. Brown provided the Hickey Memorandum to Ms. Hagen.

The majority asserts in its report:

Documents made available to Committee staff indicate that Brown did in fact share the Hickey memorandum with her supervisor, Virginia Buckles, and Hagen. For example, Brown, who maintained a daily checklist of action items, recorded on February 19, 1996, the fact that she spoke with Hagen and other Justice Department officials regarding the Hickey memorandum and showed them the document: "meet w/DOJ re dec[laration] memo to M[arie] H[agen]."<sup>96</sup>

This is simply incorrect. Ms. Brown's daily to-do list does not read, "meet w/DOJ re dec[laration] memo to M[arie] H[agen]," as the majority contends. It actually contains three relevant entries, which, if anything, suggest that Ms. Brown did not provide the Hickey memorandum to Ms. Hagen. One entry reads, "Waco-gas memo." Another reads "Meet w/ DOJ re dec (ask to review final copy of reply)." And another reads "Sherrow Dec memo to MH." Of those three entries, the only one checked off and presumably completed is the second: "Meet w/ DOJ re dec (ask to review final copy of reply)."<sup>97</sup> The Sherrow Declaration was 22 pages long and raised a number of possible fact issues relating to the cause of the fire.

Sen. Danforth and his staff read precisely the opposite meaning from this document as does the majority. And they arrive at the opposite conclusion about Ms. Hagen. The Danforth report states:

[T]he documentary evidence also indicates that Brown did not give the information to Hagen. As stated above, neither Brown nor the Office of Special Counsel was able to locate a fax cover sheet indicating that she had faxed the Hickey memo to Hagen. Hagen's files contain no copy of the Hickey memo. In addition, Brown's "To Do" list in her calendar for February 19, 1996, contains the notation, "Sherrow Declaration Memo to M[arie] H[agen]." Unlike some diary entries, this "To Do" item is not checked off. Moreover, Brown placed a number on the Hickey memorandum which would result in its being placed in an FBI litigation file that would not be disclosed to the

---

<sup>95</sup>*Id.* at 57.

<sup>96</sup>Majority Report at 55.

<sup>97</sup>Calendar of Jacqueline Brown, Assistant General Counsel, Federal Bureau of Investigation (Feb. 19, 1996).

Department of Justice.<sup>98</sup>

#### **4. Allegations Regarding the Posse Comitatus Act**

The majority alleges that White House officials and senior law enforcement officials sought advice from senior military officers that, if given, would have violated the Posse Comitatus Act.<sup>99</sup> Although the majority recites the history of the Act and the enactment of related statutes, it provides no support for its conclusion. To the contrary, the relevant statute and its legislative history suggest the opposite conclusion.

The Posse Comitatus Act prohibits the use of Army and Air Force personnel to execute the civil laws of the United States, except under circumstances prescribed by Congress.<sup>100</sup> The Act has generally been interpreted to permit military support of law enforcement short of actual search, seizure, arrest or similar confrontation with civilians.<sup>101</sup>

In 1981, Congress enacted chapter 18 of title 10 of the United States Code to clarify the law on permissible forms of military assistance to civilian law enforcement agencies.<sup>102</sup> Among other things,

---

<sup>98</sup>Danforth Report at 59. In addition to this journal entry, the majority distorts the meaning of two other documents in an effort to show that Ms. Brown provided information on the Hickey Memorandum to Ms. Hagen. Referring to Virginia Buckles, Ms. Brown's supervisor, the majority writes in its report: "Buckles' own memoranda to then-FBI General Counsel Howard Shapiro detailing the status of then-ongoing FBI civil litigation referenced Buckles' and Brown's involvement in assisting Hagen and the Justice Department to clarify the Sherrow Declaration." Although these memoranda mention the Sherrow Declaration, they address elements of the declaration that have nothing to do with its reference to military tear gas rounds. One memorandum relates to a claim that a combat engineering vehicle caused the fire after it tipped over a lantern and a claim that the FBI violated its own internal regulations. The second memorandum relates to Mr. Sherrow's analysis of "hot spots" on the FLIR video. While these documents tend to show that Ms. Brown assisted in the preparation of the Justice Department's reply brief, they give no insight into whether Ms. Brown provided information on the Hickey Memorandum to Ms. Hagen.

<sup>99</sup>Majority Report at 61 n. 225, 61; 18 U.S.C. § 1385.

<sup>100</sup>18 U.S.C. § 1385; *see generally* United States Army Judge Advocate General School, *Operational Law Handbook*, 22-1 (1996) (hereinafter "Operational Law Handbook").

<sup>101</sup>Operational Law Handbook at 22-1.

<sup>102</sup>*See generally* 1 Op. Off. Legal Counsel 36, 1991 WL 49985 (Feb. 19, 1991) (concluding that Congress intended only to prevent searches likely to result in a direct confrontation between

this statute expressly authorizes the Secretary of Defense to make military personnel available to provide “law enforcement officials with expert advice relevant to the purposes of this chapter,” subject to the limitation that the Secretary of Defense prevent “direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity.”<sup>103</sup>

The majority apparently takes the view that the advice sought by Justice Department and FBI officials is outside the scope of permissible expert advice and constitutes prohibited direct participation in an arrest. The majority, however, offers no legal support for this conclusion, which runs contrary to the legislative history of the applicable law. J. Michael Luttig, an Assistant Attorney General during the Bush administration, explained:

It is evident from the legislative history of these amendments that Congress intended to codify the distinction – articulated by the district court in *United States v. Red Feather* – between “indirect passive” assistance and “direct active” involvement in law enforcement activity. . . . Significantly, Congress understood *Red Feather* to prohibit only activity that entailed direct, physical confrontation between military personnel and civilians.<sup>104</sup>

The input sought from the military personnel at the April 14, 1993, meeting related to their area of professional expertise. The law expressly authorizes such provision of military expert advice to civilian law enforcement. In addition, Justice Department and FBI officials sought this expert advice during the formative stages of a law enforcement plan. This would not constitute the direct, active use of the military to execute the law. It thus would not have violated the Posse Comitatus Act or any other applicable statute.

Sen. Danforth thoroughly investigated the role of the military at Waco. He found that there was no violation of the Posse Comitatus Act and no other illegal or improper use of the armed forces. Sen. Danforth wrote that the two senior Army officers present at the April 14, 1993:

discussed the effects of CS gas on people, whether the delivery of tear gas could start of fire, whether the HRT personnel were fatigued or in need of retraining, and they described how the military would conduct the operation. They emphasized the differences between military and civilian law enforcement operations. This advice was within the areas of their expertise and did

---

military personnel and civilians).

<sup>103</sup>10 U.S.C. §§ 373, 375.

<sup>104</sup>15 Op. Off. Legal Counsel at 42.

not constitute direct participation in law enforcement activity.<sup>105</sup>

#### **IV. CONCLUSION**

The Committee's 13-month investigation of Waco was unnecessary, expensive, and fruitless. Although the majority report spans 100 pages and includes nearly 1,400 pages of documentary exhibits, it contributes virtually nothing to the public's understanding of Waco. Many of the report's findings duplicate those of the Special Counsel, former Senator John C. Danforth. In his report, Sen. Danforth determined, among other things, that government agents did not cause or contribute to the fire that consumed the Branch Davidian compound on April 19, 1993, did not direct gunfire at the Branch Davidians on April 19, and did not unlawfully employ U.S. armed forces at any time during the standoff. To the extent the majority report deviates from Sen. Danforth's findings, it consists largely of unsupported allegations of wrongdoing by the Attorney General and Justice Department officials.

---

<sup>105</sup>Danforth Report at 37.