1 Chairman Nunn: Thank you all for your testimony. We
2 will have all the statements incorporated in the record as
3 submitted, without objection.
4 Let me start with our usual procedure here.
5 General Stiner, in his press conference yesterday,
6 President Clinton mentioned that the military had been
7 consulted during the stand-off with the group in Waco, Texas.
8 Were personnel from the Special Operation Forces, from your
9 command, involved in any way in trying to resolve that stand-
10 off?
11 General Stiner: Not in resolving it, Mr. Chairman. We
12 did provide three technicians to the FBI. This was after the
13 initial assault took place, where the four law enforcement
14 agency members lost their lives.
15 Approximately two to three weeks at least after that, or
16 it was when the FBI employed out and the hostage rescue team
17 was given primary responsibility, for that they asked for
18 technical assistance in installing video surveillance devices
19 between observation posts. That was approved appropriately
20 and we did provide that.
21 But we were not involved in developing the plan.
22 Chairman Nunn: Were your people ever called on? Were
23 you ever called on to give any assessment to the Defense
24 Department or to the Justice Department, or to the Treasury
25 Department, for that matter, since they were all involved, as

1 to what contribution the Special Operations Forces could make
2 to that situation?
3 General Stiner: No, sir.
4 Chairman Nunn: So you really weren't called on for
5 either a plan or resources, or even an assessment?
6 General Stiner: No, not in that context. It was
7 requested just last Tuesday that Brigadier General Pete
8 Schumaker, who used to command one of our Special Operations
9 Forces and who is now the Assistant Division Commander of the
10 First Cav Division at Ft. Hood, Texas, and the current
11 commander of one of our surgical units accompany the commander
12 of the FBI's hostage rescue team to Washington to brief the
13 Attorney General on that plan.
14 They were not asked to cast judgment on the adequacy of
15 the plan or anything of that nature.
16 During the briefing, they were asked if they had ever
17 been exposed to the effects of CS gas and they indicated that
18 they had and described the symptoms. There was also an expert
19 present, a doctor who had been involved in development and
20 experimentation on this, who answered questions.
21 That was the total extent of our involvement.
22 Chairman Nunn: But your command was never asked for
23 input --
24 General Stiner: It was not.
25 Chairman Nunn: -- into either planning or what resource

1 you had that could be used in this unique set of
2 circumstances?
3 General Stiner: No, sir. It was not.
4 Chairman Nunn: Do you know, General Stiner, whether the
5 FBI and the Justice Department, who were, I understand, in
6 charge of the operation, had any understanding of what Special
7 Operations Forces can do? Do you know on your own whether
8 they know that?
9 General Stiner: Yes, they do. In fact, we have provided
10 training assistance to the FBI's hostage rescue team on other
11 occasions.
12 Chairman Nunn: Let me ask each of you this question. We
13 alerted you to this when Senator Thurmond and I apprised you
14 and advised you of our interest.
15 How do you rate the personnel morale under your commands
16 today and what recommendations do you make to this committee
17 for anything that you think is essential in our consideration
18 in making sure that the morale of our military forces does no
19 deteriorate?
20 I noticed, Admiral Larson, that you mentioned that we ar
21 standing, in your words, "On the brink of a degradation in
22 readiness." I consider that, and I'm sure you do, having
23 listed these points, to be rather significant.
24 So I would asked each of you about the morale of your
25 military forces. General RisCassi, let's start with you.

substance was his oft-repeated position that God said to wait, and that he was not coming out until God told him.

At 10:10 a.m., [redacted] attempted to contact Koresh through the FBI; however, Koresh would not speak to him since it was the Sabbath. [redacted] told [redacted] call back at 8:30 p.m.

At 8:30 p.m., [redacted] called back as instructed; however, Koresh still refused to speak to him.

April 14

From 10:21 a.m. to 11:32 a.m., [redacted] and [redacted] spoke over the telephone to Koresh and [redacted] The attorneys advised the FBI at the end of this conversation that Koresh had established a new precondition for his coming out. Koresh would only come out after he finished writing a manuscript which explained the Seven Seals.

In the afternoon, there was a meeting in FBI Director Sessions' office to brief the Attorney General on the military and medical perspectives of the proposed plan to insert CS gas into the compound. Two military experts provided their assessments of the plan, while a medical doctor summarized the

results of studies of the effects of CS gas, particularly on children, pregnant women, and the elderly.[8/]

Pursuant to an inquiry from the Attorney General, the FBI began to gather information about the compound's water supply. The Attorney General wanted to know how long the Davidians could hold out if the status quo continued.

There were ongoing conversations with individuals in the compound throughout the day and evening, but no progress was made.

April 15

At 7:30 a.m., FBI Air Operations reported that the water storage tank in the rear of the compound appeared to be full. This information was immediately made part of the report to the Attorney General. The report concluded that the compound had a sufficient water supply to last a significant period of time.

[Material redacted as required by statute.] At 5:15 p.m., the FBI activated a "flash bang" device when a male exited the compound unannounced. He returned inside for a few moments, then came back outside. The FBI activated another "flash bang."

8/ See pages 266-70 for a discussion of these assessments.

Koresh and his followers. Director Sessions believed it was essential for the FBI to be "in control of its own fate" and to ensure the safety of its own agents' lives. A major concern in everyone's opinion was the need to avoid being drawn into a situation, or taking any action, which would escalate unnecessarily. To [redacted] it was important at the same time to convey to the Davidians the FBI's commitment to a peaceful resolution and intent to remain in Waco until that objective was achieved.

Another major role for FBI Headquarters' personnel included contacting various U.S. military components regarding the transportation of agent and support personnel, and obtaining data about the effective range of assorted weapons. The FBI also sought technical information about certain military vehicles. According to [redacted] there was concern and uncertainty as to the types of weapons inside the compound, particularly in view of the reported presence of .50 caliber rifles capable of penetrating any tactical vehicle in the FBI's inventory. As a result of these concerns, the FBI requested Bradley fighting vehicles from the U.S. Army. Nine of these -- without barrels, pursuant to an agreement between the FBI and the Army to avoid posse comitatus prohibitions -- were ultimately provided.

When the Bradleys arrived and were positioned around the compound, Koresh advised that he had weapons that could "blow

them 40 to 50 feet in the air." The FBI then sought and obtained from the Army two Abrams (M1A1) tanks and five M728 Combat Engineer Vehicles (CEVs), to give FBI personnel adequate protection from the .50 caliber rifles and other, more powerful weapons the Davidians might have.[17]

Finally, FBI Headquarters' officials served as advisors to the Justice Department, particularly in the latter stages of the standoff as the plan for the insertion of gas was developed. The FBI ensured the flow of information from the Bureau and the SIOC to Acting Attorney General [redacted] (1) and later Attorney General [redacted] (2) and to other departmental officials, including members of the Criminal Division's Violent Crimes and Terrorism Section.

D. The Negotiations

1. Organization of the Negotiation Teams

In all, 25 negotiators were assigned to the negotiation team during the Waco standoff. The overall negotiation effort was coordinated by FBI Quantico SSAs [redacted] (3) (from February 28 to March 25) and [redacted] (from March 23 to April

[17] The FBI also used a 17th tracked vehicle -- a M88 Tank Retrieval Vehicle. (For a complete list of military personnel and equipment present at the compound as of April 13, 1993, see appendix B)

The intent was to give the Branch Davidians the clear impression that although there was an alternative and this was not a panic situation, the FBI was maintaining maximum control. [redacted] understood that the use of tear gas to end the standoff would take several days; the plan was to inject the gas through the windows methodically. He added that both he and the Attorney General were confident that there would be enhanced medical capabilities to meet all needs. He also said that the FBI informed them that the tear gas would not cause a fire.

2. April 14 Meetings

On Wednesday, April 14, a large meeting was held in the FBI Director's office. The Justice Department was represented by [redacted], [redacted]l, [redacted]y and [redacted]. Along with Director [redacted] the FBI representatives included [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted] chief of the Domestic Terrorism unit in CID. There were also several military representatives, and Dr. [redacted], who was present to summarize results of studies of effects of CS gas on children, pregnant women and the elderly. The Attorney General described Dr. [redacted] as "careful and scientific." She recalled that although there had been no laboratory tests performed on children relative to the effects of the gas, anecdotal evidence was convincing that there would be no permanent injury.

The military personnel present told her that the gas was used at least annually on soldiers in the U.S. Army during training exercises. They also discussed properties of the gas, including any pyrotechnic qualities. The military personnel made (1) [redacted] feel more confident with the concept of tear gas, as opposed to the original concept in her mind of "gassing." The military officials also said that in a military operation, the entire compound would be gassed at once, not gradually. However, the law enforcement interest was to go step-by-step, increase the pressure, and make it increasingly uncomfortable inside the structure in an effort to drive them out. After discussing the nature of the gas and varied tolerance levels to be expected from the occupants, the meeting participants were prepared to wait two to three days for everyone eventually to come out. The action was viewed as a gradual, step-by-step process. It was not law enforcement's intent that this was to be "D-Day." Both the Attorney General and Director (2) [redacted]s voiced concern for achieving the end result with maximum safety. (3) [redacted] made it clear that the goal of the plan was to introduce the tear gas one step at a time to avoid confusing the Branch Davidians and thereby maintain the impression that they were not trapped.

Once the Attorney General was convinced that the gas was non-lethal and would not cause permanent harm to children, pregnant women and others, she turned her attention to the HRT. One of the military officers argued that maintaining the HRT in a

constant state of readiness was not possible. He advised that the HRT be withdrawn. [redacted] advised that his team had received sufficient breaks during the standoff that they were not too fatigued to perform at top capacity in any tactical operation at the time. He added, however, that if the standoff continued for an extended length of time, he would propose that the HRT stand down for rest and retraining.[32] When [redacted] asked about using SWAT teams to take the place of the HRT, she was told that the HRT's expertise in dealing with the powerful weapons inside the compound, driving the armored vehicles, and maintaining the security of the perimeter was essential.

The FBI asserted that law enforcement on the scene in Waco could not safely maintain the security perimeter indefinitely. There was a vast open area surrounding the compound, and it was impossible safely to keep people from wandering in and out. Moreover, the Branch Davidian compound itself was a heavily armed camp, with dangerous people inside who had already killed four law enforcement agents. The situation was difficult to control, and the area was difficult to defend. In the FBI's view, there were extraordinary public safety issues. Containment of the Branch Davidians in the building with walls or wire appeared

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32/ [redacted] described the factors in the deterioration of HRT effectiveness due to the lengthy deployment. The HRT operators, including the sniper observers, were required to watch for long hours through binoculars and rifle scopes in a very tense situation. Also, while the FBI snipers were observing the Branch Davidians, the Davidians likewise observed and followed the movements of the HRT.

infeasible, and posse comitatus proscriptions prevented the use of a military force to secure the area. Some experts had raised the distinct possibility that Koresh might actually mount an offensive attack against the perimeter security, with Branch Davidians using children as shields. This would have required the best trained forces available to the FBI. Finally, the FBI expressed its concern about the possible incursions of fringe groups intent on coming to Koresh's aid. For all these reasons, the FBI regarded perimeter security as so significant that it urged the Attorney General to relieve the HRT with SWAT teams only as a last resort.

There were additional discussions about the prosecutors' concerns over maintaining the integrity of the crime scene, the rules of engagement, the deteriorating sanitary conditions, and the lack of medical personnel inside the compound. When the Attorney General asked why the standoff had to be resolved soon, Rogers and others offered the following additional reasons: Koresh had broken every promise he had made; negotiations had broken down; no one had been released since March 23; and it appeared that no one else would surrender.

Following this meeting, [redacted] met in her office with [redacted], [redacted], and [redacted] to discuss the plan. AUSA [redacted] was consulted during this meeting about indications from electronic surveillance of conversations inside the compound that the Branch

from the building at least two minutes before the first reports of smoke. The split-screen video mentioned above shows CEV-1 backing away from the building at that moment. The infrared tape shows a heat source -- the exhaust -- at the rear of CEV-1, but no heat source at the front of CEV-1.

The army has examined all the CEVs used on April 19, including CEV-1, to determine whether there was any possibility that any of the vehicles could have been outfitted with a flame-emitting device. All bills of lading, maintenance records, and other relevant documentation were checked. The evidence shows that none of the CEVs was outfitted with any device capable of emitting fire or flames. We also had each CEV examined for evidence of charring or fire. No such evidence was found.

U.S. Army maintenance personnel who were present in Waco, and who were responsible for CEV-1, were also interviewed and shown a copy of [redacted] (1) videotape. They could offer no explanation for the appearance of any fire at the end of the boom. Neither CEV-1, nor any other vehicle, was outfitted with any flamethrowing apparatus. Moreover, there were no flammable parts at the front of the CEV, and there were no electrical components which could cause a flame.

In summary, no evidence has been found to support the claim that CEV-1, or any other government vehicle, started the fire at

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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

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1996

26–167 CC

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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.

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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

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] See 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, common-sense 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. Alschuler, 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

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[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 778.
[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.

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

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-

[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?

[117] *Id.* at 756.
[118] Hearings Part 2 at 180.

> 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.

[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 (dX1), 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 Commanders 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.

[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 positions 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.

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

[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

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[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-

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 Batl (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) (7) 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]

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[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-

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[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]

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[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

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[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 1". 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.

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[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.

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[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

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[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, 4½ 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 sub-zero 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 (Lacrimators)* 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]

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[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, Israel: 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 exposo 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/m³).[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/m³.[521] Recent estimates by the U.S. military, however, estimate that the lethal concentration for humans is 61,000 mg-min/m³.[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/m³.[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/m³.[542] As discussed above, the concentration level estimated to be lethal to humans is 61,000 mgs-min/m³. 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/m³.[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/m³.[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/m³.[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/m³.[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/m³.[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 m³ = 675.67 mgs/m³.

[543] 120,000 mgs/44.4 m³ = 2,702.70 mgs/m³.

[544] Each cylinder of CS agent contained 30 grams, or 30,000 milligrams. 30,000 mgs/16.17 m³ = 185.52 mgs/m³.

[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 m³ = 6,431.66 mgs/m³.

[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 m³) the distribution of the substance throughout the building in these phases was 1,924.87 mgs/m³. 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 m³) the distribution of the substance throughout the building in these phases was 1,501.08 mgs/m³.

[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/m³. ((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]

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[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-

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[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.

PERSONAL VIEWS OF HON. HUSANA POELLENHUSEN

[illegible]

[illegible]

[illegible]

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.

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 non-reimbursable 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 sunport 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.
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.
HON. ELIJAH E. CUMMINGS.

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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.

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

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).

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

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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]

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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

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[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.

[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.

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."

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 non-reimbursable 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 para military 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.
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.
HON. ELIJAH E. CUMMINGS.

o

EXTRACT FROM EXECUTIVE ORDER 12356

Sec. 1.3. Classification Categories.

(a) Information shall be considered for classification if it concerns:

(1) military plans, weapons, or operations;

(2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

(3) foreign government information;

(4) intelligence activities (including special activities), or intelligence sources or methods;

(5) foreign relations or foreign activities of the United States;

(6) scientific, technological, or economic matters relating to the national security;

(7) United States Government programs for safeguarding nuclear materials or facilities;

(8) cryptology;

(9) a confidential source, or

(10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President. Any determination made under this subsection shall be reported promptly to the Director of the Information Security Oversight Office.

(b) Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

(c) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security.

(d) Information classified in accordance with Section 1.3 shall not be declassified automatically as a result of any unofficial publication or inadvertent or unauthorized disclosure in the United States or abroad of identical or similar information.

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The Honorable Samuel R. Pierce, Jr. The Secretary of Housing and Urban Development

B-229732

Comptroller General of the United States

1988 U.S. Comp. Gen. LEXIS 1581

December 22, 1988

HEADNOTES:
[*1]

1. Department of Housing and Urban Development (HUD) appropriations for Research and Technology and for Salaries and Expenses are not available to fund programs primarily intended to promote international trade where HUD's authority to participate in international data exchange programs is limited to those mission related programs which benefit HUD in discharging its statutory responsibility to provide for the nation's housing needs.

2. The Department of Housing and Urban Development has violated the Antideficiency Act, *31 U.S.C. § 1341* (1982), where it has no funds available to fund international trade promotion programs since obligations for such activities may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose.

OPINION:
Dear Mr. Secretary:

On August 3, 1988, in testimony before the Employment and Housing Subcommittee of the House Government Operations Committee, the General Accounting Office reported the results of its review of the commercial trade promotion activities undertaken by the Department of Housing and Urban Development (HUD) in its role as the United States executive agency for implementation [*2] of the bilateral Agreement on Cooperation in the Field of Housing and Other Construction, June 28, 1974, United States - Union of Soviet Socialist Republics, TIAS No. 7898 (Agreement). The Assistant Secretary for Policy Development and Research (PD&R) responded to our May 13, 1988 request for HUD'S position on a number of issues by letter dated June 23, 1988. We carefully considered the Assistant Secretary's responses before reporting to the Subcommittee on August 3.

Among the findings that we reported to the Subcommittee was our conclusion that HUD does not have authority to spend its appropriated funds for commercial trade promotion activities. We are now writing to advise you of the basis for this finding and to recommend, for the reasons which follow, that HUD report a violation of the Antideficiency Act to the President and to the Congress in accordance with *31 U.S.C. § 1351* (1982).

BACKGROUND

HUD's commercial trade promotion efforts grew out of its role as the responsible United States agency for implementation of the Agreement. The original purpose of the Agreement was to carry out a mutually beneficial program of technical cooperative projects with the Soviet Union [*3] in housing, construction, and urban development. In 1985, HUD and its Soviet counterpart agreed to add a commercial dimension to the Agreement. HUD's agreement to engage in this new undertaking is documented in a protocol signed on September 17, 1985. n1 The HUD Assistant Secretary for PD&R was then appointed as coordinator of United States commercial activities under the Agreement and was directed to organize "a major United States presence" at Stroyindustriya '87 -- a 10-day international construction exhibition sponsored by the Soviet government in Moscow in May 1987.

n1 The September 17, 1985 Protocol provides, in relevant part:

"The Committee noted the possibility of building mutually beneficial cooperation on a commercial basis with respect to individual project areas and directed Working Group leaders to undertake appropriate steps for establishing the required contacts prior to and during joint meetings."

We estimate that HUD spent about $ 3 million for activities related to the Agreement during fiscal years 1984 through 1987. Over half of this amount was spent, from fiscal year 1987 appropriations, for commercial activities in support of the trade exhibit. These [*4] commercial activities are to be distinguished from HUD's traditional technical cooperative projects.

Traditional technical projects frequently involved reciprocal exchange visits, information exchange and the development of technical papers and seminars in a manner mutually beneficial to both the United States and the Soviet Union. Topics have included utility systems, construction, seismic effects and urban development, and rehabilitation of buildings. These projects necessarily involved private firms with products or technological expertise in the topic fields. Although the participating companies undoubtedly hoped to see business opportunities developing from their support and participation in the program, HUD's primary purpose in involving them was to facilitate the exchange of information related to housing and urban planning and development which would be potentially useful in developing new methods of meeting problems encountered with the topic areas in the United States.

HUD's new "commercial activities," on the other hand, were primarily intended to enhance the business opportunities of the American companies which desired to do business in the Soviet Union. According [*5] to information received from HUD, after identifying key Soviet construction and housing needs and priorities, HUD officials met with Soviet technical experts in Moscow and reviewed catalogs from the American firms which had expressed interest in the trade exhibition. This review was to assure HUD and the firms that there was Soviet interest in the U.S. products and that they fit Soviet priorities. In November 1986, HUD sponsored a delegation of public and private sector executives to Moscow to conduct another catalog show and a series of seminars designed to acquaint Soviet officials with examples of American products and technology that would be exhibited at Stroyindustriya '87. The following January, HUD officials led a delegation of U.S. business men in an advance marketing mission to Moscow to begin negotiations on machinery, equipment and products that would be purchased

off the floor at Stroyindustriya '87.

In serving as the principal domestic organizer of U.S. participation in Stroyindustriya '87, HUD identified, contacted, and recruited the participating U.S. firms. Some of the companies HUD chose to participate in the trade show were marketing products which do not directly [*6] relate to housing construction or to community development. Examples of such products include airport runway sweepers, protective playground equipment, potato storage construction technology, add-on green houses, carpeting, drapery hardware, and upholstered furniture. In Moscow, HUD and its contractors handled the details of renting the exhibition building and other fair logistics. During the exhibition, HUD staff worked to arrange individual and group meetings for American exhibitors with Soviet officials, provided directories of the participating companies, and sponsored a reception for Soviet officials.

HUD's response to our inquiry indicates that it paid for these and other Agreement-related activities with funds from its appropriations for Salaries and Expenses and for Research and Technology. HUD's response does not cite any other appropriation which it believes to be available to pay for activities related to trade promotion.

DISCUSSION

Section 604 of the Housing Act of 1957, as amended, *12 U.S.C. § 1701d-4* (1982), authorizes the Secretary of HUD to participate, and pay the expenses of participation, in international conferences and other similar activities for the [*7] purpose of exchange and assembly of information relating to housing, urban planning, and urban development as deemed beneficial in carrying out the Secretary's responsibilities under legislation which he is charged to administer. Based on our review of the legislative history of Section 604, we conclude that the Congress intended the exchanges to be reciprocal as well as useful in developing new methods of meeting problems encountered in these fields in the United States. n2 In the absence of expanded authority in its appropriation acts, HUD's authority under *12 U.S.C. § 1701d-4*, however, does not extend to participation in international conferences or similar activities if their purpose is not the exchange and assembly of information relating to housing, urban planning, and urban development.

n2 "Section 604 of the bill directs the [HUD Secretary] to exchange with other nations data relating to housing and urban planning and development. Because of the significant recent progress made in this country in dealing with problems in these fields, the [Secretary] is very frequently called upon to provide information to other countries which the committee believes is helpful to those countries in solving similar problems. Furthermore, the committee believes that the housing and urban planning experience of many other countries (particularly in specialized fields) has been and will continue to be helpful to the the housing industry, the Congress, and the [Secretary] in developing new methods of meeting related problems in this country." S. Rep. No. 368, 85th Cong., 1st Sess. 31-32, reprinted in 1957 U.S. Code Cong. & Ad. News 1319, 1349. [*8]

HUD's annual appropriation for Salaries and Expenses under the heading "Management and Administration," provides funding only for "necessary administrative and nonadministrative expenses of the Department not otherwise

provided for." It finances all salaries and related costs associated with administering HUD's programs. n3 Accordingly, so long as (1) the Secretary of HUD deems his international activity under the Agreement beneficial in discharging his statutory responsibilities and, (2) those activities are for the purpose of exchanging and assembling information which relates to housing, urban planning, and urban development, HUD's information exchange activities in support of the agreement may be funded from its appropriation for Salaries and Expenses.

n3 See, e.g., Executive Office of the President, Budget of the United States Government, 1987 - Appendix, H.R. Doc. No. 144, 99th Cong., 2d Sess. at 1-M36 (1986).

With respect to HUD's activities under the commercial Component of the Agreement, n4 we examined materials issued by HUD to publicize its new initiative and concluded that the purpose of the commercial activities undertaken pursuant to the 1985 Protocol [*9] in support of Stroyindustriya '87 was the promotion of international trade rather than an exchange of data related to housing and urban development. n5 HUD's new commercial emphasis was illustrated by the catalog exhibits, advance marketing missions, the exhibition itself, and follow-up activities to monitor new business with the Soviets. HUD described these initiatives as "a major departure from past practice." Expenses relating to the Agreement were classified as either "technical" or "commercial." On the basis of these facts, it is clear that HUD's primary purpose for participating in Stroyindustriya '87 and its related activities was to facilitate commercial trade rather than to exchange technical information. Accordingly, *12 U.S.C. § 1701d-4* does not provide statutory authority for the activities HUD undertook pursuant to the commercial component of the agreement. Absent such statutory authority, HUD's appropriation for Salaries and Expenses is not available to pay for them.

n4 By letter of June 23, 1988, HUD stated its position that:

"The Agreement authorizes the parties to agree to areas of cooperation and to forms of cooperation other than those specifically mentioned in the Agreement. Accordingly, the two parties can, by Protocol, expand the areas and means of cooperation so long as the cooperation continues to be related to housing and other construction. There is no question that the 'cooperation of a commercial basis' contemplated in the 1985 Protocol related to housing and other construction and, even if not totally within the scope of the original Agreement, is a means of cooperation that could be mutually agreed upon by the parties under Article III of the Agreement."

n5 For example, HUD News Release No. 87-51, May 14, 1987, announced that:

"Samuel R. Pierce, Jr., Secretary of Housing and Urban Development, will lead a U.S. delegation of over 200 public and private sector executives to Moscow to participate in the International Construction exhibition from May 27 to June 5. A total of 105 U.S. companies will be represented in this major effort to generate Soviet commercial interest in American construction materials and technology. . . . The strong American business participation in STROYINDUSTRIA '87 resulted from a variety of advance marketing activities, led by Secretary Pierce and Dr. June Q. Koch, HUD Assistant Secretary for Policy Development and Research, designed to match Soviet priorities in the civil construction field

with capabilities of American firms . . . . As a result of secretary Pierce's initiative, there is now a significant 'commercial dimension' to the technical exchange program under the 1974 U.S. - U.S.S.R. Agreement on Housing and other Construction." [*10]

The HUD Secretary's statutory responsibility to undertake "programs of research, studies, testing, and demonstrations" under Section 501 of the Housing and Urban Development Act of 1970, as amended, *12 U.S.C. § 1701z-1* (Supp. IV 1986), is limited to those which relate to the mission and programs of HUD. n6 The primary mission of HUD is stated in the Declaration of Policy of the Housing and Urban Development Act of 1968, § 2, *12 U.S.C. § 1701t* (1982), in which the Congress affirmed the national goal, as set forth in section 2 of the Housing Act of 1949, n7 of "a decent home and suitable living environment for every American family." n8

n6 HUD, in response to our May 13 inquiry, noted that Section 520 of the 1970 Act:

"requires the Secretary of HUD to take measures necessary to encourage large-scale experimentation in the use of new technologies, methods and materials in producing housing and related facilities. Section 502 also authorizes the Secretary to provide advice and technical assistance in connection with activities authorized under Section 501 and to pay the cost of writing and printing reports concerning those activities. Section 502 further authorizes the Secretary to carry out his responsibilities under Section 501 either directly or by contract or grant. Section 502 also contemplates and authorizes mutual cooperation between this Department [HUD] and Federal, State and private agencies in furthering this Department's research missions."

n7 *42 U.S.C. § 1441* (1982).

n8 See 7 Warren, Gorham & Lamont, Housing and Development Reporter at 13 (1987). The responsibilities of the HUD Secretary are further defined at *42 U.S.C. § 3532* (1982), and include the responsibility to:

". . . encourage private enterprise to serve as large a part of the Nation's total housing and urban development needs as it can and develop the fullest cooperation with private enterprise in achieving the objectives of the Department; and conduct continuing comprehensive studies, and make available findings, with respect to the problems of housing and urban development." [*11]

The Agreement provides for cooperation with the Soviet Union in the areas of innovative techniques for the improvement of buildings and building materials; performance criteria for housing and other construction in seismic areas; improvement of construction methods in areas of extreme climatic conditions; services to housing and other buildings; and planning, design, and construction of new towns. Article II, TIAS 7898. Under *12 U.S.C. § 1701z-1*, HUD is authorized to participate in such cooperative activities so long as they relate to HUD's mission of providing for the nation's housing needs.

HUD's appropriations under the heading "Policy Development and Research: Research and Technology" are available:

"[f]or contracts, grants, and necessary expenses of programs of research and

studies relating to housing and urban problems, not otherwise provided for, as authorized by title V of the Housing and Urban Development Act of 1970, as amended *(12 U.S.C. § 1701z-1* et seq.) . . ." n9

n9 Department of Housing and Urban Development-Independent Agencies Appropriations Act, 1986, Pub. L. No. 99-160, 99 Stat. 909 (1985); Joint Resolution making continuing appropriations for the fiscal year 1987, and for other purposes, Pub. L. No. 100-202, approved October 30, 1986, 100 Stat. 3341-242. [*12]

Therefore, to the extent that a cooperative activity (1) relates to HUD's mission as required by *12 U.S.C. § 1701z-1* and, (2) qualifies as a program of research and studies related to housing and urban problems, HUD's Research and Technology appropriation is available to pay for it.

The Assistant Secretary for PD&R stated in his June 23 response to our inquiry that HUD's participation in Stroyindustriya '87 and other trade promotion activities grew from HUD's agreement to support a "commercial" initiative as documented in the September 1985 protocol. Neither the statutes making appropriations to HUD for Research and Technology nor *12 U.S.C. § 1701z-1* contains authority for HUD to undertake commercial endeavors. Commercial activities are not analogous to the "technical" research, study, testing, and demonstration programs authorized by *12 U.S.C. § 1701z-1* nor, do they qualify as a program of research and study for which Research & Technology appropriations are available.

Where, as here, the purpose of providing information on American construction and building technology to the Soviets was the acquisition of information of Soviet needs and the potential for sale of American products [*13] and services in the Soviet Union, n10 we cannot conclude that the *12 U.S.C. § 1701z-1* requirement for HUD's programs of research, studies, testing and demonstrations to relate to its mission has been satisfied. Had the intended benefit to U.S. commerce been a by-product of an authorized HUD research, study, or demonstration program to improve housing in the United States, HUD's appropriations would have been available to fund such activities. Here, however, HUD's primary purpose was to enhance business opportunities for American companies, many of which marketed products to the housing industry. Inasmuch as the promotion of trade does not qualify as a program of Research or Study related to housing and urban problems, HUD's Appropriations for Research and Technology are not available for that purpose.

n10 See Department of Housing and Urban Development, Construction Industry Technology of the United States: Stroyindustriya '87, "Fact Sheet: U.S. Participation in Stroyindustriya '87."

CONCLUSION

When an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who [*14] authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. n11 Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case the Antideficiency Act is violated. n12 As discussed above, HUD has no funds

available for its trade promotion activities. n13 This finding was the basis for our testimony on August 3, 1988, in which we reported our conclusion that HUD's trade promotion activities had resulted in a violation of the Antideficiency Act.

n11 *31 U.S.C. § 1341*(a) provides that:

"(1) An officer or employee of the United States Government or of the District of Columbia government may not - (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

n12 *60 Comp. Gen 440 (1981)*. See also, B-204270, Oct. 13, 1981.

n13 Other than its appropriations for Research and Technology and for Salaries and Expenses, HUD did not cite any other appropriation which it believes to be available to pay for activities related to the promotion of international trade. [*15]

April 8, 1975

EXECUTIVE ORDER
11850
RENUNCIATION OF CERTAIN USES IN WAR OF CHEMICAL
HERBICIDES AND RIOT CONTROL AGENTS

The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:

(a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.

(b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.

(c) Use of riot control agents in rescue missions, in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.

(d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

I have determined that the provisions and procedures prescribed by this Order are necessary to ensure proper implementation and observance of such national policy.

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States of America by the Constitution and laws of the United States and as Commander-in-Chief of the Armed Forces of the United States, it is hereby ordered as follows:

Section 1. The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any riot control agents and chemical herbicides in war is prohibited unless such use has Presidential approval, in advance.

Section 2. The Secretary of Defense shall prescribe the rules and regulations he deems necessary to ensure that the national policy herein announced shall be observed by the Armed Forces of the United States.

GERALD R. FORD

THE WHITE HOUSE,
APRIL 8, 1975

Figure 1

Introduction

a. General. Riot control agents (RCAs) and herbicides are not considered chemical warfare agents by the United States. On 22 January 1975, the U.S. ratified the Geneva Gas Protocol. As part of the ratification process, the U.S. made it clear that the Protocol prohibited only the first use of lethal gases. Non-lethal agents such as riot control agents were not prohibited by this Protocol.

b. Scope. This circular provides guidance for the use of riot control agents in combat and training. It is applicable for low through high intensity conflicts and written primarily for use by staffs at all command echelons. It gives brief descriptions of RCAs now available for use and developmental as well as standardized RCA munitions. Target effects data, area coverage, or munitions expenditure is given for each item if available. This manual is not intended as a reference for law enforcement or civil disturbance operations. For guidance on these uses of RCAs refer to FM 19-15, Civil Disturbances, dated Nov 1985.

c. Policy and Authority for Release.

(1) United States Policy does not prohibit the use of RCAs in War, however, on 8 April 1975, the President of the U.S. issued Executive Order (EO) 11850 that unilaterally renounced certain first-uses of riot control agents in armed conflict (Figure 1 - EO 11850). It does not forbid the first use of RCAs if they are used in defensive military modes to save lives in an area under direct and distinct U.S. military control. The order also places no restrictions on retaliatory use of RCAs during chemical warfare. Nonetheless, EO 11850 <u>requires</u> prior Presidential approval of any use (first-use or retaliatory) of RCAs or herbicides in war. Approval authority has been

delegated for most peacetime uses (such as civil disturbances and training and certain special conditions, (see Figure 2-1).

(2) U.S. employment of RCAs may be authorized in retaliation to enemy first-use of RCAs lethal chemical agents, incapacitating agents or toxic weapons against U.S. or Allied Forces. This retaliatory use will be conducted so as to minimize casualties among the civilian population. There are many factors that must be considered in any employment decision, such as the nature and level of the threat, the likelihood of escalation of chemical warfare, and the concerns of the host nation, Allies, and the international community. The decision to employ RCAs or herbicides will be determined on a case-by-case basis, even after first use by an enemy.

(3) Requests for deployment and use of RCAs in wartime are submitted and answered using the chemical weapons request (CWR) messages established within each theater by the commander-in-chief (CINC) in accordance with the Joint Chiefs of Staff Emergency Action Procedures. Plans for RCA employment should be included in the chemical fire support paragraph/appendix to the fire support portion of plans and orders (see Appendix D), and coordinated with the division airspace management element (DAME). RCAs should be integrated into conventional time-phased force deployment data (TPFDD) files and preplanned for both first-use and retaliatory roles by theater and subordinate staffs. Authority to employ RCAs and approve RCA targets in combat should be delegated to battalion level whenever possible to ensure the most responsive use of these weapons. (Large area RCA operations and integration with chemical strikes must still be considered at division and corps.) Coordination and logistics requirements are similar to those for chemical weapons, but less restrictive due to the essentially non-lethal nature of RCAs (see Appendix C

for DODAC and locations of RCA munitions). RCAs should be maintained at the corps ammunition supply points until released for use and included in unit prescribed chemical loads (PCLs).

NATIONAL POLICY

Extract from Executive Order No. 11850, Apr. 18, 1975

The U.S. renounces as a matter of national policy, first use of riot control agents in war except in defensive military modes to save lives such as:

(a) riot control situations in areas under direct U.S. military control, including POW riots.

(b) situations involving the use of civilians to mask or screen attacks.

(c) rescue missions in remotely isolated areas of downed aircrews, passengers, and escaping prisoners.

(d) in rear echelon areas to protect convoys from civil disturbances, terrorists, and paramilitary operations.

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Matter of: U.S. Department of Labor -- Interagency Agreement Between Employment and Training Administration and Bureau of International Labor Affairs

B-245541

Comptroller General of the United States

71 Comp. Gen. 402; 1992 U.S. Comp. Gen. LEXIS 661

May 21, 1992

HEADNOTES:
[*1]

1. The Department of Labor, Employment and Training Administration, appropriation for "Training and Employment Services" was available to fund international research projects that could assist the Secretary of Labor in finding solutions to the nation's employment and training problems. The Job Training Partnership Act requires the Secretary of Labor to establish a comprehensive program of employment and training research to help find solutions to the nation's employment and training problems. *29 U.S.C. § 1732.*

2. The Department of Labor, Employment and Training Administration, appropriation for "Training and Employment Services" is not available to fund a project to provide developing countries with access to instructional training materials. The Department's appropriation is only available to pay for international research projects to the extent the projects relate to the Department's mission under the Job Training Partnership Act to find solutions to the Nation's employment and training problems.

403 OPINION:
DECISION

This responds to a request by the Inspector General and the Assistant Secretary for Administration and Management of the United States Department of Labor (Department). They [*2] ask whether the Department improperly used its Employment and Training Administration (ETA) "Training and Employment Services" appropriation to fund three projects carried out by the United Nations' International Labor Organization. For the reasons indicated below, we conclude the appropriation was available to fund two of the projects but not the third.

BACKGROUND

At the June 1988 International Labor Conference in Geneva, Switzerland, the Secretary of Labor pledged $ 500,000 to the United Nations' International Labor Organization (ILO) n1 for research involving job training, employment promotion, and working conditions. According to Department officials, the Department's Bureau of International Labor Affairs (ILAB) n2 coordinates all international labor activities within the Department. This includes administering the technical aspects of the Department's participation in the ILO. Therefore, Department officials decided that, although funding would come from ETA, the

ILAB was best suited to administer the projects in view of its on-going relationship with the ILO.

n1 According to the Department, "the ILO, a specialized agency of the United Nations, exists to promote voluntary cooperation of Nations to improve labor conditions and raise living standards, thereby improving prospects of peace by fostering economic and social stability throughout the world."

n2 The Bureau of International Labor Affairs "integrates all international labor programs and foreign economic policy within the Department (of Labor); gives Departmental guidance to the U.S. participation in international organizations concerned with labor and employment and training problems; and provides for labor and employment and training technical services to other Government and international agencies." See Budget of the United States Government, 1989 -- Appendix, I-P18. [*3]

ETA transferred $ 500,000 from its "Training and Employment Services" appropriation to the ILAB under Inter-Agency Agreement No. 99-9-3368-75-002-03, signed on November 8, 1988. The purpose of the agreement was "to provide the Department of Labor with comparative international experience related to the Job Training and Partnership Act (JTPA) and to enhance the status of the U.S. Government in the ILO." Under the agreement, the ILAB entered into grant agreements with the ILO for the following three projects.

Project 1 (Grant Number E-9-K-9-0040): Research Project on Drug and Alcohol Abuse Prevention and Assistance Programs at the Workplace

The Department provided about $ 225,000 for the ILO to conduct an international comparative analysis of drug and alcohol abuse prevention and assistance programs in the workplace. The ILO evaluated drug and alcohol programs in Canada, the Federal Republic of Germany, Sweden, the United Kingdom, and the United States. The objective was "to improve the capability and knowledge of governments, employers' and workers' organizations and managers of enterprises to formulate effective policies and to develop, design and manage drug and alcohol related [*4] prevention and assistance programs." Under the agreement, the ILO was required to present the Department with a comprehensive report discussing "the dimensions of the problem, the various approaches tried at national and enterprise levels to prevent drug and alcohol abuse among workers and to assist those with such problems, the barriers (including legal ones) to the development and implementation of workplace programs and strategies to overcome them and elements of effective programs and the role of labor and management."

Project 2 (Grant No. E-9-K-9-0042): The Potential for Training Disadvantaged Youth Using New Training Technologies

The Department provided about $ 225,000 for a "survey and analysis of recent training programs in Latin America, in both industrialized and developing countries, for disadvantaged youth, especially from the perspective of new instructional technologies and learning theories." Under the agreement, the ILO was required to develop sample training materials designed for disadvantaged youth in Latin America and to present the Department with, among other things, "a report on the implications of new and innovative instructional technologies for training [*5] young people with poor formal education."

Project #3 (Grant No. E-9-K-9-0043): Development of a Focal Point for the Identification and Distribution of Learning Materials

The Department provided $ 50,000 to the ILO to create an international "focal point" to identify and distribute training materials, primarily American and European in origin, to developing countries. Under the agreement, the ILO was required to establish an operational link, at ILO's Center for Advanced Vocational Training, with existing data bases and to train key personnel from developing countries in how to access materials on the databases.

DISCUSSION

The DOL/ETA's Appropriation Act for fiscal year 1988 under the heading "Training and Employment Services," provides:

"For expenses necessary to carry into effect the Job Training Partnership Act . . . $ 3,658,651,000 plus reimbursements, to be available for obligation for the period July 1, 1988, through June 30, 1989. . . ." (Emphasis added.)

Pub. L. No. 100-202. 101 Stat. 1329-256 (1987).

Under *31 U.S.C.* § *1301*(a) (1988), agencies may use appropriated funds only for authorized purposes. The determination that a particular expense is necessary for an [*6] authorized purpose is, in the first instance, a matter of agency discretion.] 405 ~~B-242391, Sept. 27, 1991~~, 70 Comp. Gen. 720 (1991) Accordingly, when we consider whether an expense is necessary, we determine only whether it falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range. Id.

Here, Congress provided an appropriation for the Department of Labor to carry out the Job Training Partnership Act. The Job Training Partnership Act requires the Secretary of Labor to establish a "comprehensive program of employment and training research, utilizing the methods, techniques, and knowledge of the behavioral and social sciences and such other methods, techniques, and knowledge as will aid in the solution of the Nation's employment and training problems." *29 U.S.C.* § *1732*(a) (1988). The Act also requires the Secretary to establish "a program of experimental, developmental, and demonstration projects, through grants or contracts, for the purpose of improving techniques and demonstrating the effectiveness of specialized methods in meeting employment and training problems." *29 U.S.C.* § *1732*(b). [*7]

Department officials believe that *29 U.S.C.* § *1732* authorized the projects as part of a comprehensive research program. They believe that the knowledge, expertise, and experience of other countries can help the United States solve its own employment problems. As such, the Department considers comparative international research a legitimate component of a research program carried out under the JTPA.

Section 1732 makes clear that Congress intended for the Secretary to carry out an extensive program to "assist the Nation in expanding work opportunities and assuring access to those opportunities for all who desire it." *29 U.S.C.* § *1732*(a). The program may include, but is not limited to, studies involving such broad topics as "policies and programs to reduce unemployment," "productivity of labor," and "methods of improving the wages and employment opportunities of

low-skilled and disadvantaged workers." Id. Thus, it is within the legitimate range of the Secretary's discretion to include comparative international research projects in a comprehensive program of employment and training research.

Nevertheless, the Department's "Training and Employment Services" appropriation is only [*8] available for such projects to the extent they relate to the purpose of the Job Training Partnership Act. Cf. B-229732, December 22, 1988 (HUD funds are available for international trade program only to the extent it relates to HUD's mission and programs). The Congressionally declared purpose of the Act is to "establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment." *29 U.S.C. § 1501.*

The information resulting from Project 1, which involved research and analysis of drug and alcohol abuse prevention and assistance programs in various countries, could assist the Department in establishing similar programs in the United States. Likewise, the information resulting from Project 2, which involved research and analysis of training programs for disadvantaged youth in Latin America, could aid the Department in finding solutions to the barriers to employment facing disadvantaged youth in this country. Thus, we think it was in the Secretary's legitimate [*9] range of discretion to decide that Projects 1 and 2 would help the Department find solutions to the Nation's employment and training problems. Accordingly, the Department's "Training and Employment Services" appropriation was available for these projects. 406

The primary purpose of Project 3, however, was to provide developing countries with access to American and European training materials by establishing a data base, or "focal point," at the ILO. As the ILO's proposal for Project 3 indicates, the United States had access to these training materials on existing data bases. Clearly, therefore, the project was intended to benefit developing countries and not the United States.

Had the intended benefit to other countries been a by-product of an authorized research or demonstration project to help find solutions to employment problems in this country, as was the case with Projects 1 and 2, the Department's appropriation would have been available. Here, however, the primary purpose of the project was to provide other countries with access to training materials readily available in the United States. Thus, the project did not relate to the agency's mission in carrying out its responsibilities [*10] under the JTPA. Accordingly, the Department improperly charged its "Training and Employment Services" appropriation with the cost of the project.

CONCLUSION

When an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. *31 U.S.C. § 1341*(a). If no other funds were available for Project 3, the obligation could be viewed as either in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case, the obligation violated

U.S. Department of Justice
Washington, D.C. 20530

Report to the Deputy Attorney General on the Events at Waco, Texas February 28 to April 19, 1993

October 8, 1993

Redacted Version

D- 1932

The intent was to give the Branch Davidians the clear impression that although there was an alternative and this was not a panic situation, the FBI was maintaining maximum control. Richard understood that the use of tear gas to end the standoff would take several days; the plan was to inject the gas through the windows methodically. He added that both he and the Attorney General were confident that there would be enhanced medical capabilities to meet all needs. He also said that the FBI informed them that the tear gas would not cause a fire.

2. April 14 Meetings

On Wednesday, April 14, a large meeting was held in the FBI Director's office: The Justice Department was represented by Reno, Hubbell, Keeney and Incontro. Along with Director Sessions, the FBI representatives included Clarke, Gow, Potts, Coulson, Rogers, and Anthony Betz, chief of the Domestic Terrorism unit in GID. There were also several military representatives, and Dr. Harry Salem, who was present to summarize results of studies of effects of CS gas on children, pregnant women and the elderly. The Attorney General described Dr. Salem as "careful and scientific." She recalled that although there had been no laboratory tests performed on children relative to the effects of the gas, anecdotal evidence was convincing that there would be no permanent injury.

D- 1933

AN INDEPENDENT ASSESSMENT OF THE

BUREAU OF ALCOHOL, TOBACCO & FIREARMS

RAID OF THE BRANCH DAVIDIAN COMPOUND IN WACO, TEXAS

PREPARED BY:
Wade Y. Ishimoto, Consultant

FOR THE U.S. DEPARTMENT OF TREASURY

August 16, 1993

c. The interview of the former cult members posed a difficult problem in terms of determining their reliability and accuracy of information. Again, a system was not in place to pool information coming from these sources, to fully analyze it, and to disseminate the resulting intelligence in a useful way to tactical and support personnel.

d. The U/C house operation was an excellent idea which did not pay high dividends because of a lack of organization, proper tasking, and supervision of their activities. The logs which I reviewed were incomplete and do not substantiate many of the assumptions which were made on activity in the compound. For example, the tactical planners were adamant that a "routine" was evident in the compound with the males working outside at 10:00 AM onwards...logs from the U/C house do not corroborate this assumption. At best, the U/C house operation resulted in limited information about the physical structure, incomplete observation of activities, and information about a few of the personnel inside the compound. The U/C house operation was capable, in my opinion, of providing much more intelligence. One of the supposed goals of the U/C house was to obtain additional information on probable cause for a search or arrest warrant...it is not evident to me that this occurred.

e. The Forward Observers were not effectively used and a TOC was not in place to exploit information coming from the Forward Observers. The lack of effectiveness in this event refers to gaps in tasking, limited deployment around the compound, lateness of deployment, and the provision of extremely limited amounts of collection devices to the Forward Observers.

f. **Recommendations:**

Without access to all ATF policy, procedural guidance, and training information for intelligence, I am not able to make detailed recommendations on improvement of human intelligence operations. I therefore recommend that ATF or an outside organization conduct a more in-depth review of intelligence operations to determine whether there is need for changes/additions to policy, procedure, and training.

4. **Imagery Intelligence:**

a. In-house ATF capabilities to collect and process imagery intelligence appear extremely limited. There are references to a (i.e., only one) 35mm camera in the U/C house, a pole camera which did not work very well and was positioned poorly (both physically and in terms of how permission was obtained to install it), poor intelligence analysis and posting of information from the U/C house photographic operations, and little or no use of night vision equipment with video or photographic capability.

b. ATF capability to collect aerial imagery intelligence appears to be very limited. ATF turned to both Customs and the Texas National Guard for support in these areas. I do not find strong evidence that the ability to plan and collect imagery intelligence using aerial platforms was well planned or directed by ATF. The offer by a member of the Texas Governor's Office to overfly the compound and to use relatively unsophisticated Forward Looking Infrared

A Selective Analysis

of

Operation Trojan Horse

Conducted by

the Bureau of Alcohol, Tobacco and Firearms

Conducted by

John A. Kolman, Captain (L.A.S.D. retired)

for the Staff

of the

Waco Administrative Review

United States Department of the Treasury

the exception of smoke grenades, which were apparently unavailable from military sources. Under the circumstances, smoke grenades might have been of benefit in concealing the withdrawal or movement of the raid force. A controversy developed later concerning the availability of additional AR-15 semi-automatic rifles, but according to the Support Coordinator, all that were requested were received, and if more had been requested, they, too, would have been provided. In retrospect, there is no question that more could have been utilized.

With reference to helicopters, it had been the understanding of planners that necessary aviation assets would be provided by U.S. Customs Service. However, the decision was made at a later date to utilize Texas National Guard assets. This assistance was obtained with the cooperation of the Department of Defense liaison officer to the BATF in Washington, D.C. Whether the decision to utilize National Guard assets was based upon politics, rivalry, or practicality is a moot point. In either case, the National Guard ultimately committed to providing aviation assistance, armored vehicles on a standby basis, and other support equipment.

Fortunately, full-scale, multi-agency activities, approaching the size of Operation Trojan Horse, are still rare within law enforcement. Nonetheless, agencies must be prepared should they be confronted by circumstances of this nature requiring their attention. Logistical support of any operation, and particularly one of great magnitude, can have a marked affect on its outcome. Therefore, the assigned coordinator must be especially familiar with his role, as well as various sources of logistical assistance.

One approach to ensuring future uniformity and directed action in obtaining logistical support for an operation is to prepare and provide to each BATF Field Division Office a logistical manual. This manual, which would be provided to the Logistical Coordinator at the time of his assignment to the position, would contain a full description and statement of duties and responsibilities, along with logistical sources, procedures, and points of contact. The National Response Plan provides some direction in this regard, and that information could easily be expanded into a more helpful format, as described above.

Emergency Medical Services

One of the areas for which the BATF was most criticized by those with little or no knowledge of Operation Trojan Horse was an alleged failure to provide Emergency Medical Services (EMS). Research for this report revealed that these allegations were patently false. Unfortunately, television coverage of the evacuation of dead and wounded agents, and the withdrawal of others, prompted these allegations because there was no

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WACO ADMINISTRATIVE REVIEW

Brief
Submitted

by

John J. Murphy

Raid Implementation Analysis

Criticism must be directed at the way the raid plan was carried out.

Critical to a successful operation on this day was the element of surprise. This advantage was not maintained because of several important tactical shortcomings.

Forward observers might have helped ensure that surprise was maintained, had they been positioned to have full-circle coverage of the Compound, and had they been given a developed plan of operation. Observer and sniper teams should have been in place for twelve hours prior to the raid. This kind of coverage would have allowed ATF to see the armed Branch Davidians who apparently went to the Compound's "spider holes" during the hour before the raid; a report that Compound residents had taken these positions would have required that the raid be cancelled.

The role of the helicopters was to create a diversion immediately prior to arrival of the raid force. Had command and control accurately directed and communicated the diversion, firing at the helicopters by Branch Davidians might have provided the signal that the raid should be aborted.

The use of Waco as the staging area and the number of media vehicles active in the area prior to the raid should have received careful and in-depth assessment.

Original Operations Plan

February 25, 1993

OPERATIONS PLAN

1. SITUATION:

A. CIRCUMSTANCES:
On March 1, 1993 a Federal Search Warrant will be executed on the premises known as the residence of Vernon Wayne Howell, AKA: David Koresh, and others, along with all outbuildings and appurtenances and vehicles located on the premises.

B. TERRAIN:
The premises is in a rural setting, located on an approximate 77 acre tract of land, nearly 14 miles north and east of Waco, Texas. The premises contains the residences of approximately eighty (80) men, women and children, along with storage buildings and other structures.

C. TARGET:
Howell is the leader of a religious cult known as Branch Davidian and the premises has been named the Mount Carmel Center. For the past several years Howell has been receiving firearms parts which, if combined, could constitute the manufacture of machineguns. Also, he has been receiving shipments of chemicals and explosive materials which, if combined, could constitute the manufacture of explosive devices. These deliveries have been made through a cult operated mail drop known as the "Mag Bag". Additionally, nearby neighbors have reported hearing what they believe to be the sound of automatic weapons being fired in the nighttime coming from the Howell residence.

D. SUBJECT:
Vernon Wayne Howell is a white, male, born on August 17, 1959. He first took control of the Mount Carmel Center in early 1988 after an armed assault on the previous occupant in November of 1987. Howell, according to credible witnesses, depicts himself as Jesus Christ incarnate, requires all cult members to turn over all of their personal belongings to him, and he also sexually appropriates all of the female cult members for himself exclusively, to include female children as young as thirteen. Howell has surrounded himself with a group of approximately ten male cult members who have either criminal records and/or special skills which might precipitate violence during the execution of the search warrant.

2. MISSION:

The objective of the operation is to safely enter the premises of the Mount Carmel Center, to search the entire premises (to include the upper level residence of Howell and all other living quarters) for evidence of the manufacture of machineguns and explosive devices and for the machineguns and devices which may have already been manufactured. Personal identification of all persons on the premises will be accomplished and any persons who have outstanding warrants and/or immigration violations will be detained pending release to proper authorities. All others will be allowed to either leave the premises or to remain, as they may desire, once the search has been concluded.

3. EXECUTION:

A. HOW THE OBJECTIVE WILL BE ATTAINED:
Utilizing a number of facilities and the services of a wide array of Federal, State and local agencies, ATF will accomplish the mission. On Sunday, February 28, 1993, at approximately 8:30 p.m., an undercover ATF special agent will admit the Deputy Tactical Coordinator into an undercover residence which is across the road from the premises where the warrant will be served. Sometime prior to 8:30 a.m., on Monday, March 1, 1993, the undercover agent will position Forward Observers outside the premises, front and rear, in semi-concealed locations. At 9:00 a.m., Monday, March 1, 1993, the Tactical Coordinator will gather the tactical elements at a large parking lot site approximately eight miles away from the premises. The Tactical Coordinator will advise the undercover special agent by STU phone that the tactical elements are in position at which time the undercover special agent will visit the premises and identify the location of Howell and other principals. He will also check for recent changes at the premises and for any barriers or obstructions which may have recently been erected which might deter entry.

After his check of the premises, the undercover special agent will return to the undercover residence across the road and he will advise the Deputy Tactical Coordinator of his findings. The Deputy Tactical Coordinator will advise the Tactical Coordinator by STU phone of the conditions at the premises. Once the

premises site has been determined to be functioning normally, the Tactical Coordinator will advise the three road block sites to begin their road blocks and he will deploy his tactical force of approximately seventy SRT special agents into two cattle trailers being pulled by civilian trucks and being driven by qualified special agents. The Tactical Coordinator will ride as a passenger in one of the trucks pulling a cattle trailer. He will be accompanied by an EMT trained special agent assigned to the SRT. As the Tactical Coordinator deploys, he will notify the Deputy Tactical Coordinator, who will then broadcast a radio message to the Command Post, air support units, the road block units and the standby ambulance unit that the tactical operation has begun.

Following a prearranged flight schedule, the three helicopters participating in the operation as well as the fixed wing aircraft, will depart from their staging area and will proceed to approach and hold a position at the rear of the premises. Their arrival at the rear of the premises will coincide with and cause a diversion for the entry by the SRT trailers at the front entrance to the premises. One of the helicopters will be occupied by the Incident Commander or his Deputy to provide an overall assessment of the tactical operation from his vantage point.

The New Orleans Division SRT will lead the entry into the main structure of the premises and will push straight ahead toward the interior staircase. They will proceed to the third level and will contain all persons found at that location. Next in line of entry will be the Houston Division SRT which will split in to two separate groups. The first group will make entry to the main structure immediately behind the New Orleans SRT and will spread to the left which is a series of bedrooms. The second group will disperse around the perimeter of the premises and contain any persons found. The Dallas Division SRT will immediately follow the Houston SRT which entered the structure and will spread to the right and to the rear.

Once all persons on the premises have been located, they will be assembled in the central area of the structure. Vernon Howell will be segregated from the rest of the group so as to minimize any attempt on his part to exhort his followers to some action. Once facilities have been erected outside the structure on the premises, all persons will be removed to those

outside facilities to be identified and interviewed. Simultaneous with the structure being cleared of the cult members, a search of the entire premises will begin by those who have been designated to perform this function. Perimeter and internal security duties will be performed by additional ATF special agents until such time as the scene can be released.

B. CONTINGENCIES:
On February 28, 1993, a Texas Air National Guard aircraft will overfly the premises and will photograph the entire area. This reconnaisance will provide information regarding any late changes at the site of the tactical operation which will take place the following day.

On March 1, 1993, an ambulance will be positioned at the site of the road block closest to the premises. This ambulance will be manned by qualified Emergency Medical Technicians and will provide nearly immediate response to any injuries sustained in the tactical operation.

At the airfield at TSTC, immediately adjacent to the CP, a Careflight helicopter with a registered nurse aboard will be standing by in the event that an aerial evacuation of an injured person from the premises is required.

4. ADMINISTRATION AND LOGISTICS:

A. ASSIGNMENTS AND LODGING:
On February 23, 1993 the case agent will appear before the United States Magistrate and have the Federal Search Warrant Affidavit approved and the Federal Search Warrant signed.

On February 24, 1993 the Tactical Coordinator, the Deputy Tactical Coordinator, and the ATF SRT Team Leaders and their assistants will travel so as to arrive at Fort Hood, Texas by 1400 hours. Lodging will be arranged in the military barracks at Fort Hood to accomodate twenty (20) persons.

On February 24, 1993 the Incident Commander, the Deputy Incident Commander, the Support Coordinator, and his support staff will travel to the Texas State Technical College (TSTC), Waco, Texas to set up the Command Post

(CP). Accomodations will be arranged in a Waco motel for eleven (11) persons.

On February 24, 1993, two Communications Specialists will assist in the set up of the CP. Once the CP has been established, they will depart for Temple/Belton, Texas where they will establish a radio repeater site and be lodged in a motel. The Temple/Belton location is equidistant between Fort Hood and Waco and the repeater site at this location will facilitate radio transmissions between the SRT elements at Fort Hood and the CP at TSTC in Waco.

On February 25, 1993, the thirty-seven (37) Sector SRT members arrive at Fort Hood, Texas by 1400 hours and they are initially briefed by the Incident Commander and his staff. They will be lodged in the military barracks at Fort Hood to accomodate what is now a group of fifty-seven (57) persons.

On February 26, 1993, thirty-four (34) ATF special agents from the Houston, New Orleans, and Dallas Divisions arrive at Fort Hood, Texas by 1400 hours. These special agents represent auxiliary personnel who will be utilized in the identification and interviewing of detainees at the site of the warrant execution. They will be lodged in the military barracks at Fort Hood to accomodate what has now become a group of ninety-one (91) persons.

On February 26, 1993, one ATF special agent/pilot and two Texas Air National Guard pilots arrive in Waco at TSTC with their aircraft. They are lodged in a Waco motel and their presence increases the number of operational personnel in Waco to fourteen (14) persons.

On February 27, 1993, the Sector SRT personnel and other special agents assigned to the tactical operation will practice the tactics of the warrant execution at Fort Hood, Texas.

On February 27, 1993, two Public Information Officers (PIO) will arrive at the CP at TSTC in Waco. They will be lodged in Waco and will increase the number of personnel at this location to sixteen (16) persons.

On February 27, 1993, the Project Alliance Coordinator will arrive at the Temple/Belton, Texas location where he will meet with the Communications Specialists, bringing the number of operational personnel in this

location to three (3).

On February 28, 1993, the ninety-one (91) Sector SRT members and additional support special agents will travel from Fort Hood, Texas to Waco, Texas. The Communications Specialists and the Project Alliance Coordinator in Temple/Belton, Texas will relocate to Waco, Texas. A representative from the Tactical Response Branch, Special Operations Division, Bureau Headquarters will arrive in Waco. Two (2) representatives from the Explosives Technology Branch will arrive in Waco and two (2) fingerprint examiners from the ATF Laboratory will also arrive in Waco. On this date ten (10) Texas National Guard Aviation support personnel will arrive in Waco as well as twenty-five (25) additional ATF special agents from the Houston and Dallas Divisions. The total number of operational personnel lodged in Waco this night will be one hundred-fifty (150) persons.

On March 1, 1993 the Federal Search Warrant will be executed as outlined in section 3A of this plan.

B. EQUIPMENT:
The following special equipment, beyond what is normally carried by SRT members, was authorized for purchase during this tactical operation:

- 100 Flex Cuffs
- 250 Hospital ID Bracelets
- 2 Inertial Rams
- 1 Bolt Cutters
- 2 "Hooligan" pry bars, 30 inch
- 31 Sets of knee and elbow pads
- 26 Pair of Protective Goggles
- 3 Halon type, 13 lb, fire extinguishers

5. COMMAND AND SIGNALS:

A. COMMAND POST:
The Command Post (CP) will be physically located at the Airport Manager's Building, immediately adjacent to the airfield at the Texas State Technical College (TSTC), approximately eight (8) miles north of Waco, Texas. The CP will be the operational headquarters for the Incident Commander, the Deputy Incident Commander, and the Support Coordinator and his staff.

B. SIGNALS:
The CP will provide the Incident Commander with point-to-point Coded DES communications between all elements of the tactical operation and the National Command Center. These communications capabilities are: handheld radios, mobile radios, fixed site equipment, satellite cellular communication with secure STU III and Secure/Clear FAX. This will be accomplished through the installation of a Motorola Micor 100 watt repeater in the airfield control tower, an antenna installed on top of the airfield control tower, a portable System Saber base station and a secure STU III telephone unit with Secure/Clear FAX capability along with four secure point-to-point deskset telephones.

C. COMMANDS:

WACO REVIEW TIMELINE OF EVENTS

DATE	EVENT	REMARKS
OCT/NOV, 1987	VERNON HOWELL AND SEVERAL OF HIS ASSOCIATES PURCHASED SEVERAL RIFLES AT LOCAL PALESTINE, TEXAS AREA GUN SHOPS. THESE WEAPONS WERE USED BY HOWELL AND HIS ASSOCIATES FOR A RAID ON MT. CARMEL.	
11/3/87	VERNON WAYNE HOWELL AND SEVEN OF HIS GROUP ARE ARRESTED FOR ATTEMPTED MURDER OF GEORGE BUCHANAN RODEN.	
11/6/87	HOWELL IS RELEASED ON BAIL ($50,000) AND AWAITS TRIAL.	
4/25/88	A MISTRIAL IS DECLARED (JURY DEADLOCKED) IN HOWELL'S TRIAL - HOWELL IS NOT TRIED AGAIN. HIS SEVEN ASSOCIATES RECEIVE ACQUITTALS.	
11/4/88	THE CHARGE AGAINST HOWELL IS DISMISSED.	
11/7/88	THE COURT ORDERS ALL PROPERTY SEIZED RETURNED TO HOWELL.	THIS INCLUDES A SUBSTANTIAL NUMBER OF GUNS AND AMMUNITION.
1988-1989	GEORGE RODEN IS INCARCERATED FOR SIX MONTHS FOR CONTEMPT OF COURT. AFTER HIS RELEASE, HE KILLS A MAN AND IS COMMITTED TO AN MENTAL INSTITUTION.	THIS ALLOWS H.WELL AND HIS ASSOCIATES TO GAIN CONTROL OF MT. CARMEL.
9/90	WACO FBI RECEIVES INQUIRY ABOUT "CYRUS" PRODUCTIONS PROMOTING "SHAM" MARRIAGES WITH AUSTRALIAN CITIZENS. DISCUSSION WITH AUSA, WACO DETERMINE NO FEDERAL VIOLATION, INQUIRY IS CLOSED.	FBI DETERMINES "CYRUS" PRODUCTIONS TO BE A MUSICAL GROUP LED BY KORESH.
2/27/92	TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES (DPRS) VISIT THE MT. CARMEL COMPOUND RE: ACCUSATIONS OF CHILD ABUSE.	
3/5-9/92	DAVID KORESH, AKA, VERNON WAYNE HOWELL, VISITS THE WACO OFFICE OF THE DPRS AND SPEAKS WITH JOYCE SPARKS REGARDING THE CHILD ABUSE ALLEGATIONS. LOCAL LAW ENFORCEMENT CONDUCT SWAT TRAINING NEAR "MAG BAG". DAVID KORESH, AKA, VERNON HOWELL, REACTS BY: 1) BRINGING BACK MEMBERS FROM CALIFORNIA AND ENGLAND; 2) MAKING LARGE PURCHASES OF WEAPON PARTS; 3) ACQUIRING CHEMICALS WHICH CAN BE USED TO MAKE EXPLOSIVES; 4) PURCHASING NIGHT VISION SCOPES AND SENSORS; AND, 5) ACCUMULATING LARGE SUPPLIES OF AMMUNITION.	ATF DOES NOT LEARN OF THE SWAT TRAINING UNTIL AFTER 2/28/93. PRIOR TO MARCH 5, COMPOUND BELIEVED TO HAVE APPROX. 80 FIREARMS, AFTER MARCH 5, AN ADDITIONAL 163 (MOSTLY ASSAULT RIFLES) ARE ACQUIRED.

4/92	WACO TRIBUNE-HERALD REPORTER MARK ENGLAND BEGINS INVESTIGATION OF BRANCH DAVIDIANS AFTER HEARING REPORTS OF POSSIBLE MASS SUICIDE OVER DAVIDIAN PASSOVER. WACO FBI OPENS CASE ON KORESH FOR INVOLUNTARY SERVITUDE.	
4/6/92	TEXAS DFRS VISITS COMPOUND RE: CHILD ABUSE.	
4/30/92	TEXAS DFRS VISITS THE COMPOUND REGARDING THE CHILD ABUSE ALLEGATIONS FOR THE LAST TIME AND SUBSEQUENTLY CLOSES IT'S INQUIRY.	JOYCE SPARKS CONTINUES TO HAVE TELEPHONE CONTACTS WITH KORESH.
5/92	LT. COY JONES, McLENNAN COUNTY SHERIFF'S OFFICE CONTACTED BY UPS RE: DELIVERY OF LARGE AMOUNTS OF FIREARM PARTS TO THE MAG BAG. CHIEF DEPUTY WETENBERG CALLS SA CHARLES MEYER, AUSTIN TO REPORT UPS INFORMATION. FBI CONTACTS TEXAS DEPARTMENT OF PROTECTIVE AND REGULATORY SERVICES, JOYCE SPARKS, RE: FBI INVESTIGATION.	UPS DRIVER GILBREATH REVEALS DELIVERIES MADE SINCE MARCH, 1992 AMOUNTED TO APPROX. $20,000 IN CASH SPARKS TELLS FBI SHE IS AWARE OF KORESH.
5/26/92	SA DAVY AGUILERA IS TOLD BY SA CHARLES MEYER TO CONTACT CHIEF DEPUTY WETENBERG, McLENNAN CO SHERIFF'S OFFICE RE: UPS DELIVERIES. WETENBERG ASSIGNS LT GENE BARBER TO WORK WITH AGUILERA	MEYER ORIGINALLY TOOK CALL FROM SHERIFF'S OFFICE, BUT CASE IS REFERRED TO AGUILERA BY MEYER.
6/92	JOYCE SPARKS' LAST CONTACT WITH DAVID KORESH. FBI CLOSES INVESTIGATION OF KORESH FOR INVOLUNTARY SERVITUDE.	
6/4/92	AGUILERA MEETS FIRST W/AUSA BILL JOHNSTON, THEN WITH BARBER. BARBER SHARES HISTORY OF BRANCH DAVIDIANS, DELINEATES NATURE AND AMOUNT OF UPS DELIVERIES TO "MAG BAG".	BARBER DESCRIBES METHOD UPS DELIVERIES ARE MADE AND ABOUT A HAND GRENADE CASING FALLING OUT OF A DELIVERY PACKAGE.
6/9/92	AGUILERA SUBMITS INITIATING REPORT TO HOUSTON VIA AUSTIN.	INCLUDES INFORMATION PROVIDED BY BARBER, SKINNER AND GILBREATH
6/17/92	SAC CHOJNACKI NOTIFIES SAC LARRY SPARKS, AUSTIN VIA HANDWRITTEN FAXED NOTES. INVESTIGATION CLASSIFIED AS SENSITIVE. INVESTIGATION CONTINUES.	SENSITIVE CLASSIFICATION DENOTES HEADQUARTERS MONITORING OF CASE.
6/19/92	ATF HEADQUARTERS (HQ) BECOMES AWARE OF INVESTIGATION IN WACO.	BECOMES A HQ MONITORED CASE (SIGNIFICANT)
7/92	TACTICAL OPERATIONS OFFICER, MARK HANDLEY RECOMMENDS TO AGUILERA USE OF POLE CAMERA AND PEN REGISTER AS INVESTIGATIVE TOOLS.	

D-4

7/22/92	AGUILERA REQUESTS OPINION FROM ATF HQ RE: EXPLOSIVE MANUFACTURING AND SEMIAUTOMATIC WEAPONS MANUFACTURING/CONVERSION BASED ON COMPONENTS KNOWN TO BE IN POSSESSION OF DAVIDIANS.	
7/30/92	COMPLIANCE INSPECTION OF KENNY McMAHON BY AGUILERA AND JIM SKINNER REVEALS APPROX 65 LOWER RECEIVERS FOR AR-15s MISSING, McMAHON SAYS STORED AT PREACHER'S (DAVID KORESH), ADDITIONALLY SAYS 36 FIREARMS SOLD TO VERNON HOWELL. DOES NOT ACKNOWLEDGE OR OFFER THEY ARE SAME PERSON.	SKINNER FINDS COMPLIANCE VIOLATIONS, BUT DOES NOT CITE, IN ORDER TO MAINTAIN INVESTIGATION INTEGRITY.
8/5/92	SAC LARRY SPARKS, AUSTIN IS ADMINISTRATIVELY REMOVED FROM AUSTIN OFFICE FORMER SAC EARL DUNNAGAN IS MADE ACTING SAC OF AUSTIN.	SPARKS IS LATER FIRED FROM THE ATF AND HAS APPEALED THIS ACTION.
8/8/92	SKINNER RETURNED TO McMAHON'S PLACE OF BUSINESS AND PROVIDES HIM WITH INFORMATION ON PROPER RECORD KEEPING AND FEDERAL EXCISE TAXES.	
8/11/92	ATF INSTALLED POLE CAMERA, FAILED TO GET IT TO WORK UNTIL DECEMBER 11, 1992.	ATF ATTEMPTED TWICE IN OCTOBER TO GET THE CAMERA TO WORK.
SEPT. & OCT.	CASE AGENT AGUILERA ASSIGNED TO USSS PROTECTIVE DETAILS AT THREE WEEK INTERVALS.	DURING USSS DETAIL, HE IS UNABLE TO PURSUE THE INVESTIGATION.
10/92	GARRETT IS TEMPORARILY ASSIGNED TO HQ TO PREPARE NATIONAL RESPONSE PLAN (SECTOR PLAN).	
10/92	HARTNETT APPROVES FOREIGN OBSERVER PROGRAM.	SUBSEQUENT TRAINING OCCURS FOR SIX TEAMS IN NOV., 1992
OCT./NOV 1992	WACO TRIB REPORTER, DARLENE McCORMICK CALLS AUSA JOHNSTON RE: DAVIDIANS AND LEGALITY OF FIREARMS.	
10/92	DUNNAGAN TELLS AGUILERA TO START WORK ON AFFIDAVIT FOR SEARCH/ARREST WARRANTS AND RECEIVES AUTHORIZATION TO SET UP AN U/C HOUSE.	
11/92	SRTs FROM HOUSTON, DALLAS AND NEW ORLEANS MEET IN HOUSTON. WTVISION MEETING AT HQ, DETAILS OF INVESTIGATION AND TACTICAL PLANNING FOR SEARCH WARRANT DISCUSSED, HARTNETT AND CONROY WANT MORE INTELLIGENCE INFORMATION. TOLD DIVISION CHIEFS TO SLOW DOWN TACTICAL PLANNING....	
11/2/92	ATF HQ OPINES NOT ENOUGH EVIDENCE TO SUPPORT SEARCH WARRANT RE: EXPLOSIVE MATERIAL LIST SUBMITTED JULY 22ND.	TECH PARKER, ATF HQ, RENDERS THIS OPINION.
11/3/92	AGUILERA GOES TO CALIFORNIA TO INTERVIEW ISABELLA ANDRADE, JAYLENE OJENDA, AND SAUNDRA LEAKE RECEIVES INFORMATION FROM LAVERNE, CA PD ABOUT DAVIDIANS LIVING IN CALIFORNIA.	

D-5

11/5,6 & 7/92	ANDRADE AND OJEDA VISIT ANDRADE DAUGHTERS LIVING IN THE COMPOUND AND ARE DEBRIEFED BY AGUILERA.	
11/20/92	AUSA JOHNSTON REVIEWED PC TO DATE AND OPINES ENOUGH INFORMATION FOR A HISTORICAL SEARCH WARRANT.	DUNAGAN AND SARABYN PRESENTED FACTS OF CASE.
12/4/92	HQ PERSONNEL BEGAN TO ATTEND MEETINGS IN HOUSTON. (CHOJNACKI, ROYSTER, CAVANAUGH, BUFORD, PETRILLI, LATIMER, LEWIS, CARTER, KENNY, CURTIS WILLIAMS, LTC WALKER, DUNAGAN, AND AGUILERA) LOGISTICS FOR OPERATION DISCUSSED, INVESTIGATIVE REQUESTS MADE AND TACTICAL PLANNING CONTINUES. MEDIA INTEREST IN THE DAVIDIANS IS DISCUSSED, CHOJNACKI THINKS ATF CONTACT SHOULD BE INITIATED, CAVANAUGH ADAMANTLY OPPOSES CONTACT.	SARABYN WAS IN WDC WORKING(ON NRP AT THE TIME) AND TEACHING A CLASS. BUFORD SELECTED AS FOCAL POINT FOR SRT INVOLVEMENT. AGUILERA TOLD TO CONCENTRATE ON INVESTIGATION AND ESTABLISHING PC FOR WARRANTS. NEITHER A PEN REGISTER NOR TRAP AND TRACE WERE USED DURING THIS INVESTIGATION.
12/7/92	AGUILERA RECEIVED INFORMATION FROM SPARKS RE: CHILD ABUSE. SHE PROVIDES FLOOR PLANS OF COMPOUND.	
12/9/92	SUBPOENA TO PHONE COMPANY FOR SUBSCRIBER AND TOLL INFORMATION AND IDENTIFICATION OF ALL TELEPHONE NUMBERS ASSOCIATED WITH COMPOUND. TELEPHONE COMPANY COULD NOT PROVIDE LATTER.	
12/11/92	SA VINORA MEETS WITH TEXAS NATIONAL GUARD TO LEARN WHAT TYPE OF MILITARY SUPPORT IS AVAILABLE TO ATF IS TOLD BY TEXAS NATIONAL GUARD, A DRUG NEXUS IS NECESSARY FOR NOW REIMBURSABLE NATIONAL GUARD SUPPORT. AGUILERA LEARNS FROM SGT. HACKWORTH, LAVERNE PD, ABOUT ROBYN, JEANINE, DAVID AND DEBORAH BUNDS AND MARC BREAULT. POLE CAMERA STARTS TO WORK, BUT IS INEFFECTIVE, BECAUSE OF THE DISTANCES INVOLVED.	
12/14/92	NATIONAL GUARD RECEIVES FAX REQUEST FROM DUNAGAN FOR AERIAL PHOTOS OF COMPOUND AND MIL SUPPORT. DOES NOT MENTION DRUG NEXUS.	LT. JUSTICE NOTES LACK OF DRUG NEXUS. PHOTOS APPROVED BY LTC. PETIT.

D-6

12/15/92	AGUILERA CALLS BREAULT AND ASKS NOT TO SHARE INFORMATION WITH WACO TRIBUNE. BREAULT AGREES TO DEAL SOLELY WITH AGUILERA. AGUILERA RECEIVES VERBAL (AND LATER WRITTEN) OPINION FROM ATF FIREARM TECHNICAL BRANCH THAT THE LIST OF THE PARTS AND ACCESSORIES SUBMITTED FOR OPINION WERE CONSISTENT WITH COMPONENT PARTS, WHICH IF USED TO MAKE AN M-16 MACHINE GUN, THAT MACHINE GUN WOULD BE ILLEGAL TO POSSESS.	THIS IS FIRST ATF CONTACT WITH BREAULT. IN SPITE OF ATF REQUEST TO STOP, HE CONTINUES HIS CONTACT WITH THE WACO TRIBUNE. PARTS AND ACCESSORIES IN AND BY THEMSELVES, ARE NOT TECHNICALLY FIREARMS AS DEFINED BY LAW.
12/16/92	AGUILERA RECEIVES FAX FROM BREAULT, GIVES INFORMATION RE: METHAMPHETAMINE LAB PRESENT WHEN KORESH TOOK OVER CONTROL OF THE COMPOUND FROM RODEN, IN APRIL, 1988. AGUILERA AND C. WILLIAMS OVERFLY COMPOUND IN CUSTOMS AIRCRAFT AND OBTAIN INFRARED PHOTOS OF COMPOUND.	BREAULT NAMES JEAN SMITH, FORMER CULT MEMBER AS BEING ABLE TO CORROBORATE INFORMATION ON METHAMPHETAMINE LAB.
12/17/92	DEA NOTIFIED OF POSSIBLE DRUG NEXUS BY ATF.	
12/18/92	SECOND FAX RECEIVED BY NATIONAL GUARD FROM DUNAGAN, MENTIONS "POSSIBLY NARCOTICS" AND ASKS FOR PHOTO OF MAG BAG. MEETING IN HOUSTON WITH KALISTER, LTC WALKER, CHOJNACKI, ROYSTER, SARABYN, PETRILLI, DUNAGAN, CAVANAUGH, LATIMER, CURTIS WILLIAMS, JOHN WILLIAMS, SEIDLER, GANDLEY, DIBETTA, WHITE, TERRY ANDERSON AND AGUILERA.	FIRST TIME DRUG NEXUS NOTED VIA WRITTEN REQUEST FROM ATF. DECISION MADE TO INSERT SAs IN U/C HOUSE AND DESIGNATE TSTC AIRPORT OPS BUILDING AS ATF CP. CONCEPT FOR TACTICAL PLAN WAS FOR SIEGE AT THIS TIME.
12/26/92	MEETING AT HQ (HARTNETT, CONROY, GARNER, TROY, SPOWN, VITA, TATE AND KALISTER) RE: GENERAL BRIEFING ON CASE. VITA APPOINTED TO MONITOR THE INVESTIGATION. MENTION OF POSSIBLE USE OF U/C HOUSE TO CORROBORATE PC AND GATHER INTELLIGENCE FOR TACTICAL PLAN. HARTNETT/CONROY WANT MORE PC DEVELOPED IN CASE AND TO "SLOW" DOWN TACTICAL OPS. PLANNING.	TATE AND KALISTER DO THE GENERAL BRIEF.
12/27/92	McMAHON LOSES LEASE ON PLACE OF BUSINESS AND MOVES TO FLORIDA.	
12/28-30/92	MEETING IN AUSTIN. AGUILERA, DUNAGAN, FROST, BRZOZOWSKI, LATTIMER, KING, PETRILLI, SARABYN, C. WILLIAMS, BUFORD, AND CAVANAUGH WENT TO WACO TO VIEW THE COMPOUND AND NEGOTIATE WITH PERRY FOR USE OF U/C HOUSE.	CHOJNACKI IS OFF, DURING THIS PERIOD OF TIME. WILLIAMS MAINTAINS AT THIS POINT PLAN WAS FOR SIEGE. AGUILERA TASKED TO INTERVIEW BREAULT AND OTHERS WITH MEMBER OF SRT.

D-7

12/93 FOR MONTH OF DECEMBER	KORESH OBSERVED OFF THE COMPOUND IN DECEMBER, 1992 BY: MRS. SPOON, KORESH JOGGING BY RESIDENCE SEVERAL TIMES; JONES, EMPLOYEE AT STRING WORLD; DONNEL, PRACO PAWN SHOP; AND, DULACK, ELK GENERAL STORE.	ALTHOUGH KORESH REPORTED OFF COMPOUND IN NEWS MEDIA AFTER DECEMBER, ONLY TWO SIGHTINGS WERE CONFIRMED, 1) AUTO REPAIR JAN. 29 AND 2) VISIT TO SPOON'S RESIDENCE, LATE DECEMBER, EARLY JAN.
1/4/93	PAT PIAZZA, OWNER STRING WORLD MUSIC STORE, SAID HE TALKED WITH KORESH AT LOCAL WACO DAIRY QUEEN.	PIAZZA BASES HIS RECOLLECTION ON DATE HE RECEIVES SPEAKERS HE AND KORESH TALK ABOUT.
1/6/93	NATIONAL GUARD OVERFLY COMPOUND AND MAG BAG TAKE AERIAL PHOTOS AND INFRARED IMAGING PICTURES. THERMAL IMAGING SYSTEM PICKS UP "HOT SPOT" INSIDE COMPOUND AND IDs THREE SENTRIES TO REAR OF COMPOUND. REPORT FROM TAYLOR, ATF, EXPLOSIVES ENFORCEMENT OFFICER, (WALNUT CREEK, CA) OPINING KORESH PURCHASING CHEMICALS AND EXPLOSIVE MATERIALS FOR ILLEGAL USE. PRELIMINARY WORK ON TSTC COMMAND POST BEGINS.	TEXAS NG UC-26 IS USED. FIRST FLIGHT. NO OFFICIAL INTERPRETATION OF "HOT SPOT" PROVIDED TO ATF BY NG.
1/7-9/93	AGUILERA AND BUFORD CONDUCT INTERVIEWS OF THE BUNDS, BRAUDY, ANDRADE AND OJEKA. TELEPHONE LINES, RADIO AND COMPUTERS INSTALLED AT TSTC COMMAND POST. THIS SITE USED BY THE U/C HOUSE AGENTS AS OFFICE.	PURPOSE OF INTERVIEWS TO GAIN INTELLIGENCE FOR TACTICAL PLANNING AND GAIN INSIGHT INTO KORESH'S STATE OF MIND.
1/11/93	U/C HOUSE BEGINS OPERATION. O'FLAHERTY, BRZOZOWSKI, VIEGRA, RODRIGUEZ, BRIGANCE, SEALE, TINKER AND BROWN STAFF THE HOUSE. U/C HOUSE IS VISITED BY DAVIDIANS, DAVID JONES, WAYNE MARTIN AND NEIL SCHROEDER.	
1/13/93	ATF INTERNAL MEMORANDUM REGARDING USE OF NATIONAL GUARD PERSONNEL SIGNED BY BARTNETT. THAT IS, NG PERSONNEL AND SPECIALIZED EQUIPMENT TO BE USED AGAINST COMMON AREAS, NOT SPECIFIC INDIVIDUALS, VEHICLES, OR AREAS.	

1/14/93	SECOND NG OVERFLIGHT (RF4-C A) TAKES OBLIQUE AERIAL PHOTOS. ALSO NG UC-26 OVERFLIES MAG BAG AND COMPOUND. NUMEROUS AERIAL AND INFRARED IMAGING PHOTOS TAKEN AND SUBSEQUENTLY DELIVERED TO ATF ON OR ABOUT JAN. 21, 1993.	DUHAGAN THANKS NATIONAL GUARD FOR ASSISTANCE SPECIFICALLY FOR INTERPRETATION AND EVALUATION OF PHOTOS. NATIONAL GUARD INFORMS W.A.R. ANY INTERPRETATIONS OR EVALUATIONS BY ANY NATIONAL GUARD PERSONNEL WOULD BE DEEMED UNOFFICIAL.
1/18/93	U/C AGENTS TOLD BY SPOONS, DAVIDIANS SUSPECT OCCUPANTS OF U/C HOUSE TO BE FBI AGENTS, THAT KORESH THOUGHT POLICE WERE WATCHING THEM AND THAT KORESH WAS EXPECTING A VISIT FROM THE FBI.	
1/19/93	SARABYN VISITS U/C HOUSE. HE AGREES WITH U/C AGENTS TO DISCONTINUE SURVEILLANCE DURING THE NIGHT TIME HOURS. HE FURTHER CHANGED THE PRIORITY FROM SURVEILLANCE TO INFILTRATION OF THE COMPOUND VIA UNDERCOVER MEANS. TEAMS TOLD NOT TO PUT EVERYTHING IN LOGS, ONLY SIGNIFICANT THINGS.	PRIOR TO SARABYN'S VISIT, SURVEILLANCE WAS AT 100% LEVEL. CHANGED TO MONITOR UNUSUAL ACTIVITY AT ALL TIMES. BUT, VISUAL SURVEILLANCE WAS LIMITED TO DAYLIGHT HOURS.
1/21/93	POLE CAMERA REMOVED, DUE TO SECURITY LEAK BY POWER COMPANY EMPLOYEE. REQUEST BY LTC. WALKER/SARABYN TO MILITARY FOR EQUIPMENT TO SUSTAIN A SIEGE (INCLUDING SEVEN BRADLEY FIGHTING VEHICLES) IS MADE.	NOTHING OF EVIDENTIARY OR INTELLIGENCE NATURE WAS GAINED FROM THIS EQUIPMENT. PLAN FOR SIEGE IS CONFIRMED BY THIS REQUEST.
1/22/93	SA PALI CONTACTS DEA LIAISON, TO OPERATION ALLIANCE, WILLIAM ROSKEN AND DISCUSSES DRUG NEXUS. ROSKEN OFFERS DEA TECHNICAL ASSISTANCE FOR SUSPECTED METHAMPHETAMINE LAB AT THE COMPOUND.	
1/23/93	AGUILERA AND BUFORD INTERVIEW DAVID BLOCK. SUPPOSED TO HAVE MOST CURRENT INTELLIGENCE ON COMPOUND, HAVING LEFT THE COMPOUND AROUND MAY, 1992. BLOCK INFORMED: TOWER NOT USED FOR SURVEILLANCE, BUT, FOR WOMEN'S SLEEPING AREA, MEN SEGREGATED FROM WOMEN, GAVE ROUTINE, GAVE LOCATION OF ARMORY (SAID IT WAS LOCKED), MEN OCCASIONALLY KEPT GUNS UNDER BED AND A FEW MEN ALLOWED TO RETAIN PRIVATE WEAPONS OF SMALL CALIBER, KORESH OBSESSED WITH POSSIBILITY OF SIEGE, HAD VAST QUANTITY OF FOOD (MREs), THREE .50 CALIBER WEAPONS IN COMPOUND, AND, POSSIBLE "STEN" GUN BEING MADE IN COMPOUND.	THIS AND OTHER INFORMATION, TO INCLUDE A DISCUSSION OF A POSSIBLE MASS SUICIDE. PROVIDED BY PREVIOUS INTERVIEWS OF FORMER CULT MEMBERS LIKELY MOVES TACTICAL PLANNERS FROM SIEGE TO DYNAMIC ENTRY APPROACH.

1/27-29/93	MEETINGS IN HOUSTON. C. WILLIAMS, LATIMER, LITTLETON, PETRILLI, KING, WHITE, DUNAGAN, AGUILERA, BETTERTON, HONNYCUTT, CHOJNACKI, SARASYN, ROYSTER, AND MARTIN. BUFORD PRESENTS INFORMATION GLEANED FROM INTERVIEWS. U/C HOUSE REPORTS NO SENTRIES VISIBLE AND A ROUTINE WHERE MEN AND WOMEN ARE SEGREGATED AND MEN AWAY FROM GUNS. DISCUSSION OF SIEGE VS. DYNAMIC ENTRY HELD. IT IS CONCLUDED, BASED ON INTELLIGENCE GATHERED, TO GO WITH DYNAMIC ENTRY. MEDIA INTEREST IN COMPOUND DISCUSSED, MOST AGREE A MEETING WITH A REPRESENTATIVE FROM THE WACO TRIBUNE IS WARRANTED. A COIN FLIP DETERMINES DEPUTY INCIDENT COMMANDER POSITION FOR OPERATION. MARTIN WINS AND IS NAMED DEPUTY. ROYSTER NO LONGER PARTICIPATES IN SUBSEQUENT PLANNING SESSIONS.	DURING THIS PHASE THE TACTICAL PLANNERS BEGIN IN EARNEST TO DEVELOP AN OPERATIONAL PLAN PREFACED ON A DYNAMIC ENTRY.
1/27/93	GA MEDRANO IN U/C ROLE (UPS TRAINER) VISITS MAG BAG AND COMPOUND.	
1/28/93	SA ROBERT RODRIGUES AND SA WADE BROWN MAKE FIRST SUSTAINED CONTACT WITH COMPOUND MEMBERS, INCLUDING KORESH.	CONTACT LASTS ONE HOUR, AND IS CONDUCTED OUTSIDE THE COMPOUND BUILDINGS.
1/29/93	KORESH LEAVES COMPOUND TO PICK UP PARTS FOR HIS CAMARO AT MICHAEL BARNARD'S PLACE OF BUSINESS, PERFORMANCE AUTOMOTIVE MACHINE, AITKIN, TX.	NOT OBSERVED BY U/C SURVEILLANCE.
2/1/93	SARASYN AND DUNAGAN MEET WITH BARBARA ELMORE, WACO TRIBUNE. ANDRADE AND OJEDA VISIT ANDRADE'S DAUGHTERS AT THE COMPOUND. THEY RETURN TO THE COMPOUND ON THE 2ND AND 3RD. THEY ARE NOT DEBRIEFED BY ATF.	APPROXIMATE DATE OF ATF ACTION GIVEN.
2/3/93	RODRIGUES GOES TO COMPOUND, BUT IS TOLD KORESH IS ILL AND TO RETURN. OPERATION ALLIANCE SUPPORT AUTHORIZED, BASED ON ATF SUBMISSION OF A DRUG NEXUS PRESENTED BY SA PHIL LEWIS AT EL PASO. ROCKER, DEA, OFFERS DEA CLANDESTINE CERTIFIED LABORATORY TEAM TO ATF.	
2/4/93	JOINT COMBAT PLANNING SESSION WITH CHOJNACKI, SARASYN AND REPRESENTATIVES FROM THE NATIONAL GUARD, JTF-6 AND SPECIAL FORCES.	SARASYN ANSWERS QUESTION'S REGARDING DRUG NEXUS.
2/5/93	RODRIGUES ATTENDS FIRST BIBLE STUDY AT COMPOUND, INTENSE ONE ON ONE SESSION WITH KORESH.	
2/9/93	CHUCK ROCKER, COX ENTERPRISES, CALLS CHOJNACKI AND SAYS HE IS THE WACO TRIBUNE'S LIAISON WITH ATF. CHOJNACKI MAKES REQUEST TO HQ TO ACTIVATE THE (NRP) SECTOR PLAN.	ROCKER SAYS CHOJNACKI TOLD HIM ACTION TO OCCUR 3/1/93.

2/11/93	BRIEFING AT HQ. INVESTIGATORS AND TACTICAL PLANNERS BRIEF HARTNETT ET AL. PROBABLE CAUSE DISCUSSED AS WELL AS TACTICAL PLAN IN DEPTH.	SOME SAY DELAY IN THIS MEETING CAUSED DELAY IN THE OPERATION'S PLANNED DATE FEB. 22, 1993.
2/12/93	BRIEFING AT HQ FOR HIGGIN'S BENEFIT. SAME ISSUES DISCUSSED AS PREVIOUS DAY. AUSA'S JOHNSTON AND PHINISY AND SA DUNAGAN MEET WITH WACO DISTRICT ATTORNEY, ELIZABETH TOBIN TO DISCUSS LOCAL ARREST WARRANT FOR KORESH FOR CHILD ABUSE.	WANTED TO USE WARRANT TO GET KORESH AWAY FROM COMPOUND.
2/16/93	HARTNETT ACTIVATES SECTOR PLAN PER ATF ORDER 3350.10	
2/17/93	FOUR OF EIGHT U/C AGENTS SENT HOME FROM U/C HOUSE. RODRIGUES ATTENDS BIBLE STUDY (2.5 HRS). CHOJNACKI CALLS ROCKER AND VIA MESSAGE INVITES ROCKER TO VIEW ATF TRAINING AT FORT HOOD. VALI BRIEFS TEXAS GOVERNOR'S REPRESENTATIVE TO THE TEXAS NARCOTICS CONTROL PROGRAM, JAMES WILLBORN ABOUT THE HOWELL INVESTIGATION.	KORESH TELLS RODRIGUES HE DOES NOT LEAVE COMPOUND OFTEN.
2/18/93	RODRIGUES ATTENDS BIBLE STUDY (3 HRS) IN COMPOUND. NATIONAL RESPONSE PLAN - ATF ORDER 3350.10 IS FORMALIZED.	RODRIGUES ARRANGES TO SHOOT WITH KORESH NEXT DAY.
2/19/93	RODRIGUES AND BRZOSOWSKI SHOOT WITH KORESH IN REAR OF COMPOUND. KORESH NOTES HE HAS OBSERVED U/C AGENTS SHOOTING, TALKS ABOUT DROP IN SEARS. RODRIGUES AND BRZOSOWSKI TAKEN THROUGH COMPOUND BUILDING TO REAR AREA. CURTIS WILLIAMS CANCELS U.S. CUSTOMS SUPPORT REQUEST.	
2/21/93 MONDAY	KORESH ASKS RODRIGUES TO COME TO COMPOUND TO LISTEN TO MUSIC. INVITES RODRIGUES TO BECOME MEMBER OF HIS GROUP.	RODRIGUES AGREES TO BEGIN BIBLE STUDY TO START MARCH 1, 1993.

2/22/93 TUESDAY	AGUILERA & DUNAGAN BRIEF McLENNAN SHERIFF'S OFFICE RE: RAID SUPPORT REQUESTS. DUNAGAN SAID HE CALLED ELMORE AND TOLD HER WITH SARABYN'S PERMISSION, RAID DATE MOVED TO MARCH 1, 1993. AGUILERA ACCOMPANIES A FEMALE MINOR TO DISTRICT ATTORNEY TOBIN'S OFFICE FOR INTERVIEW.	RAID DATE GIVEN AS MARCH 1, 1993. ELMORE SAID CALL CAME IN SOMETIME EARLY TO MID FEB. THE FEMALE MINOR DECLINES TO TESTIFY AGAINST KORESH, SO TOBIN CONCLUDES STATE CANNOT PROCEED AGAINST KORESH FOR CHILD ABUSE.
2/24/93 WED:	CHOJNACKI MEETS WITH EDITORIAL STAFF OF WACO TRIBUNE-HERALD IN AN ATTEMPT TO DELAY PUBLICATION OF ARTICLE. FREDDY MAKES TENTATIVE DECISION TO PRINT SERIES STARTING SATURDAY. WITHERSPOON TELLS STAFF ABOUT HIS "TIP" GIVING RAID DATE FOR MONDAY, 3/1/93. BLANSETT ASSIGNS THREE REPORTERS TO COVER ANTICIPATED RAID ON MONDAY, 3/1/93. SARABYN TRAVELS TO FT. HOOD TO COMMENCE SRT TRAINING FOR OPERATION. SRT LEADERS, ASSIST. TEAM LEADERS AND FORWARD OBSERVERS PRESENT. CHOJNACKI ASKS SARABYN IF RAID COULD BE MOVED UP TO SATURDAY, IS TOLD NO, DECISION IS MADE TO MOVE RAID TO SUNDAY, 3/28/93. TSTC COMMAND POST STAFF ARRIVE IN WACO AND BEGIN TO SET UP CP. NOTIFICATIONS GO OUT TO ATF PERSONNEL, MOVING UP REPORTING DATES TO FORT HOOD/WACO. ATF REQUEST TO THE NATIONAL GUARD FOR MILITARY SUPPORT IS SUBSTANTIALLY DIFFERENT FROM THE JAN. 21 REQUEST, ELIMINATING ITEMS NECESSARY FOR A SIEGE, INCLUDING THE BRADLEY FIGHTING VEHICLES.	BARTNETT, AFTER BEING BRIEFED BY CHOJNACKI, AGREES TO SUNDAY RAID DATE.
2/25/93 THURS:	SRTs ARRIVE AT FORT HOOD AND BEGIN TRAINING: MAGISTRATE GREEN SIGNS AFFIDAVITS FOR ARREST AND SEARCH WARRANTS. WITHERSPOON TELLS MULLONY ABOUT ATF RAID ON MT CARMEL TO OCCUR ON MARCH 1, 1993.	

2/26/93: FRIDAY:	SA CUTLER PROVIDES TREASURY WITH ONE PAGE MEMORANDUM RE: ATF'S PLANNED ACTION AGAINST THE DAVIDIANS. TREASURY EXPRESSES CONCERN ABOUT RAID, AT FIRST CANCELS RAID, THEN, AFTER FURTHER DISCUSSION WITH HIGGINS, RESCINDS ORDER TO CANCEL RAID. 3:00PM - ROCHNER TELLS CHOJNACKI ARTICLE TO COME OUT ON SATURDAY, NO MENTION OF ATF IN ARTICLE. DUNAGAN ADVISES SHERIFF'S OFFICE AND OTHERS ABOUT NEWS ARTICLE AND THAT RAID IS MOVED UP TO SUNDAY MORNING, 3/28/93.	A NUMBER OF CALLS ARE MADE TO INFORM SUPPORT PEOPLE OF THE CHANGE IN RAID DATE BY ATF AND COY JONES AND GENE BARBER.

FEBRUARY 27, 1993 (SATURDAY)

1:00AM	-	PEROT/GRAY GET ADVANCE PUBLICATION OF WACO TRIBUNE HERALD AND DELIVER COPY TO CHOJNACKI.
8:00AM	-	RODRIGUES JOINS CHURCH SERVICES IN COMPOUND.
77:77AM	-	WITHERSPOON'S INFORMANT TELLS HIM RAID CHANGED TO SUNDAY.
	-	WITHERSPOON CALLS BLANSETT AND SAYS INFORMANT GAVE CHANGE IN RAID DATE TO SUNDAY.
12:00N	-	RODRIGUES LEAVES COMPOUND AND RELATES INFORMATION TO CHOJNACKI ON THE REACTION OF KORESH TO THE ARTICLE. SARABYN AND CHOJNACKI INDICATE RODRIGUES OBSERVES NO OVERT CALL TO "ARMS" BY KORESH, MOREOVER, CHOJNACKI REPORTS TO HARTNETT ONLY CONCERN OF KORESH IS WHAT ARTICLE WILL DO TO FUND RAISING. DURING AFTERNOON BRIEF OF CHOJNACKI, RODRIGUES ONLY RECALLS CHOJNACKI ASKING IF RODRIGUES HAD SEEN GUNS OR PREPARATIONS. RODRIGUES IN W.A.R. INTERVIEW STATES, KORESH TOLD FOLLOWERS "THEY" WERE COMING FOR HIM AND SHOULD THIS HAPPEN, THE FOLLOWERS SHOULD NOT GET HYSTERICAL AND REMEMBER WHAT HE HAD TOLD THEM TO DO. CHOJNACKI OR SARABYN NOT TOLD THIS BY RODRIGUES.
	-	FREDDY, BLANSETT, LOTT AND ROCHNER MEET AT PAPER TO DISCUSS WITHERSPOON'S INFORMATION. DECISION IS MADE TO COVER THE RAID. BLANSETTE CHANGES THE NUMBER OF PERSONNEL ASSIGNED TO COVER THE RAID, FROM 3 TO 9.
	-	HELMSTETTER GETS FROM GLOVER RAID TO OCCUR ON SUNDAY, AND TELLS MULLOHY.
3:00PM	-	MULLOHY AND WITHERSPOON PLAY RACQUETBALL AND DISCUSS CHANGE OF RAID DATE.
	-	BLANSETT, LOTT, AND ROCHNER DRIVE BY COMPOUND, ON WAY BACK TO PAPER OBSERVE HELICOPTER FLY TOWARDS TSTC. PROCEED TO TSTC AIRPORT AND SEE HELICOPTER AND PEOPLE, SOME IN UNIFORMS. ROCHNER THINKS STAGING AREA FOR ATF.
5:00PM	-	RODRIGUES RE-ENTERS COMPOUND, LISTENS TO KORESH'S ASSESSMENT OF THE WACO TRIBUNE'S ARTICLE "SINFUL MESSIAH".
	-	SCHNEIDER CALLS BLANSETT AND ASKS FOR INTERVIEW RE: NEWS ARTICLE. BLANSETT CALLS ENGLAND AND ROCHNER. ROCHNER CALLS CHOJNACKI AND ASKS IF SAFE TO SEND REPORTER INTO COMPOUND FOR INTERVIEW. ENGLAND DECLINES OPPORTUNITY TO PERSONALLY INTERVIEW KORESH OR SCHNEIDER.
	-	BLANSETT NOTIFIES REPORTERS/PHOTOGRAPHERS TO MEET SUNDAY AT 6:00AM AT PAPER.
7:00PM	-	BRIEFING FOR SUPPORT PERSONNEL AT WACO BEST WESTERN HOTEL.. BRIEFING CONDUCTED BY SARABYN.
9:00PM	-	FORWARD OBSERVERS INSERTED INTO U/C HOUSE, CAVANAUGH IS INSERTED LATER....
12:00MN	-	RODRIGUES EXITS COMPOUND AND RELATES OBSERVATIONS TO SARABYN. IS TOLD BY SARABYN HE WILL HAVE TO GO BACK INTO THE COMPOUND NEXT AM. RODRIGUES IS NOT HAPPY ABOUT HAVING TO REENTER THE COMPOUND ON SUNDAY MORNING.

OTHER EVENTS OCCURING ON 2/27/93 (SATURDAY)

AGENTS AT FORT HOOD CONTINUE TRAINING, ARE TOLD RAID MOVED UP TO SUNDAY....MANY READ THE ARTICLE ON THE DAVIDIANS.
ATF SUPPORT AGENTS, ARRIVE AT WACO AND ARE BRIEFED THAT NIGHT WITH OTHER LOCAL LAW ENFORCEMENT AND NATIONAL GUARD, AT THE BEST WESTERN HOTEL.
PIO WHEELER CONTACTS LOCAL DALLAS MEDIA FOR WEEKEND NUMBERS.
NATIONAL GUARD HELICOPTERS PRACTICE RAID AT FORT HOOD, THEN PROCEED TO TSTC AIRPORT AND STAGE HELICOPTERS, ARRIVING THERE AT APPROXIMATELY 4:00PM. (ABOUT THE TIME BLANSETT, LOTT AND ROCHNER OBSERVE THEM)
ATF BOMB TRUCKS TRANSPORTED FROM HOUSTON AND DALLAS AND PARKED AT THE TSTC AIRPORT COMPLEX.

RAID DAY FEB. 28, 1993 (SUNDAY)

4:30AM	-	REAR COVER FORWARD OBSERVER (FO) TEAM AND COVER SRT MEMBERS DEPART FORT HOOD.
6:00AM	-	ATF CARAVAN DEPARTS FORT HOOD.
	-	REAR COVER FORWARD OBSERVER TEAM AND COVER SRT ARRIVE TSTC COMMAND POST.
7:30AM	-	ENTX (MULLOHY, PEELER, McLEMORE AND BRADFIELD) MEET AT STATION.
	-	ATF CONVOY ARRIVES AT BELLMEAD CIVIC CENTER.
7:45AM	-	REAR COVER FORWARD OBSERVER TEAM AND COVER SRT, LEAVE TSTC FOR HAY BARN, TRANSPORTED BY BRZOZOWSKI.
	-	ENTX (MULLOHY AND McLEMORE) ARRIVE COMPOUND AREA (FR2691). PEELER IS LOST IN THE AREA OF OLD MEXIA ROAD.
8:00AM	-	RODRIGUES ENTERS COMPOUND.
	-	SARABYN GIVES SHORT UPDATE AT BELLMEAD CIVIC CENTER.
	-	ATF NATIONAL COMMAND CENTER IS MANNED BY VITA/GARNER (9:00EST)
	-	WACO TRIB REPORTERS MEET AT PAPER OFFICES.
8:30AM	-	PEELER TELLS MULLOHY VIA CELLULAR PHONE, HE CAN'T TALK TO MULLOHY, SINCE HE IS TALKING TO A POSTMAN.

RAID DAY FEB. 28, 1993 (SUNDAY) CONTINUED.

	-	DAVID JONES RETURNS TO THE COMPOUND AND ALERTS KORESH ABOUT RAID.
8:45AM	-	TRIB REPORTERS (3 CARS) ARRIVE COMPOUND AREA. TRIBUNE PHOTOGRAPHER, SANCHEZ ARRIVES TSTC AIRPORT.
8:46AM	-	SANCHEZ CALLS BLANSETT AND REPORTS HELICOPTERS AND POLICE VEHICLES AT TSTC AIRPORT.
9:00AM	-	SARABYN RETURNS TO TSTC CP.
9:05AM	-	RODRIGUES DEPARTS COMPOUND
	-	RODRIGUES TALKS TO CAVANAUGH.
	-	RODRIGUES CALLS SARABYN, WHO IS AT THE TSTC COMMAND POST.
	-	SARABYN, CHOJNACKI AND ROYSTER DISCUSS RODRIGUES' INFORMATION AND DECIDE TO "GO".
	-	SARABYN DRIVES TO BELLMEAD
	-	RODRIGUES LEAVES U/C HOUSE FOR TSTC COMMAND POST.
9:10AM	-	CHOJNACKI CALLS THE NATIONAL COMMAND CENTER (NCC) IN WASHINGTON, D.C. AND INFORMS THE OPERATION IS A GO.
9:13AM	-	SANCHEZ REPORTS VEHICLES AT TSTC WERE STARTING TO LINE UP AS IF TO MOVE.
9:25AM	-	SARABYN ARRIVES BELLMEAD AND ANNOUNCES OPERATION TO PROCEED.
	-	ATF AGENTS BOARD THE CATTLE TRAILERS AND PREPARE FOR THE RAID.
9:29AM	-	SANCHEZ REPORTS TO BLANSETT, HELICOPTERS ON THE WAY.
9:30AM	-	SARABYN CALLS CAVANAUGH ON CELLULAR PHONE AND GETS UPDATE ON COMPOUND ACTIVITY AND TELLS CAVANAUGH, THEY ARE ON THE WAY TO MT. CARMEL.
9:35AM	-	O'FLAHERTY AND ARSOSOWSKI GO TO SPOON RESIDENCE TO SECURE.
9:41AM	-	SANCHEZ IS PULLED OVER BY ATF AGENTS AFTER TRYING TO PASS THE CATTLE TRAILERS ON FR 2491. HE SEES ATF AGENTS AND CALLS BLANSETT TELLS HIM THEY ARE ON THE WAY.
9:45AM	-	"MAG BAG" SEARCH TEAM DEPART TSTC EN ROUTE "MAG BAG".
	-	MULLOHY/McLEMORE AT FR 2491 AND DOUBLE E SEE, THEN FOLLOW CATTLE TRAILERS INTO COMPOUND, STOPPING AT BUS.

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	-	ENGLAND AND DOE FOLLOW MULLOHY/McLEMORE DOWN DOUBLE E ROAD, BUT PASS THE MT. CARMEL DRIVEWAY AND PARK BY ATDELOTTE'S CAR, ON DOUBLE E ROAD.
	-	WITHERSPOON ASKS O'FLAHERTY IF HE CAN FILM FROM SPOON PROPERTY. IS TOLD NO, AS CAR WITHERSPOON ARRIVED IN IS BACKING OUT ONTO DOUBLE E ROAD, THEY SEE CATTLE TRAILERS ENTER COMPOUND DRIVEWAY.
9:47AM	-	SARABYN AND CAVANAUGH END THEIR CELLULAR TELEPHONE CALL.
	-	REAR FO TEAM MOVE INTO POSITION BEHIND COMPOUND AND ARE IMMEDIATELY TAKEN UNDER FIRE BY POSITION/S TO THEIR LEFT.
	-	HELICOPTERS ARRIVE IN SIGHT OF COMPOUND AND ARE TAKEN UNDER FIRE.
	-	RAID BEGINS....AGENTS TAKEN UNDER FIRE. MEDIA ON DOUBLE E ROAD ARE SHOT AT. KNTV CAMERA CREW HALF WAY DOWN MT. CARMEL DRIVEWAY HEAR SHOTS AND TAKE COVER BEHIND BUS, AND VIDEO RAID.
	-	"MAG BAG" SEARCH TEAM CALLED BACK TO TSTC.
9:48AM	-	911 RECEIVES CALL FROM WAYNE MARTIN REPORTING RAID ON MT. CARMEL.. GUNSHOTS ARE HEARD IN BACKGROUND. HE REMAINS ON THE LINE BRIEFLY, THEN LEAVES THE PHONE OFF HOOK.
9:52AM	-	911 ATTEMPTS TO CONTACT ATF TO REPORT OPEN LINE INTO COMPOUND. ATTEMPTS CONTINUE (19 TIMES) TO REACH ATF. CONTACT IS FINALLY ESTABLISHED VIA TSTC PATROLMAN "197" AT 10:20AM.
9:55AM	-	BCC IS NOTIFIED BY THE TSTC COMMAND POST, WARRANT EXECUTED, AGENTS RECEIVING HEAVY GUNFIRE.
	-	BCC NOTIFIES DADLE COMROY, WHO NOTIFIES ADLE HARTNETT, WHO NOTIFIES DIRECTOR HIGGINS.
	-	911 HAS OPEN LINE INTO COMPOUND, BUT, NO ONE IS ON THE LINE. 911 CONTINUES TO HEAR GUNSHOTS.
10:02AM	-	CALL TO 911 IS TERMINATED BY COMPOUND.
10:02AM	-	911 CALLS COMPOUND, ESTABLISHES OPEN LINE. WAYNE MARTIN AND OTHERS CONVERSE ON SPEAKER PHONE TO LT. LYNCH. LYNCH STARTS NEGOTIATION WITH MARTIN.
10:15AM	-	DYER TAKES 12 INDIVIDUALS FROM TSTC COMMAND POST AND ATTEMPTS TO SET UP AN OUTER PERIMETER.
10:30AM	-	911 MAKES CONTACT WITH ATF VIA SHERIFF'S RADIO FREQUENCY. CHOJNACKI AND ROYSTER PARTICIPATE IN NEGOTIATIONS FOR CEASE FIRE THROUGH LT. LYNCH.
10:30AM	-	HARTNETT TELLS COMROY TO GO TO WACO.

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10:34AM	-	KORESH CALLS 911 VIA CELLULAR PHONE.
10:40AM	-	KORESH'S CALL IS DISCONNECTED.
10:42AM	-	KORESH CALLS 911 AGAIN ON CELLULAR PHONE, TALKS TO LYNCH.
10:43AM	-	KORESH'S CALL DISCONNECTS.
10:46AM	-	SCHNEIDER CALLS 911 ON CELLULAR PHONE, TALKS TO LYNCH, KORESH GETS ON LINE THEY TALK ABOUT CEASE FIRE.
10:49AM	-	SCHNEIDER'S CALL DISCONNECTS.
	-	LYNCH PASSES TO ATF AT TSTC THE TELEPHONE NUMBER FOR KORESH/SCHNEIDER'S CELLULAR PHONE AND ADVISES KORESH WANTS ATF TO CALL DIRECT. ROYSTER PASSES TELE # TO CAVANAUGH AT U/C HOUSE.
10:59AM	-	ATF ESTABLISHES HARD TELEPHONE LINE CALL INTO 911. ROYSTER AND LYNCH CONDUCT NEGOTIATIONS WITH MARTIN/SCHNEIDER FOR CEASE FIRE.
11:27AM	-	CAVANAUGH CALLS INTO COMPOUND VIA CELLULAR PHONE AND CONTINUES TO NEGOTIATE FOR CEASE FIRE.
11:30AM	-	HARTNETT ARRIVES NCC (12:30PM EASTERN TIME) AND GETS FURTHER BRIEF ON EVENTS AT WACO.
	-	"MAG BAG" SEARCH TEAM TOLD TO GO TO "MAG BAG" AND SECURE PERIMETER, WERE TOLD NOT TO EXECUTE SEARCH WARRANT.
	-	HARTNETT UNILATERALLY REQUESTS FBI HRT SUPPORT.
11:39AM	-	AGENTS START TO MOVE TO PICKUP SA KING AND OTHERS. ONLY FOUR AGENTS ARE ALLOWED TO REMOVE KING.
11:44AM	-	MARTIN TELLS LYNCH ATF GOT ONE WOUNDED FROM BACK OF COMPOUND BUILDING (K. KING).
11:46AM	-	MARTIN SAYS ATF CAN GET WOUNDED FROM FRONT OF COMPOUND.
11:54AM	-	AMBULANCE MOVES INTO COMPOUND TO PICK UP WOUNDED AND DEAD AGENTS.
12:01PM	-	ROYSTER TELLS LYNCH TWO AGENTS ON ROOF ARE DEAD.
12:12PM	-	ROYSTER TELLS LYNCH, "IT'S NOW A STANDOFF", ALL AGENTS (WOUNDED AND DEAD) HAVE BEEN REMOVED FROM THE COMPOUND AND ALL OTHER AGENTS ARE SAFE.
12:37PM	-	SCHNEIDER DEMANDS CONTACT WITH ATF, JIM (CAVANAUGH), LYNCH GIVES SCHNEIDER CAVANAUGH'S CELLULAR TELEPHONE NUMBER.

12:53PM	-	LYNCH CONFIRMS WITH MARTIN THAT SCHNEIDER IS TALKING WITH CAVANAUGH.
	-	CAVANAUGH LEAVES U/C HOUSE FOR TSTC.
	-	CAVANAUGH REESTABLISHES CONTACT WITH SCHNEIDER/KORESH.
2:00PM	-	HIGGINS ARRIVES THE NATIONAL COMMAND CENTER AND TELLS HARTNETT TO PROCEED TO WACO.
4:00PM	-	REAR FORWARD OBSERVER TEAM AND COVER HRT WITH DYER, BRIGANCE AND APPELT COME UNDER FIRE WHILE MOVING FROM THE HAY BARN TO EVACUATION POINT. SCHROEDER KILLED, HAAS ARRESTED, KENDRICK ESCAPES.
5:00PM	-	HARTNETT DEPARTS WASHINGTON, D.C.WITH THE FBI HOSTAGE RESPONSE TEAM (HRT).
5:30PM	-	FBI SAC JAMAR ARRIVES TSTC ATF COMMAND POST.
	-	ROYSTER CONDUCTS FIRST PRESS CONFERENCE.
6:30PM	-	CONROY ARRIVES TSTC COMMAND POST.
10:00PM	-	HARTNETT ARRIVES TSTC AIRPORT VIA FBI HRT PLANE.

MARCH 1, 1993 (MONDAY)

1:00AM	-	HARTNETT AND CONROY ARE TAKEN TO THEIR HOTEL.
6:00AM	-	HARTNETT ADVISED BY TREASURY, FBI, HRT TO ASSUME CONTROL OF OPERATION.
10:00AM	-	MEETING WITH HONPOSTED ATF AGENTS, HARTNETT INFORMS THEM FBI TO BE IN CHARGE.

APRIL 28, 1993, WEDNESDAY

SECTION: MAJOR LEADER SPECIAL TRANSCRIPT

LENGTH: 8976 words

HEADLINE: HSE JUDICIARY CMTE/RENO
HEARING OF THE HOUSE JUDICIARY COMMITTEE
SUBJECT: GOVERNMENT DECISIONS IN THE WACO INCIDENT
CHAIRED BY: REPRESENTATIVE JACK BROOKS (D-TX)
WITNESSES:
ATTORNEY GENERAL JANET RENO,
FBI DIRECTOR WILLIAM SESSIONS, AND
ATF DIRECTOR WILLIAM HIGGINS
ROOM 2141, RAYBURN HOUSE OFFICE BUILDING

BODY:
REP. BROOKS: (Sounds gavel.) The committee will come to order. I've called this hearing of the full Committee on Judiciary to examine the events surrounding the stand-off between federal law enforcement agencies and members of the Branch Davidian cult near Waco, Texas.
As the Members well know, hearings at the full committee level are rare enough an occurrence to be called extraordinary, and I believe that the subject matter of today's hearing is appropriate for such extraordinary treatment because it cuts across multiple aspects of the committee's broad jurisdiction over law enforcement activities.
While speculative and contradictory theories have abounded, it is only in the past few days that on-site forensic teams have begun to draw a number of tentative conclusion based on scientific observation and testing. That's all for the best, even if it departs from the scripts of the made- for-television movies already in production. The basic chronology of events related to the stand-off and its fiery conclusion can be stated succinctly. On February 28th, after an extensive investigation and pursuant to legal process, a team of agents from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms raided the heavily armed compound then under control of the cult leader calling himself David Koresh in order to serve warrants for federal weapons violations.

The raid turned into a fierce gun battle that left four BATF agents dead, 15 wounded, and six cult members dead. There ensued a stand-off for the next 51 days, during which time the Federal Bureau of Investigation assumed the lead law enforcement responsibility and attempted through a variety of tactics to persuade Koresh to lay down his weapons, let the adult and juvenile cult members leave the compound -- all to no avail.
Finally, on April the 19th, the FBI undertook a major action to inject tear gas into the compound in an effort to drive the occupants out. The effort failed. Instead, Koresh and more than 80 of his followers died as a raging fire consumed all the compound's buildings in a few short minutes. However, establishing the baseline chronology of events is not the sole purpose for what we -- for being here today. Rather it is to hear from the three law enforcement officials directly responsible for the actions and the choices taken in Waco so that we can understand the decisionmaking process behind the events.
Now I don't relish playing omniscient second guesser when there are still facts to be ascertained, evidence to be (introduced ?), and given the instant experts that pop up everywhere in the press, I may be in a distinct minority. What I care about is whether we have in place in our federal enforcement agencies the capability and, yes, the creativity to deal with the increasingly disturbing situation of terrorism, where in the high office towers of our urban centers, or in small, entrenched pockets of alienate citizens who operate separate and apart from a larger society. If such groups, whether they are called cults or not, pose a direct physical and violent threat to their own members or to others in society, then their operations cannot be ignored or justified through innovations -- invocations to the great American tradition of the right of each citizen to be left alone. Oliver Wendell Holmes declared the essence of a free society is indeed the right to be let alone, but not at the expense of the social compact which allows all of us as Americans to live together based on the values we share together.

What this committee and the public need to know is how, in a difficult situation of dealing with Branch Davidian cult, did our agencies perform, and how they processed signals, other information -- such as it was -- from this man Koresh, whether they developed alternative plans of action, how they negotiated, how they prepared, how they implemented decisions that were made.

The verdict on David Koresh's methods and aims can already be read in the Gallup polls. We're here to seek answers to weightier questions. I'm delighted our three leading law enforcement officials have made themselves available to the committee.

And now I would just like to offer several notes of caution about testimony we're going to hear today. First, investigations of both the decisionmaking process and the events of last Monday are at a very preliminary stage. It may well be that the answers to many of our questions will have to wait until completion of the forensic examination or the internal review of the Treasury and Justice Department's activities that the President has ordered. And secondly, it may be that the witnesses will be reluctant to respond to some questions because they might expose investigative sources and methods, or could jeopardize the pending criminal actions against a number of cult members relating to the deaths of four BATF agents. I believe that people of goodwill can easily accommodate both these considerations and Congress' need for accurate and complete information.

We're participating in an important proceeding today, and to admit all members to have the chance to question our witnesses, I feel compelled to limit oral opening statements to the ranking minority members of the full committee, and the chairmen and the ranking minority members of the two subcommittees with major jurisdictions over the issues under discussion. Of course, all members are free and encouraged to submit individual statements for the Record at this point, and so at this point I would yield to my distinguished friend from New York, Mr. Ham Fish.

REP. FISH: Thank you, Mr. Chairman. It is indeed a tragic set of circumstances that brings us here today. In recent days there has been considerable fault-finding and finger-pointing. Hopefully, as you have said, this hearing will get us beyond recrimination and help us to better understand what happened in Waco, why it happened, and how better to prepare for possible future similar episodes.

On Monday, April the 19th, 86 persons, 24 of whom were children, lost their lives. Prior to this, on February 28th, four brave ATF agents were killed in the line of duty. This committee oversees the operations of the Department of Justice, the Federal Bureau of Investigations, and the Bureau of Alcohol, Tobacco, and Firearms. It is a legitimate exercise of our legislative and oversight responsibilities to inquire into the strategies and decisions that led to the tragic events in Waco. Moreover, the American people expect their Congress to inquire on their behalf -- deliberately, thoroughly, and fairly -- into the threat, the decisionmaking, the options, and the lessons learned.

Obviously this was an unusual and extremely difficult situation for law enforcement officials because they were dealing with a complex, unpredictable, and dangerous personality. This certainly was not the classic hostage situation, nor was it terrorism, but was this a bizarre, isolated incident or a portent of things to come? We need to know whether we are facing a new and different challenge to the public safety, health and welfare.

Law enforcement in this country today involves enormous challenges. It places great responsibility on the shoulders of law enforcement officers as well as agencies. And throughout this nation, heroic deeds and rescues on the part of police occur daily.

Certainly mistakes are made. But most often law enforcement in this country is carried out with great skill and professionalism. Nevertheless, when a high profile episode such as the Branch Davidian stand-off occurs, and results in what appears to have been an unnecessary loss of life, America asks why. America and the Congress have a right to know what happened, but in this search, we should not forget the difficult, almost impossible challenges that law enforcement face every day.

And so I welcome our distinguished witnesses -- the attorney general of the United States, the FBI director, and the director of the Bureau of Alcohol, Tobacco, and Firearms. Thank you for being with us, and I look forward to your testimony.

REP. BROOKS: Mr. Edwards, the gentleman from California.

REP. EDWARDS: Thank you, Mr. Chairman. And I, too, welcome the attorney general and the other witnesses. We're here today to listen to these witnesses, not necessarily to criticize. The President and the attorney general have both said that the Congress should study this incident to see if there are any lessons to be learned. And I'm especially interested in the process by which the events were carried out.

But Mr. Chairman, it would be a mistake to view this as a cult issue. Religion had very little to do with the incident. It just as well could have been a white supremacist group or another group whose philosophy and identity had nothing to do with religion. The question is how does the government deal with highly motivated, coherent groups barricaded in a fortified compound. This is a serious issue and deserves the committee's attention and the attention of the law enforcement agencies.

Thank you.

REP. BROOKS: Thank you very much, Mr. Edwards.
Mr. Hyde.
REP. HENRY J. HYDE (R-IL): Thank you, Mr. Chairman.
The 52-day standoff between the FBI and members of the Branch Davidian sect culminated in a fiery inferno which claimed the lives of 86 people. We mourn the loss of all of those inside the compound, especially the 24 children who perished last week, and the four ATF agents, who lost their lives in the initial conflict on February 28th.
It certainly appears in the light of the tragic conclusion to the standoff that something went wrong. We need to know why the ATF agents were given the initial order to storm the compound in late February after it seems clear they no longer had the element of surprise in their favor. We also need to know whether the plan put into action on the morning of April 19 was really the best available option or whether we just ran out of patience in trying to peacefully coax the group out of the compound.
We are not here today to second-guess the attorney general, the FBI, or the ATF, or try to affix political blame. Our purpose today is simply to understand the judgment calls that were made and whether or not those decisions were the most appropriate under the circumstances.
We also need to know if adequate resources, including military resources, were available or requested, and if not, why not? We need to get answers from the past so we can learn to avoid similar situations in the future. I look forward to hearing your testimony.
REP. BROOKS: Mr. Schumer, the gentleman from New York.
REP. CHARLES E. SCHUMER (D-NY): Thank you, Mr. Chairman. And I thank you for holding this hearing today.
Let me say at the outset I want to express my full confidence in the attorney general. In my opinion, President Clinton has put an absolutely outstanding person in this difficult job. She's tough, intelligent, and possesses an integrity and forthrightness that is refreshing in Washington.
Now, I'm sure that under her leadership the Justice Department's internal review will produce a complete and thorough report on this entire episode, including a full accounting of any mistakes that may have been made when all the evidence is in. And that's because we're dealing with a new breed of attorney general, one who is candid about facts and matter of fact about taking responsibility. There may well have been errors in judgment in Waco, but we should keep in mind that mistakes in outcome are not always the results of mistakes in judgment. Personally, I'd rather have Janet Reno making these judgments than just about anybody else.
We would also do well to remember that we're looking at the actions of law enforcement personnel motivated by a genuine desire to follow the rule of law. We're not dealing with a corrupt or dishonest government agency. We're not dealing with acts of venality or cover-up, as in so many other scandals we have seen. And so, I strongly hope we will keep all this in mind while pursuing our legitimate search to find out what went wrong.
To me, there are two key questions we need to explore in order to understand what went wrong. First, why was the element of surprise lost in the initial raid by BATF? If it was, did BATF leadership know that? And if they knew it, what was the process that resulted in going ahead with the raid anyway? Second, what was it that led FBI officials to make the judgment that David Koresh would not destroy himself and his followers when faced with ultimate capture by law enforcement?
Now, as we look at these issues and other issues surrounding the tactical and strategic decisions in the matter, I believe it's also important not to lose sight of the fact that the real villain here was David Koresh. He and his followers' desire and willingness to use children as hostages and to ultimately sacrifice them in a ferocious act of self- immolation surely must go down as one of history's most heinous crimes.
If our ultimate goal is to avoid future Waco disasters from taking innocent lives, we also have to take a close look at how David Koresh was able to amass one of the largest and most deadly arsenals ever faced by US law enforcement. We need to take a rational look at all the guns involved. More than 10,000 rounds were fired at the BATF agents on February 28th as they attempted to serve legal arrest and search warrants at the Waco compound.
This committee will hear today about how Koresh was able to arm his followers with more than a hundred fully automatic machine guns, grenades, and other materials such as explosives and bomb components. This an area where change is surely needed, because once David Koresh had established himself in that compound, surrounded by children and emotionally captive adults and with that arsenal, he really held all the cards. Can anyone doubt we would be looking at a different outcome had the Branch Davidians been armed only with knives, ordinary hunting rifles, or other sporting weapons? Koresh was determined not to be taken alive, and if necessary to take every one of his followers and as many federal agents as possible with him. As we have seen graphically, because of weaknesses and loopholes in existing law and his own criminal intent, he had the abundant means to do so.
I'll shortly be introducing legislation to address part of the problem by banning the sale of machine gun parts that can be used to convert legal firearms to machine guns unless the purchaser is a legal machine gun owner and to ban the sale of such parts by mail in all cases. David Koresh used this weakness in the law to amass parts and convert legal weapons

to the deadly fully automatic machine guns he fired. This legislation will also prohibit the sale of large caliber ammunition to all but law enforcement and military agencies. The .50 caliber ammunition possessed by Koresh, which although perfectly legal can easily blow through an ordinary vehicle like a fire truck, has no legitimate purpose in the hands of anyone.

Mr. Chairman, I know that this hearing is not specifically about guns, it's about accountability and responsibility. But I also believe if we're going to get beyond the tactical issues involved we must adopt a strategy that recognizes the role played by guns and the excessive firepower so easily available to a madman. I look forward to hearing our witnesses today.

REP. : Will the gentleman yield for a moment? Will the gentleman yield for a moment?

REP. BROOKS: Not now. This is his opening statement. We want to go to Mr. Sensenbrenner for --

REP. : (Off mike) -- Mr. Schumer to yield.

REP. BROOKS: Not at this point, no.

Mr. Sensenbrenner, the gentleman from --

MR./REP. : Wisconsin.

REP. BROOKS: -- Wisconsin is recognized.

REP. F. JAMES SENSENBRENNER JR. (R-WI): Thank you very much, Mr. Chairman, and I also salute you for calling timely hearings on the disaster is Waco.

I think it is very plain that the function of this hearing should not be to second-guess the activities of either the FBI or the Department of Justice, nor should it be to micromanage either of these agencies. That's not the role of the Congress of the United States. And furthermore, we should not be involving politicians in either the executive or legislative branches of government in operational decisions in law enforcement agencies. The people of this country expect the decisions of law enforcement to be free from politics and severely chastise anybody who tries to bring politics into those types of law enforcement decisions.

But the Waco operation had a result that none of us desired, and that was the deaths of all of the people who were inside the compound a week ago last Monday. Thus it's legitimate for this committee in discharging its oversight functions over law enforcement to ask what went wrong and how we can learn from the mistakes that were made in the Waco operation to prevent that from happening again.

I think that the principal focus of this committee's activity should be to look into the chain of command. What types of options were presented? By whom? Who reviewed those options, and who eventually signed off on those options before April the 19th?

In conclusion, I would like to state my personal admiration for the activities and brave behavior of both the FBI and ATF agents who were on the scene in Waco and again express my personal condolences to the families of those ATF agents who passed away at the time of the first assault. I also think it is important that everybody realize that no one on this committee holds anyone but David Koresh responsible for the tragic deaths of those who died within that compound. He was the one that brought them there, he was the one that kept them there, and he was the one that led them to their deaths in the fire that occurred at the time the FBI stormed the compound a week ago Monday. Anybody that seriously says that the FBI or law enforcement was at fault really didn't know what was happening down there or cared not to listen.

So I would hope that we could get into the business of overseeing the FBI, the Justice Department and the ATF here so that all of us can learn from this very tragic activity, and so that the word can go out to anybody that is contemplating holding innocent people hostages, as Mr. Koresh did, that law enforcement will be able to get to them and, hopefully, have a result that will bring those who are guilty of committing crimes to justice in a court of law rather than the tragic outcome that occurred in Waco.

REP. BROOKS: Thank you very much. And I would, at this point, want to recognize the presence of Congressman Chet Edwards of Texas, whose district was the location of the Branch Davidian compound. And without objection, I would recognize a statement from the Congressman regarding the subject matter of these hearings be entered into the record at this point.

Thank you very much, Congressman.

REP. : Mr. Chairman, I understand that members, such as Mr. Moorhead, who did leave a statement, will be -- any members who have a statement at this point they can --

REP. BROOKS: All members who have statements at this point will be put into the record and this record will be open for a few days in case you have some time to perfect your statement to be put in the record at this point.

REP. : Thank you.

REP. BROOKS: And now I'm delighted to welcome Attorney General Janet Reno to the committee in her first appearance before us since being sworn in. We're familiar with her background as a result of the confirmation hearings. However, for those who are not, I'll just tell you a little bit about her.

From 1978 until the time of her appointment as attorney general, Mrs. Reno was a state attorney in Miami, Florida. She's been a partner in a Miami-based law firm, an assistant state attorney, staff director of the Florida House of Representatives Judiciary Committee. She comes from good Florida stock, feeling every bit at home as much with alligators as with the more dangerous predators she's encountered on this side of the Potomac. (Laughter.)

And, Madam Attorney General, while we regret the sad events that necessitated this hearing, we welcome you. We look forward to your testimony. You proceed as you see fit.

ATTY GEN. RENO: Thank you very much, Mr. Chairman. Can everybody hear me?

I truly appreciate this opportunity to appear before you to discuss the tragic events at the compound in Waco, Texas this past week. I want to be as open as possible with you and with all the American people about what we knew before, what we knew on that day, and what we know now and as our investigation proceeds. I want to be responsible and accountable to the Congress and to the American people in every way I possibly can.

This was one of the hardest decisions that anybody could ever be asked to make. We deliberated long and carefully before reaching a decision. Nothing we do now can change the suffering felt by the families of the ATF agents or the families of those who perished in the compound. But as you have pointed out so eloquently, we must do everything we can to learn from these events about what we can do in the future to prevent people like David Koresh, or people motivated by other thoughts, from causing such a senseless, horrible loss of human life.

On February 28, 1993, four agents of the Bureau of Alcohol, Tobacco and Firearms were killed and 16 were injured in a shoot-out that occurred when they attempted to execute an arrest warrant for Vernon Howell, also known as David Koresh, and a search warrant at the Branch Davidian compound near Waco, Texas.

The agents were met by a barrage of gunfire from numerous firing points in the compound that lasted 45 minutes, involved thousands of rounds of ammunition

and left the agents dead and injured. Weapons used by the Branch Davidians included 50-caliber rifles having an effective range of 3,000 yards, from the Capitol to the White House. All of those killed or wounded were shot or injured by homemade hand grenades. While several members of the commune were killed and injured, there was apparently no serious injury to any of the children.

After the shoot-out, the remaining ATF agents established a protective perimeter around the compound. A few hours later, three Branch Davidians attempted to enter the compound, resulting in a second shoot-out with ATF agents in which one Davidian was killed. Attempts were made to further secure the perimeter.

ATF officials then requested that the FBI dispatch its hostage rescue team, which we refer to as HRT. On February 28th, 1993, agents of the Federal Bureau of Investigation, including the HRT, arrived on the scene. The FBI found an armed fortress, a compound consisting of approximately 70 acres located on Route 7 near Waco.

I took office on March 12th, 1993. After my FBI clearance, I had been briefed previously by the acting attorney general and was thereafter briefed specifically on the situation at Waco. I was advised that the primary goal of the FBI's hostage rescue team was to negotiate with Koresh to secure the release of the children and the surrender and prosecution of all those who participated in the murder and assault of the federal agents without further violence or injury to anyone concerned. I concurred that we must try to negotiate to avoid further bloodshed to the extent that we could. As this situation evolved, the FBI had consistently rejected a direct assault on the compound because of the danger of heavy casualties to the agents and to the children and because of the layout which prevented a surprise assault.

I was told as I was briefed that the FBI had a trained negotiator on the scene and that they had and during the course of these deliberations continued to consult with behavioral experts and others who had knowledge of the cult to determine how best to proceed to negotiate with Koresh. From the start, the negotiation tactics focused on restricting the activities of those inside the compound and depriving them of a comfortable environment so as to bring the matter to a conclusion without further violence.

Those inside the compound were advised of the FBI's rules of engagement. Under those rules, the agents conveyed the information that they would not use deadly force against any person except as necessary in self-defense or defense of another, when they had reason to believe that they or another were in danger of death or grievous bodily harm. The FBI installed lights to illuminate the compound at night and loudspeakers to ensure that they could communicate with all members of the compound at once, rather than having to rely solely on the single telephone line available to speak to Koresh and those he permitted to talk on the phone. They also used loudspeakers to disrupt their sleep. They cut off their electricity and they sought to restrict communications of those within the compound just to the hostage negotiators.

Additionally, they sent in letters from family members and made other good-faith efforts designed to encourage surrender by those who wished to leave the compound. In particular, and I asked about this during the course of our deliberations, they made repeated efforts to secure the release of the children. In further efforts to encourage the

negotiating process, attorneys representing Koresh and Steve Schneider were allowed to enter the compound or communicate by telephone with them on several occasions.

Throughout this 51-day process, Koresh continued to assert that he and others inside would at some point surrender. However, the FBI advised that at no point did he keep his word on any of his promises. Despite all efforts, the negotiators concluded that negotiations were at a standstill and that they had not been able to negotiate a single item with Koresh.

Although 21 children and 14 adults had been allowed to leave the compound between February 28th and March 23rd, 1993, those persons who left the compound did so because Koresh affirmatively wanted them out as they were not fully committed to his cause, they were a drain on his efforts at internal discipline and resources, or he viewed them as potential spokesmen to the media.

During the week of April the 5th, the FBI advised me that they were developing a plan for the possible use of tear gas in an effort to increase the pressure on those in the compound to surrender. Thereafter, I had a series of meetings with the FBI to discuss the emerging proposal.

The threshold question I asked was whether the gas would cause permanent injury to the children. I did not even want to consider the matter further if we could not be certain about this factor. The FBI assured me that the gas would not cause permanent injury. I asked them to research further, and subsequently they arranged for me to meet with Dr. Harry Salem, a top expert in toxicology, who is chief of the Life Sciences Department at the Edgewood Arsenal. He reviewed with me case studies that confirmed that it would not cause permanent injury.

Then the primary question I asked again and again during the ensuing discussion was "Why now? Why not wait?" I asked about their food and water supply and was told that it could last at least a year or more. I asked that the information about the water supply be checked and double checked by observing the level in the water tanks. We explored but could not develop a feasible method for cutting off their water supply.

I asked my staff to have direct personal discussions by phone with the chief negotiator on the scene to satisfy ourselves that we had, indeed, reached an impasse in discussions, in negotiations. After a two and a half hour conversation, that seemed clear.

I became convinced that short of allowing David Koresh to go free, he was not coming out voluntarily. Given that unacceptable result and in light of the fact that he was such a dangerous criminal, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large, or the government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible injuries and attended injuries and harm.

But we continue to deliberate. And in the course of our deliberations we met with General Peter Schumacher (sp) and Colonel Jerry Boinken (sp), former and present commanders of Delta Force, respectably, the Army's rough equivalent to the FBI's HRT, to review the plan. Their comments were instructive. While indicating that the plan appeared to be sound, one suggestion was that rather than an incremental approach to use -- to the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously.

I preferred the FBI approach, which called for a gradual increase in pressure over time. It seemed to me that that would be best to ensure the safety of those inside. I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that as a result of the initial use of tear gas Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease operations. On the other hand, if Koresh and his followers endangered the agents by firing upon them, they were authorized to return the fire.

To the great credit of the FBI, they received substantial fire from within the compound both at the vehicles and at sniper positions surrounding the compound without returning any fire. In fact, throughout the 51 day siege, the FBI never fired a single shot. Instead, when fired upon, the FBI responded by beginning to insert gas throughout the compound consistent with what the Delta Force commanders had suggested.

The commanders also expressed concern about the length of time the HRT had been on the scene in a state of constant readiness, and all expressed the view that the team would have to be pulled back for retraining very quickly if they were going to come back to the scene. All advised that there was not a substitute civil force that could secure the extensive area around the compound that had the expertise of the Hostage Rescue Team.

We continued deliberations. I wanted and received assurances that the gas and its means of use were not pyrotechnic. I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.

I also considered that Koresh had talked about suicide, and that might occur at any time under conditions that the FBI might be less likely to control. Experts, however, advised the Bureau that the chances of suicide were not likely, but I again emphasize that it was something that was considered, something that was considered that might happen at any point along the way, regardless of what the FBI did.

In considering the FBI proposal, I weighed the many concerns of the government with respect to the state of affairs inside the compound. They included the well-being of the children in the compound given the deteriorating sanitary conditions; the apparent lack of adequate medical care inside; and reports of sexual and other abuse over the past; the vulnerability of the outer perimeter, which created a threat to public safety and the federal agents at the perimeter -- the outer perimeter was vulnerable because there were, inside the compound, 50- caliber weapons having an effective killing range of 3,000 yards, a distance that would reach from the US Capitol to the White House; our inability to maintain the presence of the HRT on-site indefinitely; and the advice I received that there was a lack of a suitable substitute force that could replace them at the compound and ensure the security of all involved; fourth, the increasing risk as the stand-off continued, of injury to federal agents, whether by accident or by the risk of shooting from the inside.

Since being sworn in as attorney general, I have had numerous conversations with people both inside and outside the Department of Justice concerning the Waco situation. In addition, I directed my staff to keep the White House apprised of ongoing developments. My discussions with representatives at the White House were predicated on the premise that as chief law enforcement officer, the decision on how to proceed was mine. I advised the President on the Sunday before the operation of my decision to authorize the FBI's use of tear gas at the compound, and he said he would support my decision.

I believe we were dealing with a situation that would not resolve itself by mere acquiescence to the stand-off. Negotiations had proven to be fruitless, and despite our best efforts, we could not secure the release of the children. It was a situation that suggested to me that time would only increase the risk to public safety, to the safety of government agents, and to those within the compound, without any realistic expectation that the matter would be resolved peacefully if we did nothing. It was my call, and I made it the best way I know how.

Let me urge that we focus on the future, and to try to determine how we can best avoid the recurrence of this tragedy. In this regard, at the President's request, we in the Department of Treasury are looking at a process whereby the events at Waco will be examined by experts, both within and outside the government to consider the following questions.

One, in the execution of the arrest and search warrants by ATF, were established procedures followed, and if so, were they adequate? Two, is federal law enforcement adequately prepared to negotiate in dangerous situations in terms of training, staffing, and available techniques? Three, is training for the execution of warrants involving barricaded suspects who may be holding innocent third parties adequate for all law enforcement agencies? Four, are improvements needed in coordinating the activity of the various investigative agencies? Five, how should federal law enforcement agencies marshal resources in various disciplines, including psychology and psychiatry in situations involving cults and other groups using barricades and holding innocent people? Six, what systems and understandings about command and control should guide the relationships among leaders of the departments, and career officials, and operating units when field operations impose a substantial risk of danger to law enforcement officials and others?

The incident at Waco ended tragically for all involved. I have thought every day since about -- since April 19th about what I might have done differently. I only hope that we can work together to make sure that I never have to make such a decision again.

I would be glad to answer any of your questions.

REP. BROOKS: Well, Ms. Reno, the major focus of today's hearing is the decisionmaking process at the highest levels of the law enforcement community which led to the actions involving the Branch Davidian cult. Could you describe for the committee the major considerations you personally brought to bear in approving the actions leading up to and including the April 19th operation?

ATTY GEN. RENO: The prime concern that I ask is -- the question I kept asking over and over again, Mr. Chairman -- why now, and why not wait? I reviewed statements that he had made about apocalypse at any time -- he could have done this at any time. The FBI advised me that they were in better control, considering the state of readiness of their HRT team, so that that was a definite factor. I reviewed the -- it was important and we spent a lot of time determining the water supply. I thought that might be a way, if the water supply were reduced, that we might be able to force them out. And again and again we went back through trying to observe the level of water in the tanks to see if it might be possible to wait them out in that fashion.

It appeared from everything that we were told, based on our discussion with the negotiator on the scene who advised that negotiations had reached an impasse, that he was going to stay there, and he would not come out voluntarily, and it was going to be an indefinite stay that would expose the lives of agents on the perimeter to danger, would threaten the continued safety of all inside. I continued to be concerned about the children. There was no sanitary facility for them. They were dumping their waste. The conditions were increasing in that regard. We had had reports -- as I have pointed out, until you see the children you cannot confirm the reports one way or the other about the abuse of the children.

But the concern I had was that to let this go on indefinitely, where you had dangerous offenders who had killed four agents, injured 16 others, was something that could best be resolved by increasing the pressure, not to make this D Day,

but to try to increase the pressure by the use of gas, which I had determined by -- after very careful review, would not be permanently harmful to the children -- that by tear gassing the compound that would be the best way to proceed to increase the pressure to try to force them out.

REP. BROOKS: Now, Mrs. Reno, questions have been raised about the extent to which the White House was involved in the decision-making process relative to the events in Waco. Could you describe the extent and the nature of your contact with the White House during the standoff, and particularly during the days preceding April the 19th?

ATTY GEN. RENO: I kept the White House advised through the White House Counsel's Office during the course of my deliberations after the FBI had made its proposal about the use of gas. There were continued discussions as we developed new information.

On Sunday, prior to April the 19th, I talked with the President, advised him of what we proposed to do, and he gave me his full support.

REP. BROOKS: Would you describe in detail how you kept in touch with the situation in Waco and the individuals with whom you consulted in formulating and approving the actions against the Branch Davidian compound?

ATTY GEN. RENO: The first conversation I had concerning the possible use of tear gas at the compound was with Director Sessions, who said that during the week of April the 5th that he would like to arrange some time to brief me on a proposal that they would like to present. I met with Director Sessions and other representatives of the Department, including Floyd Clarke, Larry Potts, Doug Gow, and there may have been others, but those are the people that I specifically remember.

I was briefed in all details about everything that had been done up to that point in trying to resolve the matter peacefully. We went through it in detail. Then I started asking the questions. What about the gas, would it be harmful to the children? Go back and do some more study. I had real concern about that. It was pointed out to me, after they had had the doctor brief me, that the gas was non-lethal, it was tear gas as we understand tear gas, and that members of the United States Army are gassed as part of preparation. So I became comfortable with that. But I was still not comfortable with the primary question of why now, why not wait.

We had explored other possible alternatives. As I suggested to you, the FBI, before I had been sworn in, and then I concurred totally with them, rejected any direct assault on the compound as being far too dangerous for the agents and for those inside the compound.

We asked to meet with military officials. And the general who was the former commander of Delta Force, and the colonel presently commanding the Delta Force, came to Washington and met with us and FBI officials after they reviewed the plan. And we consulted very carefully about that.

One of the points, raised for the first time by the Delta Force commanders and previous commander, was that the HRT had to be at a constant state of readiness and that to keep them on a scene for the length of time that these agents had been on the scene began to raise questions that they could not remain there much longer and still be in the state of readiness that should be expected of an HRT team.

I asked, well, isn't there another team, and was advised no, except for the Delta Force, and then I believe the Navy has a force for marine disasters. We explored the provisions of posse comitatus and became convinced that you could not use the Delta Force in a civilian situation. I asked at that time, well, can't you send in SWAT teams or something like that. I'm not a law enforcement expert, but I was asking every question I knew to ask.

And they explained and went step by step through the training that the HRT team has in terms of sniper firing and their ability to maintain security. So, I became convinced that if we had to pull back the HRT team and substitute somebody else, we couldn't begin to provide the security for all of those concerned that we would with the HRT.

I continued to be concerned about the water tank because I heard some information that indicated their water supply might be low. We went back in and with the ability of the FBI to determine the level of the water tank from a distance, we were advised that it continued to be replenished and that it looked like they had enough supplies and water to last for over a year.

What concerned me was the fact that even with the HRT team, it was going to be difficult to control a perimeter. If you can imagine having to control a perimeter that extended from here to the White House and the same distance either way, it could be a very difficult situation. People had been able to get in there and people could come out. There could be confrontations.

We reviewed -- because I directly considered the fact that people had talked about the possibility of a mass suicide, and you remember the situation with respect to Jonestown, and that's something I considered. The FBI advised me that its behavioral experts had indicated -- and by the way, Mr. Chairman, I've asked the FBI because I want to be as candid as I possibly can, to interrupt me if I say anything that's inaccurate in any way, and I would ask that because I want to make sure that I lay out the clearest picture possible for you in terms of any advice that they gave me. But we looked at it. They advised me again that their experts had concluded that the chances of a mass suicide were not likely, but if they were, they could happen at any time. And if we let the standoff go on forever, they could happen -- it could happen if

you got some rambunctious group in there that wanted to square off against the Davidians, it could happen in any number of ways.

I made -- went step by step again through the decisions, weighing it back and forth, and reached a conclusion that the gas was not lethal, that it would not permanently harm them. By everybody's description, it would be so -- they could last with gas masks for some time, but it would become so uncomfortable that they would come out. I think as a footnote to this, one of the things we didn't count on was that wind. And I think from all -- one of the things that we will have to review and look at and understand is why the gas didn't cause more discomfort immediately.

But those were the factors that led to my decision. And constantly during this time, I was consulting and trying to be available at their request to the director, to Mr. Clarke, Mr. Potts, and Mr. Gow. REP. BROOKS: Thank you very much.

In accordance with the rules of the committee, I want to note that -- well, I've asked only three questions -- we want to adhere strictly to the five-minute limit because I want all of the members to have an opportunity to make their positions clear.

Mr. Fish.

REP. HAMILTON FISH, JR. (R-NY): Thank you, Mr. Chairman.

And General Reno, I commend you for your frankness. I would like at the outset to take a step back and ask you a threshold question. What was the reason or perhaps reasons that federal law enforcement personnel were there at the compound in the first place? Was there a serious enough threat posed by the Branch Davidians to justify the BATF raid and, following that, the 52-day stakeout, as well as the FBI action on April 19th?

ATTY GEN. RENO: Congressman, I have focused my attention on Department of Justice activities and on the FBI. And I would refer matters that preceded February 28th to the investigation that will be conducted. I have not reviewed that in terms of making any informed comment on what led up to it.

What I did satisfy myself was that four agents had been killed, 15 had been wounded by very dangerous people, and that the FBI had been called in. When I accepted -- when I took office, that was the situation that I was faced with, and I made a judgment based on all the information that I had that they were indeed dangerous offenders who had knowingly killed federal agents. But at that point, with the tragedy of the agents' deaths, the 15 wounded, the issues with respect to the siege, I did not want to be in the process of second-guessing somebody else.

REP. FISH: Thank you. General Reno --

REP. BROOKS: Excuse me. Would the gentleman yield one moment?

REP. FISH: Of course.

REP. BROOKS: I would say to the members of the public -- let me say that we would ask that you rotate -- that is, leave the committee room -- every twenty minutes, because there are 150 or more people outside patiently waiting to come in for a while. And if you would stay twenty minutes and rotate out, it would give others an opportunity to participate in and hear this public hearing.

Pardon me, Mr. Fish.

REP. FISH: Thank you.

Janet Reno, you've demonstrated both personal courage and professionalism in your willingness to take responsibility for the decisions that led to the events of April 19th. But while you're ready to take public responsibility, it does not mean you actually made the decisions. As to the tactics, whose idea was it to use the tear gas and the tanks? Who actually made the decision to move in that manner and on the particular day?

ATTY GEN. RENO: The FBI made the decision to bring in the tanks, and the tanks were on the scene as I recall when I was sworn in on March the 12th, 1993. So CEVs, as they were called, which I believe are construction equipment vehicles, and Bradley vehicles and, as I recall, a tank were already on the scene.

The proposal that was made to me was made by the FBI to use tear gas inserted in order to protect those involved and to protect the agents involved from the weapons that were inside the compound, that it would be inserted with what we -- I came to refer to as a CEV, which is a tank-like vehicle with a boom on the front of the tank.

REP. FISH: Attorney General, the -- in the April 25th issue of the Washington Post Outlook section, Richard Restak -- R-E-S-T-A-K -- a neurologist and neuropsychiatrist, author of eight books on brain behavior, had this to say:

"Unfortunately, in dealing with psychotics, negotiations may take weeks or months, but not waiting is extremely dangerous. Psychotics respond very erratically under pressure. Indeed, if a person could deal effectively with stress, he would not have descended into psychosis in the first place.

"Unfortunately, those making the decisions about what to do about Koresh unwittingly set up situations from the beginning that could almost be guarantee to further his descent into madness. Even a well-adjusted person could decompensate, as doctors say, under the pressures of psychological warfare techniques like aiming high intensity floodlights at the compound or playing loud, irritating tapes of jet planes and the cries of rabbits being slaughtered. Such techniques can be successful when applied to individuals whose responses can reasonably be anticipated. But if there's

one thing the authorities surrounding the compound at Waco can agree about, it is that David Koresh was not predictable."

My question, General Reno, is, with the benefit of hindsight and recognizing that you were dealing with a psychotic who was not likely to respond rationally to stress, efforts to break down his resistance, the increasing of the pressure, and so forth, should a similar situation arise in the future, would you recommend a course different from the law enforcement procedure applied in the Davidian standoff?

ATTY GEN. RENO: What I want to do, congressman, is talk with Mr. Restak, because I saw this -- this article and reviewed it at the time that -- this past Sunday -- talk with any other expert I can, brief them on everything we tried to do, and try to understand whether a man like David Koresh, whom he calls unpredictable and whom everybody agrees was unpredictable, if there is any other way to have done it.

One of the things that I've learn is never believe everything you read in the newspaper. And the second thing is make sure that the person who writes the story in the newspaper who's being as accurate as they know how have all the information concerning the subject matter of which they write before relying on their conclusion. And with Mr. Restak, Mr. Adams, and others who have suggested that they might have had a better way, that is what I intend to try to do.

REP. FISH: I thank you for that. On page five of your testimony, you say that to determine how best to negotiate, the FBI was consulting with behavioral experts and others. And yet, as you know, the result of the techniques used and psychological warfare only served to make Mr. Koresh more irritable and prone to angry outbursts.

So my questions are, upon what information was this strategy of psychological warfare based, and who are the experts that were consulted?

ATTY GEN. RENO: The FBI will testify after I do, and they will give you in detail just whom they consulted with and sometimes the conflicting information that was given.

In fact -- and I think it -- it will be important to hear from the FBI, in terms of it -- his -- his outbursts, at times he was very peaceful. You were dealing with a madman, congressman, and he was totally unpredictable. What we will do is sit down with the experts, with the experts that we consulted with, with those who now have opinions as to how we might have proceeded, and try to come up with the best understanding of what to do with people like him or others in other situations for the future.

REP. FISH: To your knowledge, were biblical scholars and theologians involved as experts either in consultation or in negotiation?

ATTY GEN. RENO: My understanding, because I directly asked it, is that the Bureau, the FBI had consulted with religious experts to understand the significance of the various biblical references during the course of the negotiations.

REP. FISH: But not to negotiate directly with Mr. Koresh.

ATTY GEN. RENO: I don't know of any negotiation in which a religious person directly negotiated, but you should enquire of the FBI.

REP. FISH: I shall. Thank you very much, General Reno.

REP. BROOKS: Mr. Edwards, the gentleman from California.

REP. DON EDWARDS (D-CA): Thank you, Mr. Chairman, and thank you for your forthright testimony, Madame Attorney General.

I was interested in Congressman Fish's questions. Did -- did the FBI tell you that they had examined previous experiences by the Department of Justice in situations such as this? I'm not talking about the ordinary hostage, where day to day criminals are involved; where highly motivated types of people like, as I said in my opening statement, white supremacists or religious people who have some kind of a cult attitude were involved. Did -- did they tell you that they had examined what happened in San Francisco a number of years ago when Indians took over Alcatraz Island, and the President -- it happened to be President Nixon at that time -- said "Let them stay and they'll get tired of it." And they did. They stayed over a year, and then they got tired of it and left. And did they also -- had they also looked into what the federal government, the Department of Justice did at Pine Ridge, where a similar waiting period worked out rather well?

ATTY GEN. RENO: I do not recall any reference to Alcatraz nor to Pine Ridge specifically, congressman.

Again, what we were dealing with here was not somebody who had just taken over a place, but people who were dangerous in terms of the surrounding community who had killed people and a perimeter which had to be secured. And as I recall, we discussed whether we had ever seen a situation. I'd obviously not seen a situation like that in my experience in Miami, but whether we had ever really seen anything precisely like this. And my information was that we had not. But I would refer you to the Bureau in order to make sure that the Department of Justice's representations are as accurate as possible.

REP. EDWARDS: Well, I think we will have quite a lot of questions for the FBI, because after all, you were only there less than half the time that the siege was going on.

I guess, Mr. Chairman, that I will yield back my time.

REP. BROOKS: Thank you very much, Mr. Edwards.
END OF EXCERPT
(NOTE: This is a resumption of the hearing which took place Wednesday, April 28, 1993 with Attorney General Janet Reno testifying before the House Judiciary Committee. Coverage resumes at the point where it was dropped yesterday.)
Mr. Carlos Moorhead, the gentleman from California.
REP. CARLOS J. MOORHEAD (R-CA): Thank you, Mr. Chairman.
You know, one question I'd like to ask, and you may not be the one to ask this, but why was the press notified prior to the BATF going in there to begin with? Because obviously, they knew about what was going to happen inside the perimeter. And in one of the briefings we got, it was stated that one of the people that came from inside was notified by a pressman about what was going to happen, and they knew about the thing. Why did that ever happen? Why was the press notified?
ATTY GEN. RENO: Congressman, again, I have tried to focus my responsibility and my review on the issues that the Department of Justice confronted, and I would respectfully refer you to ATF.
REP. MOORHEAD: All right. My next question is, you state here in your opening statement that the big question you had was whether the gas could cause permanent injury to the children. Was there any consideration about whether this attack, using the tanks and gas, could be successful or would be successful? Did anyone weigh the damage that could come, the possible harm against the possible good?
ATTY GEN. RENO: When I say the big question, that was the threshold question. I wasn't even going to consider using gas unless I could be sure that it would not be permanently harmful to children. So, that was the threshold question before I began the deliberations.
We then continued with the big question being why now, why not wait? We reviewed -- and those were the alternatives. I reviewed it. I became convinced that the gas was not harmful, that the gas, as described by the commanding officer of Delta Force and by the head of the HRT, the FBI hostage rescue team, would force the people in the compound out. As I have said, I took into consideration that there were concerns expressed that Koresh might commit a mass suicide, that he might commit suicide. I expressed concerns that he might put the children up against the window and threaten to do things to the children. And I gave specific instructions that if anything like that should happen, we should fall back immediately.
But the issue was, based on what we had been told and the comments made by Koresh that if he were going to do something like what he did, he could do it and might do it at any time, particularly when the bureau had less control of the situation than it had with the HRT team on the site.
Based on what the commanding officers of Delta Force told us and what the HRT team told us, the gas was going to be so uncomfortable that they would come out rather quickly. Some would be more immune to it than others. They would have gas masks. We knew they had gas masks, and that might give them a longer period of time before they came out, but that they would come out.
I made -- one of the things that I was concerned about, I kept thinking of what can be the worst case scenario, and what I envisioned was that he would do something terrible like set an explosion. And I just balanced it with the fact that this was something that he had threatened to do that I could not control. Based on all the information that we had, everything we had been told, he could stay there for over a year. It was something that I felt that we were in the best position to bring to a conclusion by increasing the pressure through the use of gas.
REP. MOORHEAD: There were children being let out from time to time and other people that were in there were deciding to leave under the pressure and had already left. I don't know how many able-bodied men were inside of this place, but it would seem to me that their ability to resist was being cut down by the people that were being allowed to leave. And it just seems to me that some gain could be there by letting time go on. I know it was costing a million dollars a day, and that's a lot of money, but weighed against all the lives that were lost, it doesn't sound like that heavy an expense.
ATTY GEN. RENO: Congressman, you don't consider dollars when you consider human lives, and that was not a factor that I considered at all. What I tried to consider was the best way to resolve it over time with the least danger to all involved. Most of the people who had come out had come out early on. They were in there. They weren't coming out. They were heavily armed. They had 50-caliber ammunition that could fire the distance from here to the White House. They were not somebody that was a non- dangerous offender who was sitting there because they wanted to take over a place. These were dangerous people who had killed and who had the chance of killing again.
REP. MOORHEAD: Well, I think we understand that. Obviously. But in -- you know, we learned in Jonestown that being pressed, these people that are a little bit warped to begin with do go to suicide many times. And the pressure down there was very soft, just one of our members of our Congress had shown up and they thought he might be a danger. And they caused all that damage there. This guy was very similar to --

ATTY GEN. RENO: Congressman, we will welcome any suggestions you have as to any issue that we might review to avoid a tragedy like this for the future.

Nobody will ever know what the right answer was in this situation, and I think we have to collectively work together to come up with the best guidelines, the best procedures to try our level best to avoid a tragedy such as this in the future.

REP. MOORHEAD: Well, we can't do anything about this one, but I think we can learn a lot for the next time that something like this comes up. And history has told us those things repeat themselves.

ATTY GEN. RENO: Well, I'm trying my best to make sure that I have exhausted every possibility of learning everything I can in the course of these next several weeks that can avoid a tragedy like this in the future if it's possible. In some instances, with a madman like that, it may not be.

REP. BROOKS: Thank you very much.

Mr. Conyers, the gentleman from Michigan.

REP. JOHN CONYERS JR. (D-MI): Thank you, Mr. Chairman.

Madame Attorney General, I am extremely disappointed in the decisions that have been made out of the Department of Justice, the Federal Bureau of Investigation, the Agency of Alcohol, Tobacco, and Firearms. In Philadelphia we had a mayor that bombed people out of an eviction (sic). In Jonestown, we lost the lives of my colleague, Congressman Ryan, who tried to get Don Edwards to go to -- go out there with him because of a miscalculation about cult people. We had Patty Hearst and the Symbionese Liberation Army. We had Wounded Knee with the Indians. Now, when in God['s] name is the law enforcement at the federal level going to understand that these are very sensitive events, that you can't put barbed wire, guns, FBI, Secret Service around them, send in sound 24 hours a day and night, and then wonder why they do something unstable?

The root cause of this problem was that it was considered a military operation, and it wasn't. This is a profound disgrace to law enforcement in the United States of America, and you did the right thing by offering to resign. You did exactly the right thing. I commend you for it.

Now, there is no longer any reason why the Alcohol, Tobacco, and Firearms agency cannot be folded into the Federal Bureau of Investigation. And if there is some reason for continuing ATF, I'd like to hear it today. And I'll be introducing legislation to that point very, very shortly.

And now I'd like you to know that there is at least one member in the Congress that isn't going to rationalize the death of two dozen children that weren't cultists, they weren't nuts, they weren't criminals. They happen to be parents of people, and they were innocently trapped in there. And that decision that was jointly made by these agencies bears extreme criticism. And it's not President Clinton's fault. He's taking your advice. He's taking Judge Sessions' advice. He's taking Mr. Powell's advice.

And so I'd like to get some straight answers. I've read so many conflicting rationales about this that it's absolutely embarrassing. And I've been through each of these incidents that I've cited. Doesn't anybody have any historical recollection in federal law enforcement about how to deal with these kinds of people? And I'll yield the balance of my time for anything you'd like to respond to me, Madame Attorney General.

ATTY GEN. RENO: I haven't tried to rationalize the death of children, congressman. I feel more strongly about it than you will ever know. But I have neither tried to rationalize the death of four ATF agents, and I will not walk away from a compound where ATF agents have been killed by people who knew they were agents and leave them unsurrounded. I will not authorize a military excursion with the forces of the military into that compound with a direct assault such as what you might expect in a military situation. I will stand by and be proud of the FBI as it used its restraint. But most of all, congressman, I will not engage in recrimination. I will look to the future, try to learn everything I can from this situation to avoid tragedies such as this in the future.

REP. CONYERS: Are you concluded?

ATTY GEN. RENO: I'm not concluded if you have further questions of me, sir.

REP. CONYERS: Well, I consider that a non-responsive answer.

ATTY GEN. RENO: You did not ask me a question, sir. You asked me if I had any comment, and I responded with my --

REP. CONYERS: And I consider those non-responsive comments.

ATTY GEN. RENO: Do you have a question of me, sir?

REP. CONYERS: I have more questions of you than I'll ever get time to put before you in this committee.

ATTY GEN. RENO: I am prepared for as long as you would like to question me, sir, and I will come to your office.

REP. CONYERS: Well, ask the chairman to give me some more time.

ATTY GEN. RENO: I will come to your office and be prepared to answer any question at any time that you may ever have about anything that I have ever done.

REP. CONYERS: Well, I -- I'll thank the gentle lady and accept her invitation. REP. BROOKS: The gentleman from Illinois, Mr. Hyde.

REP. HENRY J. HYDE (R-IL): Thank you, Mr. Chairman.

Hopefully a little change of pace. I just want to comment that all of us are sometimes victimized, and I use the word with some caution, by experts. We rely on experts a little bit too much sometimes, and we should be more aware of the fact that there are experts and there are experts and there are experts. And it would seem to me common sense would dictate that suicide was a real possibility. Dealing with people who are religiously obsessed in an aberrant or bizarre direction and with the history of Jonestown where 900 people lost their lives, to say suicide is not a real possibility, I would wonder if all the experts said that. Now, I know you don't know because you relied on the FBI, who was told by experts. And I'll ask Mr. Sessions and others whether that was a unanimous view or whether there were other experts, and they chose to believe one set of experts and gave you that information. But you don't know that, and so I certainly don't ask you that.

You've made a statement that only the hostage rescue team was appropriate to accomplish the mission they were assigned in this operation. And then we note that fatigue had set in on the hostage rescue team. And that troubles me, because evidently we only have one hostage rescue team. Maybe we have two. I understand it's made up of 50 people and there are two groups of them, 25 and 25, but the inability to wait out these people does trouble me, the impatience. And if there was no backup, if there were no people to relieve the hostage rescue team, then I'm concerned about that. Because if, indeed, we have hostage situations on both coasts simultaneously, one in Seattle and one in Pensacola, and we only have one team, we're in trouble.

So, I have made inquiry as to why we didn't have adequate backup, if indeed only a hostage rescue team is appropriate; the Delta Force is out, SWAT teams are out, whatever; theologians trying to seduce these people to come out; all of that is inappropriate, and we have to rely on a hostage rescue team and we don't have adequate resources. So, I tried to find out why. I thought perhaps Congress was to blame, that we wouldn't provide the funds, that the FBI has asked for funds to train more hostage rescue team, and Congress wouldn't give them the funds. If so, then it's our fault. But I learned no, that OMB -- that the FBI has asked for additional funds to train additional hostage rescue teams, but they've been denied that by OMB, certainly not this OMB, the previous OMBs, Office of Management and Budget, and previous Justice Departments.

And so, I guess the moral of the story is if you're taking testimony from people and you want to know what's going on, you'd better know the right questions to ask. Because I never knew the shortage of hostage rescue teams. And I think if Congress knew of that, we would be forthcoming with appropriate funds because hostage taking cannot be confined to one incident at a time. And so, I just ask you, is it not a fact that we didn't have sufficient backup; they did get fatigued; and it would have been helpful if they did have backup, if Congress had provided the funds?

ATTY GEN. RENO: One of the things I'm not is an expert on how hostage rescue teams should be staffed or deployed, and I would respectfully defer to the FBI, who I think can furnish information to you concerning budget requests that have been made. But one of the things that we are in the process of doing is to determine just what appropriate staffing levels should exist even if this situation could be resolved in short order, if there had been another situation, an airplane hijacking or something such as that. And we'd like to approach it in a very orderly way to make a recommendation to Congress.

REP. HYDE: Well, sure, and I'm going to try to know what questions to ask the next time the FBI appears before our subcommittee so things they need and want we can elicit from them, maybe going around or underneath or over the OMB or the Justice Department. Thank you.

REP. BROOKS: Mr. Romano Mazzoli, the gentleman from Kentucky.

REP. ROMANO L. MAZZOLI (D-KY): You're getting closer, Mr. Chairman. In another couple of years, you'll get it right. We appreciate that.

REP. BROOKS: You'll still be a subcommittee chairman in --

REP. MAZZOLI: Yeah, that's right. (Laughter.) I know how tough it is for Texans to wrap their tongues around the word Romano. But, in any event, thank you, Mr. Chairman. And thank you for having the hearings. We appreciate it.

I think we all of us applaud the heroism of the FBI, of the ATF, of the good people that my friend, Chet Edwards, represents down in Waco, the sheriff's departments, the fire department people who showed up at the place. We grieve obviously the ATF agents who were killed, the 16 who were wounded, their families. And as my colleague from Michigan has said, we grieve the children who perished and all of the adults in the compound.

We applaud you, General Reno. We know that you've done a very good job and you've had a very difficult first encounter with the life that you'll live as our attorney general, and I

applaud you for taking responsibility. I think that's in the spirit of public service and we appreciate that.

And just like my friend from Illinois, Mr. Hyde, is saying, we want to help you do the job better. So if it comes to appropriations or monies or things like that, we hope you're not at all hesitant, even if it means breaking from the

administration in some respects, to tell us what you really think your department really needs. Because too often we've sat here at hearings and we've had members from other administrations come up and act as a loyal soldier in carrying out their instructions, failing to ask for what they know they should have and they fail, therefore, to get it, and then sometimes there's a failure down the line. So we hope that you'll say that.

And we certainly hold only responsible here David Koresh and those people who followed his persuasion. And I think, as you've said, what we need now to do is look to the future, try to develop some ways to avoid these horrible carnages. And in looking to the future, we'll not at all question the valor, the heroism, the great devotion and dedication of all the people who were down there for those 50 days and are still down there trying to figure out what went on.

But I think it is correct, and certainly I glean from your own questions in your statements, that we have to look at the training, we have to look at the techniques, we have to look at the coordination, we have to look at the professional skills, that the people who act in your behalf, in our behalf, are up to the task that they would face.

And in that setting, I would ask this question. In some of the television that occurred soon after the blaze at the compound, families said they pleaded with President Clinton, they said they faxed messages to the White House, apparently pleaded with you, maybe pleaded with the FBI, maybe with the ATF, let some of the family members go in there and see if they couldn't reason and solve the problem. My question is, did you ever say no to those requests? Did they ever reach your desk? Are you aware of the FBI ever having denied family members an opportunity to intercede?

ATTY GEN. RENO: I never -- those requests never reached my desk and I'm not aware of that. You would have to check with the FBI on that. I'm not familiar --

REP. MAZZOLI: So you're not aware of whether they existed at all?

ATTY GEN. RENO: That's correct.

REP. MAZZOLI: Nor whether they were denied? Let me ask you, are you aware of -- and the question was raised, a lot of callers apparently watching on television the blaze in live coverage, called the fire departments and called the FBI and said why aren't the fire departments there. Now, we realize all the logistical problems of water on the scene, of long distance rifles with -- or rifles with capability of killing the fire people who might respond. Were you aware of any discussions when you had with all these people leading up to this misadventure that the question of available fire department personnel, available water, special pumps, auxiliary electrical supplies was ever brought up?

ATTY GEN. RENO: I never specifically discussed fire vehicles, I just discussed a sufficient emergency response. Because as I indicated to you, what I envisioned was -- I mean, even if he didn't do something, there might be an accidental explosion considering all the ammunition. And I just -- I directed that there be sufficient emergency vehicles to respond, both from a medical and another point of view, but I did not specifically address the issue of fire vehicles.

REP. MAZZOLI: I'm very proud of the work our firefighters do around the country. And we have a fire caucus here on the Hill. And these people are trained beyond almost any enforcement officers in responding to emergency, whether they involve fire, hazardous or toxic smoke, whether they involve giving first aid and immediate rescue to people. But apparently they weren't involved here.

ATTY GEN. RENO: You would have to ask the bureau exactly what circumstances that they worked out with the fire departments.

REP. MAZZOLI: Let me ask you one other question, General Reno. I have read -- and I may not be asking the right person the question -- I have read that Koresh was a jogger and that there were times during this 51 days when he went out for his exercise, came away from the compound and was jogging in that area, I guess, that was cordoned off. Are you aware of that having been the case and whether or not any of your discussions dealt with what could be done while he was absent the compound?

ATTY GEN. RENO: I never addressed that. The only -- I never heard of Koresh being outside the compound other than just to go outside. But my understanding from the bureau was that they were trying to restrain the boundary, the perimeter immediately around the compound by increasing pressure.

REP. MAZZOLI: But, I mean, I'm talking about jogging, when he might have been out in something --

ATTY GEN. RENO: I did not hear any -- I've not ever heard about -- anything about Koresh jogging.

REP. MAZZOLI: Well, thank you very much. And again, my time is about to expire and all members want to ask questions. Again, I want to applaud you on your willingness to accept responsibility here, even as we gather, it was not your responsibility to accept but you did it anyway. But we will -- and I applaud the committee for trying to get to the bottom of exactly what did go on, what could be approached for the future.

Thank you.

REP. BROOKS: Thank you, Mr. Mazzoli. And the chair recognizes the gentleman from Wisconsin, Mr. Sensenbrenner.

REP. JAMES SENSENBRENNER (R-WI): Thank you very much, Mr. Chairman.

And I hope when you come back, General Reno, that it's in a little bit more advantageous circumstances than this one.

I have a few questions relative to the chain of command and decision- making process. The first is, is after you assumed office, were you briefed every day on the Waco situation?
ATTY GEN. RENO: Not every day.
REP. SENSENBRENNER: But frequently enough on developments --
ATTY GEN. RENO: Frequently, and if there were any changes or any new developments.
REP. SENSENBRENNER: Yeah. By whom were you briefed?
ATTY GEN. RENO: I would be briefed by Director Sessions upon occasion and by Mark Richard in my office. Those were the two primary -- and people who would be with Director Sessions.
REP. SENSENBRENNER: At any time prior to Saturday, April 17th, which was two days before the fire broke out, did you discuss this matter with the President?
ATTY GEN. RENO: No, I did not.
REP. SENSENBRENNER: When was the first time you discussed the matter with President Clinton?
ATTY GEN. RENO: Sunday.
REP. SENSENBRENNER: And at that time did you brief him about what the FBI's plan was and seek his reaction?
ATTY GEN. RENO: Yes, I did.
REP. SENSENBRENNER: Okay, and what was his reaction?
ATTY GEN. RENO: He supported my decision.
REP. SENSENBRENNER: When was the first time after the fire broke out that you talked to President Clinton about what happened?
ATTY GEN. RENO: That night late.
REP. SENSENBRENNER: You appeared on Tom Brokaw's program, which I had hoped to see, but I had already fallen asleep at 11:30 at -- at night on that. And at that time Mr. Brokaw asked you ten hours after the fact if you had discussed the matter with President Clinton. You said that you didn't, and in a part of that interview you said you were going to talk to the President after you got off the air. Is that when you had your first conversation with him?
ATTY GEN. RENO: I don't remember the exact time when I got off the air, because I was then subsequently responding to further inquiries from the media and felt that it was important since I knew the President had been briefed as to what had happened to try to respond to the American people and be accountable to them since I considered it my decision.
REP. SENSENBRENNER: During the Brokaw interview, you said that the President was talking with Webster Hubbell about what had happened in Waco and the events leading up to that. Could you tell us what you found out about that conversation between the President and Mr. Hubbell?
ATTY GEN. RENO: What I think I did, and that may be subject to correction, because when I -- I think what I told Mr. Brokaw was that Webster Hubbell had been the person discussing the issues with the White House. I had talked with the President that morning, and I had forgotten during the course of that afternoon and all that had happened that before the fire broke out I'd given him an update.
Hubbell was talking to the White House that afternoon and into the evening. What I -- thought I -- corrected myself with Brokaw was to say I don't know whether Hubbell had talked directly with the President or with somebody in the White House counsel's office.
REP. SENSENBRENNER: Do you know if Hubbell ever went to the scene of the siege outside of Waco after it started?
ATTY GEN. RENO: No, he did not.
REP. SENSENBRENNER: Okay. So you -- he did not go there. It's not that you don't know.
ATTY GEN. RENO: He did not --
REP. SENSENBRENNER: Yeah.
ATTY GEN. RENO: -- go there.
REP. SENSENBRENNER: Yeah. What was Mr. Hubbell's role in this? The concern that I -- I am having is that there has not been direct communication between you as head of the Justice Department who has got the ultimate responsibility as you have accepted for the activities of the agencies, your department and the President, that somehow Mr. Hubbell was in the loop, and I think it would be instructive for us to know exactly where in the loop he was.
ATTY GEN. RENO: Mr. Hubbell is the Associate Attorney General- designate, and he was talking with the White House counsel's office. I had talked with the White House counsel's office, and that was how he was in the loop.
REP. SENSENBRENNER: Yeah.
ATTY GEN. RENO: I was the person that briefed the President on the Sunday before it happened as to what the plan of action was, and he supported it. I talked to him that night after it happened. I've talked to him on several occasions since then, and he has been very supportive. REP. SENSENBRENNER: Well, from what you said to Mr. Brokaw, is that apparently Mr. Hubbell was talking to the President before you were able to talk to the President after the fire broke

out and the people perished. And I am -- I am trying to -- to find out what Mr. Hubbell's role was in -- was in all of this. He's not been confirmed by the Senate or sworn in. He has been designated, but he still isn't doing that job.

ATTY GEN. RENO: As I indicated, I think I corrected myself or at some point during the course of the evening corrected myself when I realized that I didn't -- I knew that he had been talking to the White House. I don't know whether he talked directly to the President. I made a it a point of talking directly to the President. He had been fully briefed, understood what had happened, and we have continued to talk.

REP. SENSENBRENNER: Did he play any role in your approval process of the breaking up of the siege in Waco?

ATTY GEN. RENO: Yes, sir. I talked to him the Sunday before, on April the 18th, and explained to him what we proposed to do, and he approved.

REP. SENSENBRENNER: Was he briefed by the FBI on what the options were independently of you?

ATTY GEN. RENO: No, he was not.

REP. SENSENBRENNER: Okay. Thank you very much.

REP. BROOKS: Mr. Hughes, the gentleman from New Jersey.

REP. WILLIAM J. HUGHES (D-NJ): Thank you, Mr. Chairman. First of all, let me thank you, Mr. Chairman for convening this very timely hearing, and welcome, General.

Let me just say that like my colleague from New York, I think most of us are very happy that you are the Attorney General of the United States. You take the kind of compassion and toughness and savvy and experience to that office that we need, and you're like a breath of fresh air, and we wish you well. We're happy the President supported you wholeheartedly when you offered to resign.

I -- I'm concerned about a couple areas. My colleague, Henry Hyde, has already touched on one area. Since Teledago (sp), some 18 months or so ago, we realized that we have one hostage rescue team. And fatigue should never be a factor in our decision-making. And I hope that we'll look at what we need to do to provide the resources so that we don't have that as a factor in our decision as to when to move in a law enforcement operation.

Let me focus, instead, more directly on who we consulted. I understand you've indicated that the FBI will testify as to who they consulted by way of behavioral experts. You testified that you did talk to Dr. Harry Salem (sp) relative to tear gas and his expertise. Did you ever talk to any of the folks from the American Family Association that has developed quite a bit of expertise, or the Cult Awareness Network, possibly, during this time?

ATTY GEN. RENO: I personally did not, sir.

REP. HUGHES: Do you know whether the FBI did?

ATTY GEN. RENO: I have not heard of that -- of the American Family Association, but I'm not sure that that's --

REP. HUGHES: Family Foundation, I'm sorry. The American Family Foundation.

ATTY GEN. RENO: I think the American Family Association and the American Family Foundation are separate. But I --

REP. HUGHES: They are. And the Foundation is what I'm referring to.

ATTY GEN. RENO: Yes. And I have not talked to them.

REP. HUGHES: Well, the American Family Foundation has developed a great deal of expertise, as you may know. Are you familiar with the article that appeared recently, in fact, April 20th, on how many Jonestowns will it take?

ATTY GEN. RENO: I have a copy of that article. I'm trying to collect as much information as I can to pass on both to the investigators from within the department and independent investigators so that we make sure that anything such as this is fully considered in trying to develop guidelines, processes and policies for addressing these issues in the future. And also, as Congressman Edwards points out, for addressing non- cult situations that might develop in the same fashion.

REP. HUGHES: See, I -- one of my main concerns -- and I have corresponded, as you know, with your department before you became attorney general, over the lack of information, strategic information in particular, about cults around the country. We don't even know how many we have. And while the CIA apparently many years ago did some in-depth studies on mind control, we've done very little, apparently. And I realize there are some very serious First Amendment questions involved, but it seems to me that we cannot deal with situations like this without a lot more information. One of the constructive suggestions I've received from those that are working with the Cult Awareness Network -- and I've been in touch with them for a number of months -- is that we don't know how to deal with people like David Koresh or Vernon Howells (sp) in these types of situations because it's not like the usual hostage situation. And I would hope that we try to develop that kind of expertise in the future.

And I'm not faulting, you know, basically, any agency, because I understand, you know, the difficulties that we have to be careful about with regard to freedom of religion in particular.

ATTY GEN. RENO: As you know, Congressman, we met and I am following up on some of your suggestions and doing everything I can to make sure that we determine all available experts that can advise us in terms of how we

address these problems in the future, what do we do now to address the cults that exist, what action should be taken, if any. We want to do a very careful review.

REP. HUGHES: I don't -- I don't know that it would have made any difference no matter we would have done. David Koresh is responsible for what happened. I don't buy the suggestions of my colleagues that the law enforcement community should be criticized. I don't agree with the suggestions I've heard that the search warrant needs to be examined very carefully and the complaint that was filed. Frankly, I read it last evening and there was more than enough evidence to issue both the search warrant and the warrant, in my judgment. And I'm sure most of my colleagues will agree with that assessment.

I mean, the issue is, frankly, what we can do to provide more information, basically, so that we can make better decisions to avert what occurred. I'm going to have some questions of ATF about the options that we were presented with. I gather the FBI was not in the loop when you made the decision on April the 19th. Had they been -- had the FBI been consulted at that time on the plan that was developed?

ATTY GEN. RENO: The FBI?

REP. HUGHES: The FBI.

REP. : February.

REP. HUGHES: I'm sorry. February 19th, yeah, February 19th.

ATTY GEN. RENO: February 28th.

REP. HUGHES: February 28th. Sorry. The day that you made the decision to go ahead with one particular plan after weighing options.

ATTY GEN. RENO: I would have to refer you to the FBI on that. Again, I focused on what happened as we -- as existed on the date that I took office and what I had been briefed on in terms of the Department's responsibilities, including the FBI. REP. HUGHES: Okay. So you're not sure at this point whether the FBI was consulted --.

ATTY GEN. RENO: No. I think to be accurate you --

REP. HUGHES: -- as the plan evolved.

Did you ever -- did you ever look at an option that would do as Mr. Mazzoli has suggested, basically attempt to get David Koresh when he was outside the compound?

ATTY GEN. RENO: I asked them if there were any situations where we thought we could get them out and isolate them, and based on the information they furnished to me, that was not going to be possible.

REP. HUGHES: Well, Mr. Chairman, I just hope that we don't rush to judgment. You know, I hear suggestions that we should basically realign ATF, and there are some difficulties there because they have regulatory responsibilities that don't lend themselves to law enforcement missions.

But I hope that out of this will come an examination of what occurred, of the structure, of the mission, command and control, and see if we can do it, perhaps, better next time. And that's not leveling any criticism at anybody because, frankly, I believe that David Koresh is the one that was responsible for the death of the children and the adults that died in that compound. (Nothing could have changed that ?), in my judgment.

ATTY GEN. RENO: I want to join you in that.

REP. BROOKS: Thank you very much, Mr. Hughes.

Mr. Gekas, the gentleman from Pennsylvania.

REP. GEORGE W. GEKAS (R-PA): I thank the chair.

And I join in the welcome that has been proffered to the attorney general to these proceedings. Many of us on this panel, as you've probably discerned by now, are former prosecutors and we have a kind of a feel for the process that was undertaken from beginning to end because part of the responsibility in a criminal action is to prepare for the eventual court proceeding and final process in the justice system that we have. In that regard, I wanted to focus on something. When you came on board as attorney general, were sworn in, who was the US attorney in the Waco area? My information is that that was the western district of Texas, is that correct?

ATTY GEN. RENO: Mr. Ederer.

REP. GEKAS: Yes. And our information also, if you can confirm, is that he was instrumental in the preparation of the search warrant and the affidavits and the consultations with the judge in this case. Is that correct?

ATTY GEN. RENO: I don't know, sir.

REP. GEKAS: You don't know that?

ATTY GEN. RENO: I don't know whether he was personally instrumental or not.

REP. GEKAS: Well, when you issued your order or directive or announcement about dismissing or asking for the resignations of US attorneys, did that include Mr. Lederer (sp)?

ATTY GEN. RENO: What we did when we asked for the resignation of US attorneys was to take each case on a case-by-case basis to make sure that there was an orderly transition and that nothing was impacted. One of the first questions that I raised was the issue of Waco to make sure that there was an orderly transition. REP. GEKAS: Was that based on

the severity of the case or the importance to the public of the case? There were criteria apparently that you utilized in asking him to stay on?

ATTY GEN. RENO: The criteria that I utilized in each instance was to make sure that there was no interruption in ongoing matters that would be affected by a US attorney leaving if there was going to be an interim US attorney appointed. Subsequently, concern was expressed by people at the scene. I sent Mark Richards (sp) from the criminal division to Waco to personally meet with everybody concerned to make sure that we had the best prosecution presence available on the scene to properly handle the matter.

REP. GEKAS: So, the reports you got back from Mr. Richards -- Richards or Richardson? Richards -- was to the effect that he should be requested to stay on or that he could stay on? is that it?

ATTY GEN. RENO: What we discussed with Mr. Richards, and he is here and can go into more detail, was we reviewed it to see what experience prosecutor should be assigned -- the trial prosecutor who would actually handle it who had had extensive experience. The recommendation of the criminal division was that that would be Mr. Ray Jahn -- I believe the last name is spelled J-a-h-n -- who had had extensive experience, as I recall, in the prosecution of a case involving the murder of a federal judge. Based on all the conclusions, everybody's discussions with the FBI, with local prosecutors, with people on the scene, Mr. Richards met with Mr. Ederer and people on the scene. We determined that Mr. Ray Jahn would be the person that would lead the prosecution at the scene.

REP. GEKAS: In Mr. Lederer's (sp) jurisdiction, you're saying.

ATTY GEN. RENO: Yes. Mr. Jahn, as I understand it, was an assistant United States attorney in Mr. Lederer's -- Ederer's office.

REP. GEKAS: And Mr. Lederer (sp) would be staying on?

ATTY GEN. RENO: That was going to be addressed as we went along, but we felt very comfortable with Mr. Jahn being on the scene and being the person directly involved in the prosecution of the case.

REP. GEKAS: Was Mr. Lederer (sp) relieved during that time? I mean, was he not supposed to focus on this incident while Mr. Jahn was doing his --

ATTY GEN. RENO: Mr. Jahn was going to be the person directly on the scene, handling it directly, coordinating with the Texas Rangers, with local prosecutors, with everybody involved on the scene, since Waco was somewhat removed from San Antonio.

REP. GEKAS: So, if a new search warrant or other affidavit or other legal process would have to be confronted at the initial stage, it would have been presented by the FBI or ATF to Mr. Jahn at that time or not Mr. -- ATTY GEN. RENO: Mr. Jahn and the person who had been at the scene, whose name, as I recall, is David Johnson or Johnston, who was the assistant United States attorney on the scene. Which prosecutor personally handled the search warrant, I'd have to refer you to ATF, and we would be happy to furnish you with the information as to who assisted in the original search warrant from the US attorney's office.

REP. GEKAS: Is Mr. Lederer (sp) still on duty?

ATTY GEN. RENO: It's Ederer, as I recall, E-d-e-r-e-r.

REP. GEKAS: Oh, Ederer. I'm sorry.

ATTY GEN. RENO: Yes. E-d-e-r-e-r, as I recall.

REP. GEKAS: Is he still -- I guess I didn't catch -- maybe I didn't ask it correctly. Is he still now the US attorney for that district?

ATTY GEN. RENO: I don't know. I'll be happy to furnish you that information to see whether he has resigned at this point or not.

REP. GEKAS: On another quick matter. The --

ATTY GEN. RENO: I'm told that he is still there.

REP. GEKAS: All right. Just to follow up to conclude that portion of it, when the decision was made that his resignation should not be requested, I take it, you can confirm it one way or another, that part of the reason that he was not asked to resign in your general conclusion about the transition which you describe, the importance of the case, the public attention which had been drawn to it, and the general circumstances of the high visibility of that case, is that correct?

ATTY GEN. RENO: That would be one of the factors, sir.

REP. GEKAS: I have no further questions.

REP. BROOKS: Thank -- thank you very much.

Mr. Synar, the gentleman from Oklahoma.

REP. MIKE SYNAR (D-OK): Thank you, Mr. Chairman.

Welcome, Ms. Reno. Let me focus in on the tough decision you eventually had to make.

In making that decision, was there any additional information you either wanted or needed that you did not have available to you at the time of the decision?

ATTY GEN. RENO: I asked question after question, congressman, about the circumstances of the children, about anything that I could think of in trying to elicit as much information as I could to make sure that we had fully explored everything. And I don't recall being told "We can't further you this information." I mean, each -- each question where I was told "No, we can't do that" was based on a technological impossibility.
REP. SYNAR: In making your decision, what influence did the death of the four agents have in that decision?
ATTY GEN. RENO: The decision of the -- death -- the death of the four agents and the injury to the 15 or 16 other agents created the situation in the first place of a dangerous offender who knowingly had killed federal agents, who had knowingly injured federal agents, who was dangerous, armed, armed with very -- very high-powered weapons. And all of those factors created the situation in which I was faced with a situation that I couldn't say "Here, put down the guns, we'll walk away from this," or "Here, we'll put down the guns and let Koresh come out and talk to us." Here was a person who had murdered. And obviously that was a significant factor.
REP. SYNAR: What influence did the nature and amount of weapons within the arsenal have on your decision?
ATTY GEN. RENO: That had a real impact, because I learned a lot more about weapons.

At first, when I asked why we needed an HRT or a hostage rescue team to -- to try to ensure the security of the perimeter, I was surprised when they said, "Well, we're going to have to pull back at some point if we don't -- aren't able to resolve this because they're the only ones that can really secure the perimeter." And I said, "Well, why not a SWAT team, or bring in other agencies?" And then they just started describing just how far a .50 caliber weapon or ammunition can travel and started putting it in terms of from here to the White House, and I had -- I even questioned that. And they said "Well, its effective range is 3,000 yards, and an intentional killing range where they have a real chance of success is a thousand and -- a mile." And as I put those into perspective just looking at Washington areas, that was another factor. The powder that they obviously had in the place, the -- the degree that they had armed themselves, the fact that they had built additional gun holes and portholes from which to fire these weapons was certainly a factor because I was concerned with the life of FBI agents on the scene, I was concerned with people who might wander into the compound area and institute or just initiate through accidental or other means a confrontation with them. There were so many factors that had to be considered because these people were armed and extremely dangerous.
REP. SYNAR: What influence did the resources being expended have on the decision?
ATTY GEN. RENO: That's the one factor that people kept mentioning that I tried not to address, because I don't think that you can address the -- the exposure of -- I mean, the danger of exposing human life. It -- it was expensive, but I just very early on put that in the background and said "I can't consider that when I have the lives of the children at stake."
REP. SYNAR: And the length of time that the agents had been on-site, how did that influence your decision?
ATTY GEN. RENO: That influenced my decision in the sense that I was told -- the first I heard about it was by Delta Force, and I had not yet had the chance to meet with the head of the hostage rescue team, but he was there the same day. And both pointed out that the state of readiness of the HRT would be diminished if they were required to stay on the scene much longer, that they could pull back. But at the same time, the compound was arming itself with gun holes and taking other precautions, and I made the decision that no time was perfect, but that at this point we should increase the pressure with our expectation that it would simply -- that it might not go down that day, the next day. We might not get everybody out for -- for three days. There might be a bunker where they could go, but that we should increase the pressure to try to get them out in a peaceful, safe manner.
REP. SYNAR: And finally, at any time during your decision process, did you feel like you had inadequate personnel, equipment, strategy, or resources to make the decisions necessary?

ATTY GEN. RENO: No. Every time I turned around, the Bureau was -- here we asked for the Delta Force, and much to my -- I thought I'd be talking to them on the telephone. Much to my amazement, there they were at the FBI, both the former commander and the present commander. Here was the hostage rescue team leader. Here was the doctor. The questions I had trying to probe -- they always came through and tried to provide me with as much information as possible.
REP. SYNAR: Thank you.
REP. BROOKS: Thank you, Mr. Synar.
Mr. Coble, the gentleman from North Carolina.
REP. HOWARD COBLE (R-NC): Thank you, Mr. Chairman.
Ms. Reno, it's good to have you here. Ms. Reno, let me think aloud with you for a minute or two and propound a series of statements and/or questions to you, then I'll be glad to hear from you.
On February 28th, it appears that the element of surprise had been compromised, perhaps even emasculated, and I'm wondering why at that time the raid was not aborted and delayed until a subsequent time.

Number two, many complaints have been voiced because the invasion of the compound occurred too soon. You yourself, I think, in your testimony said why -- why now? Why not wait? Let me put another spin on it, Ms. Reno, and ask if anyone considered conversely accelerating the operation.

I'm thinking now fiscally, and I realize it's very delicate because you have innocent people inside that compound, but I know the daily cost was enormous -- I am told in excess of one million dollars -- and after the fact the result may have been even better to have done that.

Admittedly, Ms. Reno, every one of us at this panel up here is applying 20/20 hindsight today, and that's far easier, I will stipulate, than was -- than what confronted these agents when they were in the trenches. But having said all that, it appears probably about every person who touched the ball presumably fumbled it at one time or another. Again, that's easy for us to say today.

But I don't want these hearings to conclude, Mr. Chairman, without at least mentioning -- and this has been said before -- I think the most crucial fumble of all must be charged against David Koresh. After all, it was he who started this in motion. He cannot, in my opinion, be exonerated and should not be exonerated, which leads me to this question, Ms. Reno.

I guess when you're dealing with what appeared to be a prominent presence of emotional and/or mental instability inside the walls of that compound, at that point perhaps a higher degree of care should have been imposed, and I'm curious to know if you believe that was done. I don't believe it has been asked yet at this stage of the hearing whether or not, Ms. Reno, you and/or Director Sessions ever went to Waco. I'd be curious to know about that. And if you did not, I'd like to know why not. If --

ATTY GEN. RENO: With respect to -- oh, okay.

REP. COBLE: Let -- let me ask one more -- a couple more, Ms. Reno.

If I were drafting a plan for subsequent use -- hopefully we'll never have Waco II, but if I were drafting a plan to be used, I believe I would insert therein provisions for a more thorough continuous briefing for the President. It appears -- and I may be wrong, but it appears that the President was in the anteroom rather than at the head of the table. And I'm thinking he was a -- he's a former governor. He was a chief executive at Arkansas. Who knows? He may have had a similar encounter while there. I'm wondering if that was ever discussed.

And finally, in response I -- the gentleman from New York, Mr. Fish, asked you, Ms. Reno, concerning psychological warfare, and I think it's clear that that was a key component in Waco. And I'm curious to know if you approved of the use of psychological warfare against the Branch Davidian compound.

I apologize, Ms. Reno, for hitting in rapid-fire succession, but these are questions that have plagued me almost since the outset. And if you can respond in the time that's left, I will be appreciative.

ATTY GEN. RENO: First of all, your first question, as I understand it, is why, after it appeared that the ATF assault had been compromised, was it not delayed, and I would have to refer to the ATF for that. That is in another department.

REP. COBLE: That's fine.

ATTY GEN. RENO: Secondly, you made reference to a complaint -- the complaints that we went in too soon. Again, I have spelled out why we took the time we did to try to exhaust negotiation techniques and do everything we could to try to resolve it peacefully. We did not go in in the sense of an armed assault. We went in by trying to increase the pressure through the use of gas.

Your third question was, on the other side of the coin, why didn't we physically assault the place at the beginning? Based on the firepower that was in that building, I did not think, based on what the Bureau told me, and it was certainly their conclusion, that they could assault that place physically while at the same time ensuring the safety of the agents involved and ensuring the safety of the innocent children inside.

Third -- your fourth question is -- you made a reference to a higher degree of care.

REP. COBLE: Well, yeah. I was going to say, when -- when you're dealing with -- with emotional and mental instability, maybe -- you know, some people are prone to say "Well, my gosh, they're just a bunch of nuts. Let's go in and take over." I think maybe we ought to do it in a more delicate, careful -- but I say "Listen, we've got a problem in here. We're not quite sure what the response is going to be." Do -- do you think that at that point they said "Let's be especially more careful"? That was my question.

ATTY GEN. RENO: I think we -- the FBI approached it with the greatest care imaginable. On February 28th they went in to Waco, but they didn't go into that compound, they didn't assault it, they very carefully started talking to people. As you hear from them today, they will tell you who they talked to, the care they went to, everything they did to try to affect in the most thoughtful manner possible a proper resolution of it.

You ask why I didn't -- I don't know whether Director Sessions went to Waco, but whether I went to Waco. I did not go to Waco. I am not an expert in hostage negotiation. I am the person where the buck stops. I'm not an expert in

terms of law enforcement tactics. And the Bureau frankly told me, "When we get into a tactical situation, that's our job." And I acknowledge that. But at the same time, the buck stops with me in terms of a review of --

If -- if they had said, "Well, we're going to go something crazy," I would have said "No, you're not." If they had said "We're going to do something that didn't make any sense," I would ask them questions until it made sense. But as I ask question after question of the Bureau, their responses made sense. And nothing that I was going to learn on the ground at Waco that I didn't see from picture after picture, from reviewing the models of the compound, from understanding everything from -- understanding where every water tank was, the bunkers were, where the armament was expected to be, that was a -- it was not a decision made overnight.

The first time this question of using the gas came up was during the week of April the 5th. There was meeting after meeting in terms of reviewing it, asking the questions, saying "Go get more information," "Go do this," "Check this out," "Let us talk with the Delta Force people," "What about the water tanks?" -- question after question. Whether --

If -- if, upon our investigation, if, upon the recommendation of all involved, all of us who want to make sure that this tragedy or a tragedy like this does not recur again, they say we can do something with greater care, I'm going to be the first to try to do it. But I do know that extraordinary care, extraordinary deliberation went into this. While --

REP. COBLE: Ms. Reno, I think our -- the chairman is uneasy about a red light. I'll be glad to hear from you, but I suspect --

Mr. Chairman, I'll yield whatever you say on that.

REP. BROOKS: Have you completed -- you completed your --

REP. COBLE: Well, I --

ATTY GEN. RENO: He's got two more questions.

REP. BROOKS: Go ahead.

REP. COBLE: Ms. Reno, would -- would you approve of the plan that I drafted to bring the President from the anteroom to the head of the table if he, in fact, was in the anteroom? It appeared that he was not continuously brought up to speed on this. And I'm not saying this critically, but that seems to be my gut feeling.

ATTY GEN. RENO: I guess it's the difference between President Roosevelt and General Marshall and General Eisenhower and General Bradley. And I think that President Clinton did exactly what President Roosevelt did during World War II, and I was in kind of the position of General Marshall, and there are -- he got briefed, and he took responsibility, and he's been supportive, and it was my decision, and I take responsibility.

REP. COBLE: So I don't think you -- I think you would sign off on my plan for Waco II, and I say that with tongue in cheek.

ATTY GEN. RENO: I -- I would not sign off on your plan to send the President of the United States into all of the details that have to be made, because as I was making decisions there, I was also dealing with Los Angeles and making other decisions, and there -- there are an awful lot of issues that have to be dealt with in the country. But the President has been supportive of me. He was informed. He was concerned because he had had a situation in Arkansas, and he had considerable thought, and he had the right questions.

REP. COBLE: Mr. Chairman, I thank you for the additional time.

Ms. Reno, I thank you for your response.

REP. BROOKS: Thank you very much.

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HSE JUDICIARY CMTE/RENO
HEARING OF THE HOUSE JUDICIARY COMMITTEE

SUBJECT: GOVERNMENT DECISIONS IN THE WACO INCIDENT

CHAIRED BY: REPRESENTATIVE JACK BROOKS (D-TX)

WITNESSES:
ATTORNEY GENERAL JANET RENO,
FBI DIRECTOR WILLIAM SESSIONS, AND
ATF DIRECTOR WILLIAM HIGGINS

ROOM 2141, RAYBURN HOUSE OFFICE BUILDING

WEDNESDAY, APRIL 28, 1993

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TRANSCRIPT BY: FEDERAL NEWS SERVICE
620 NATIONAL PRESS BUILDING
WASHINGTON, DC 20045
202-347-1400

REP. BROOKS: (Sounds gavel.) The committee will come to order. I've called this hearing of the full Committee on Judiciary to examine the events surrounding the stand-off between federal law enforcement agencies and members of the Branch Davidian cult near Waco, Texas.

As the Members well know, hearings at the full committee level are rare enough an occurrence to be called extraordinary, and I believe that the subject matter of today's hearing is appropriate for such extraordinary treatment because it cuts across multiple aspects of the committee's broad jurisdiction over law enforcement activities.

While speculative and contradictory theories have abounded, it is only in the past few days that on-site forensic teams have begun to draw a number of tentative conclusion based on scientific observation and testing. That's all for the best, even if it departs from the scripts of the made-for-television movies already in production.
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The basic chronology of events related to the stand-off and its fiery conclusion can be stated succinctly. On February 28th, after an extensive investigation and pursuant to legal process, a team of agents from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms raided the heavily armed compound then under control of the cult leader calling himself David Koresh in order to serve warrants for federal weapons violations.

The raid turned into a fierce gun battle that left four BATF agents dead, 15 wounded, and six cult members dead. There ensued a stand-off for the next 51 days, during which time the Federal Bureau of Investigation assumed the lead law enforcement responsibility and attempted through a variety of tactics to persuade Koresh to lay down his weapons, let the adult and juvenile cult members leave the compound -- all to no avail.

Finally, on April the 19th, the FBI undertook a major action to inject tear gas into the compound in an effort to drive the occupants out. The effort failed. Instead, Koresh and more than 80 of his followers died as a raging fire consumed all the compound's buildings in a few short minutes. However, establishing the baseline chronology of events is not the sole purpose for what we -- for being here today. Rather it is to hear from the three law enforcement officials directly responsible for the actions and the choices taken in Waco so that we can understand the decisionmaking process behind the events.

Now I don't relish playing omniscient second guesser when there are still facts to be ascertained, evidence to be (introduced ?), and given the instant experts that pop up everywhere in the press, I may be in a distinct minority. What I care about is whether we have in place in our federal enforcement agencies the capability and, yes, the creativity to deal with the increasingly disturbing situation of terrorism, where in the high office towers of our urban centers, or in small, entrenched pockets of alienate citizens who operate separate and apart from a larger society. If such groups, whether they are called cults or not, pose a direct physical and violent threat to their own members or to others in society, then their operations cannot be ignored or justified through innovations -- invocations to the great American tradition of the right of each citizen to be left alone. Oliver Wendell Holmes declared the essence of a free society is indeed the right to be let alone, but not at the expense of the social compact which allows all of us as Americans to live together based on the values we share together.

What this committee and the public need to know is how, in a difficult situation of dealing with Branch Davidian cult, did our agencies perform, and how they processed signals, other information -- such as it was -- from this man Koresh, whether they developed alternative plans of action, how they negotiated, how they prepared, how they implemented decisions that were made.

The verdict on David Koresh's methods and aims can already be read in the Gallup polls. We're here to seek answers to weightier questions. I'm delighted our three leading

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law enforcement officials have made themselves available to the committee.

And now I would just like to offer several notes of caution about testimony we're going to hear today. First, investigations of both the decisionmaking process and the events of last Monday are at a very preliminary stage. It may well be that the answers to many of our questions will have to wait until completion of the forensic examination or the internal review of the Treasury and Justice Department's activities that the President has ordered. And secondly, it may be that the witnesses will be reluctant to respond to some questions because they might expose investigative sources and methods, or could jeopardize the pending criminal actions against a number of cult members relating to the deaths of four BATF agents. I believe that people of goodwill can easily accommodate both these considerations and Congress' need for accurate and complete information.

We're participating in an important proceeding today, and to admit all members to have the chance to question our witnesses, I feel compelled to limit oral opening statements to the ranking minority members of the full committee, and the chairmen and the ranking minority members of the two subcommittees with major jurisdictions over the issues under discussion. Of course, all members are free and encouraged to submit individual statements for the Record at this point, and so at this point I would yield to my distinguished friend from New York, Mr. Ham Fish.

REP. FISH: Thank you, Mr. Chairman. It is indeed a tragic set of circumstances that brings us here today. In recent days there has been considerable fault-finding and finger-pointing. Hopefully, as you have said, this hearing will get us beyond recrimination and help us to better understand what happened in Waco, why it happened, and how better to prepare for possible future similar episodes.

On Monday, April the 19th, 86 persons, 24 of whom were children, lost their lives. Prior to this, on February 28th, four brave ATF agents were killed in the line of duty. This committee oversees the operations of the Department of Justice, the Federal Bureau of Investigations, and the Bureau of Alcohol, Tobacco, and Firearms. It is a legitimate exercise of our legislative and oversight responsibilities to inquire into the strategies and decisions that led to the tragic events in Waco. Moreover, the American people expect their Congress to inquire on their behalf -- deliberately, thoroughly, and fairly -- into the threat, the decisionmaking, the options, and the lessons learned.

Obviously this was an unusual and extremely difficult situation for law enforcement officials because they were dealing with a complex, unpredictable, and dangerous personality. This certainly was not the

classic hostage situation, nor was it terrorism, but was this a bizarre, isolated incident or a portent of things to come? We need to know whether we are facing a new and different challenge to the public safety, health and welfare.

Law enforcement in this country today involves enormous challenges. It places great responsibility on the shoulders of law enforcement officers as well as agencies. And throughout this nation, heroic deeds and rescues on the part of police occur daily.

Certainly mistakes are made. But most often law enforcement in this country is carried out with great skill and professionalism. Nevertheless, when a high profile episode such as the Branch Davidian stand-off occurs, and results in what appears to have been an unnecessary loss of life, America asks why. America and the Congress have a right to know what happened, but in this search, we should not forget the difficult, almost impossible challenges that law enforcement face every day.

And so I welcome our distinguished witnesses -- the attorney general of the United States, the FBI director, and the director of the Bureau of Alcohol, Tobacco, and Firearms. Thank you for being with us, and I look forward to your testimony.

REP. BROOKS: Mr. Edwards, the gentleman from California.

REP. EDWARDS: Thank you, Mr. Chairman. And I, too, welcome the attorney general and the other witnesses. We're here today to listen to these witnesses, not necessarily to criticize. The President and the attorney general have both said that the Congress should study this incident to see if there are any lessons to be learned. And I'm especially interested in the process by which the events were carried out.

But Mr. Chairman, it would be a mistake to view this as a cult issue. Religion had very little to do with the incident.

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It just as well could have been a white supremacist group or another group whose philosophy and identity had nothing to do with religion. The question is how does the government deal with highly motivated, coherent groups barricaded in a fortified compound. This is a serious issue and deserves the committee's attention and the attention of the law enforcement agencies.

Thank you.

REP. BROOKS: Thank you very much, Mr. Edwards.

Mr. Hyde.

REP. HENRY J. HYDE (R-IL): Thank you, Mr. Chairman.

The 52-day standoff between the FBI and members of the Branch Davidian sect culminated in a fiery inferno which claimed the lives of 86 people. We mourn the loss of all of those inside the compound, especially the 24 children who perished last week, and the four ATF agents, who lost their lives in the initial conflict on February 28th.

It certainly appears in the light of the tragic conclusion to the standoff that something went wrong. We need to know why the ATF agents were given the initial order to storm the compound in late February after it seems clear they no longer had the element of surprise in their favor. We also need to know whether the plan put into action on the morning of April 19 was really the best available option or whether we just ran out of patience in trying to peacefully coax the group out of the compound.

We are not here today to second-guess the attorney general, the FBI, or the ATF, or try to affix political blame. Our purpose today is simply to understand the judgment calls that were made and whether or not those decisions were the most appropriate under the circumstances.

We also need to know if adequate resources, including military resources, were available or requested, and if not, why not? We need to get answers from the past so we can learn to avoid similar situations in the future. I look forward to hearing your testimony.

REP. BROOKS: Mr. Schumer, the gentleman from New York.

REP. CHARLES E. SCHUMER (D-NY): Thank you, Mr. Chairman. And I thank you for holding this hearing today.

Let me say at the outset I want to express my full confidence in the attorney general. In my opinion, President Clinton has put an absolutely

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outstanding person in this difficult job. She's tough, intelligent, and possesses an integrity and forthrightness that is refreshing in Washington.

Now, I'm sure that under her leadership the Justice Department's internal review will produce a complete and thorough report on this entire episode, including a full accounting of any mistakes that may have been made when all the evidence is in. And that's because we're dealing with a new breed of attorney general, one who is candid about facts and matter of fact about taking responsibility. There may well have been errors in judgment in Waco, but we should keep in mind that mistakes in outcome are not always the results of mistakes in judgment. Personally, I'd rather have Janet Reno making these judgments than just about anybody else.

We would also do well to remember that we're looking at the actions of law enforcement personnel motivated by a genuine desire to follow the rule of law. We're not dealing with a corrupt or dishonest government agency. We're not dealing with acts of venality or cover-up, as in so many other scandals we have seen. And so, I strongly hope we will keep all this in mind while pursuing our legitimate search to find out what went wrong.

To me, there are two key questions we need to explore in order to understand what went wrong. First, why was the element of surprise lost in the initial raid by BATF? If it was, did BATF leadership know that? And if they knew it, what was the process that resulted in going ahead with the raid anyway? Second, what was it that led FBI officials to make the judgment that David Koresh would not destroy himself and his followers when faced with ultimate capture by law enforcement?

Now, as we look at these issues and other issues surrounding the tactical and strategic decisions in the matter, I believe it's also important not to lose sight of the fact that the real villain here was David Koresh. He and his followers' desire and willingness to use children as hostages and to ultimately sacrifice them in a ferocious act of self-immolation surely must go down as one of history's most heinous crimes.

If our ultimate goal is to avoid future Waco disasters from taking innocent lives, we also have

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to take a close look at how David Koresh was able to amass one of the largest and most deadly arsenals ever faced by US law enforcement. We need to take a rational look at all the guns involved. More than 10,000 rounds were fired at the BATF agents on February 28th as they attempted to serve legal arrest and search warrants at the Waco compound.

This committee will hear today about how Koresh was able to arm his followers with more than a hundred fully automatic machine guns, grenades, and other materials such as explosives and bomb components. This an area where change is surely needed, because once David Koresh had established himself in that compound, surrounded by children and emotionally captive adults and with that arsenal, he really held all the cards. Can anyone doubt we would be looking at a different outcome had the Branch Davidians been armed only with knives, ordinary hunting rifles, or other sporting weapons? Koresh was determined not to be taken alive, and if necessary to take every one of his followers and as many federal agents as possible with him. As we have seen graphically, because of weaknesses and loopholes in existing law and his own criminal intent, he had the abundant means to do so.

I'll shortly be introducing legislation to address part of the problem by banning the sale of machine gun parts that can be used to convert legal firearms to machine guns unless the purchaser is a legal machine gun owner and to ban the sale of such parts by mail in all cases. David Koresh used this weakness in the law to amass parts and convert legal weapons to the deadly fully automatic machine guns he fired. This legislation will also prohibit the sale of large caliber ammunition to all but law enforcement and military agencies. The .50 caliber ammunition possessed by Koresh, which although perfectly legal can easily blow through an ordinary vehicle like a fire truck, has no legitimate purpose in the hands of anyone.

Mr. Chairman, I know that this hearing is not specifically about guns, it's about accountability and responsibility. But I also believe if we're going to get beyond the tactical issues involved we must adopt a strategy that recognizes the role played by guns and the excessive firepower so easily available to a madman. I look forward to hearing our witnesses today.

REP. : Will the gentleman yield for a moment? Will the gentleman yield for a moment?

REP. BROOKS: Not now. This is his opening statement. We want to go to Mr. Sensenbrenner for --

REP. : (Off mike) -- Mr. Schumer to yield.

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REP. BROOKS: Not at this point, no.

Mr. Sensenbrenner, the gentleman from --

MR./REP. : Wisconsin.

REP. BROOKS: -- Wisconsin is recognized.

REP. F. JAMES SENSENBRENNER JR. (R-WI): Thank you very much, Mr. Chairman, and I also salute you for calling timely hearings on the disaster is Waco.

I think it is very plain that the function of this hearing should not be to second-guess the activities of either the FBI or the Department of Justice, nor should it be to micromanage either of these agencies. That's not the role of the Congress of the United States. And furthermore, we should not be involving politicians in either the executive or legislative branches of government in operational decisions in law enforcement agencies. The people of this country expect the decisions of law enforcement to be free from politics and severely chastise anybody who tries to bring politics into those types of law enforcement decisions.

But the Waco operation had a result that none of us desired, and that was the deaths of all of the people who were inside the compound a week ago last Monday. Thus it's legitimate for this committee in discharging its oversight functions over law enforcement to ask what went wrong and how we can learn from the mistakes that were made in the Waco operation to prevent that from happening again.

I think that the principal focus of this committee's activity should be to look into the chain of command. What types of options were presented? By whom? Who reviewed those options, and who eventually signed off on those options before April the 19th?

In conclusion, I would like to state my personal admiration for the activities and brave behavior of both the FBI and ATF agents who were on the scene in Waco and again express my personal condolences to the families of those ATF agents who passed away at the time of the first assault. I also think it is important that everybody realize that no one on this committee holds anyone

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but David Koresh responsible for the tragic deaths of those who died within that compound. He was the one that brought them there, he was the one that kept them there, and he was the one that led them to their deaths in the fire that occurred at the time the FBI stormed the compound a week ago Monday. Anybody that seriously says that the FBI or law enforcement was at fault really didn't know what was happening down there or cared not to listen.

So I would hope that we could get into the business of overseeing the FBI, the Justice Department and the ATF here so that all of us can learn from this very tragic activity, and so that the word can go out to anybody that is contemplating holding innocent people hostages, as Mr. Koresh did, that law enforcement will be able to get to them and, hopefully, have a result that will bring those who are guilty of committing crimes to justice in a court of law rather than the tragic outcome that occurred in Waco.

REP. BROOKS: Thank you very much. And I would, at this point, want to recognize the presence of Congressman Chet Edwards of Texas, whose district was the location of the Branch Davidian compound. And without objection, I would recognize a statement from the Congressman regarding the subject matter of these hearings be entered into the record at this point.

Thank you very much, Congressman.

REP. : Mr. Chairman, I understand that members, such as Mr. Moorhead, who did leave a statement, will be -- any members who have a statement at this point they can --

REP. BROOKS: All members who have statements at this point will be put into the record and this record will be open for a few days in case you have some time to perfect your statement to be put in the record at this point.

REP. : Thank you.

REP. BROOKS: And now I'm delighted to welcome Attorney General Janet Reno to the committee in her first appearance before us since being sworn in. We're familiar with her background as a result of the confirmation hearings. However, for those who are not, I'll just tell you a little bit about her.

From 1978 until the time of her appointment as attorney general, Mrs. Reno was a state attorney in Miami, Florida. She's been a partner in a Miami-based law firm, an assistant state attorney, staff director of the Florida House of Representatives Judiciary Committee. She comes from good Florida stock, feeling every bit at home as much with alligators as with

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the more dangerous predators she's encountered on this side of the Potomac. (Laughter.)

And, Madam Attorney General, while we regret the sad events that necessitated this hearing, we welcome you. We look forward to your testimony. You proceed as you see fit.

ATTY GEN. RENO: Thank you very much, Mr. Chairman. Can everybody hear me?

I truly appreciate this opportunity to appear before you to discuss the tragic events at the compound in Waco, Texas this past week. I want to be as open as possible with you and with all the American people about what we knew before, what we knew on that day, and what we know now and as our investigation proceeds. I want to be responsible and accountable to the Congress and to the American people in every way I possibly can.

This was one of the hardest decisions that anybody could ever be asked to make. We deliberated long and carefully before reaching a decision. Nothing we do now can change the suffering felt by the families of the ATF agents or the families of those who perished in the compound. But as you have pointed out so eloquently, we must do everything we can to learn from these events about what we can do in the future to prevent people like David Koresh, or people motivated by other thoughts, from causing such a senseless, horrible loss of human life.

On February 28, 1993, four agents of the Bureau of Alcohol, Tobacco and Firearms were killed and 16 were injured in a shoot-out that occurred when they attempted to execute an arrest warrant for Vernon Howell, also known as David Koresh, and a search warrant at the Branch Davidian compound near Waco, Texas.

The agents were met by a barrage of gunfire from numerous firing points in the compound that lasted 45 minutes, involved thousands of rounds of ammunition

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and left the agents dead and injured. Weapons used by the Branch Davidians included 50-caliber rifles having an effective range of 3,000 yards, from the Capitol to the White House. All of those killed or wounded were shot or injured by homemade hand grenades. While several members of the commune were killed and injured, there was apparently no serious injury to any of the children.

After the shoot-out, the remaining ATF agents established a protective perimeter around the compound. A few hours later, three Branch Davidians attempted to enter the compound, resulting in a second shoot-out with ATF agents in which one Davidian was killed. Attempts were made to further secure the perimeter.

ATF officials then requested that the FBI dispatch its hostage rescue team, which we refer to as HRT. On February 28th, 1993, agents of the Federal Bureau of Investigation, including the HRT, arrived on the scene. The FBI found an armed fortress, a compound consisting of approximately 70 acres located on Route 7 near Waco.

I took office on March 12th, 1993. After my FBI clearance, I had been briefed previously by the acting attorney general and was thereafter briefed specifically on the situation at Waco. I was advised that the primary goal of the FBI's hostage rescue team was to negotiate with Koresh to secure the release of the children and the surrender and prosecution of all those who participated in the murder and assault of the federal agents without further violence or injury to anyone concerned. I concurred that we must try to negotiate to avoid further bloodshed to the extent that we could. As this situation evolved, the FBI had consistently rejected a direct assault on the compound because of the danger of heavy casualties to the agents and to the children and because of the layout which prevented a surprise assault.

I was told as I was briefed that the FBI had a trained negotiator on the scene and that they had and during the course of these deliberations continued to consult with behavioral experts and others who had knowledge of the cult to determine how best to proceed to negotiate with Koresh. From the start, the negotiation tactics focused on restricting the activities of those inside the compound and depriving them of a comfortable environment so as to bring the matter to a conclusion without further violence.

Those inside the compound were advised of the FBI's rules of engagement. Under those rules, the agents conveyed the information that they would not use deadly force against any person except as necessary in self-defense or defense of another, when they had reason to believe that they or another were in danger of death or grievous bodily harm.

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The FBI installed lights to illuminate the compound at night and loudspeakers to ensure that they could communicate with all members of the compound at once, rather than having to rely solely on the single telephone line available to speak to Koresh and those he permitted to talk on the phone. They also used loudspeakers to disrupt their sleep. They cut off their electricity and they sought to restrict communications of those within the compound just to the hostage negotiators.

Additionally, they sent in letters from family members and made other good-faith efforts designed to encourage surrender by those who wished to leave the compound. In particular, and I asked about this during the course of our deliberations, they made repeated efforts to secure the release of the children. In further efforts to encourage the negotiating process, attorneys representing Koresh and Steve Schneider were allowed to enter the compound or communicate by telephone with them on several occasions.

Throughout this 51-day process, Koresh continued to assert that he and others inside would at some point surrender. However, the FBI advised that at no point did he keep his word on any of his promises. Despite all efforts, the negotiators concluded that negotiations were at a standstill and that they had not been able to negotiate a single item with Koresh.

Although 21 children and 14 adults had been allowed to leave the compound between February 28th and March 23rd, 1993, those persons who left the compound did so because Koresh affirmatively wanted them out as they were not fully committed to his cause, they were a drain on his efforts at internal discipline and resources, or he viewed them as potential spokesmen to the media.

During the week of April the 5th, the FBI advised me that they were developing a plan for the possible use of tear gas in an effort to increase the pressure on those in the compound to surrender. Thereafter, I had a series of meetings with the FBI to discuss the emerging proposal.

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The threshold question I asked was whether the gas would cause permanent injury to the children. I did not even want to consider the matter further if we could not be certain about this factor. The FBI assured me that the gas would not cause permanent injury. I asked them to research further, and subsequently they arranged for me to meet with Dr. Harry Salem, a top expert in toxicology, who is chief of the Life Sciences Department at the Edgewood Arsenal. He reviewed with me case studies that confirmed that it would not cause permanent injury.

Then the primary question I asked again and again during the ensuing discussion was "Why now? Why not wait?" I asked about their food and water supply and was told that it could last at least a year or more. I asked that the information about the water supply be checked and double checked by observing the level in the water tanks. We explored but could not develop a feasible method for cutting off their water supply.

I asked my staff to have direct personal discussions by phone with the chief negotiator on the scene to satisfy ourselves that we had, indeed, reached an impasse in discussions, in negotiations. After a two and a half hour conversation, that seemed clear.

I became convinced that short of allowing David Koresh to go free, he was not coming out voluntarily. Given that unacceptable result and in light of the fact that he was such a dangerous criminal, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large, or the government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible injuries and attended injuries and harm.

But we continue to deliberate. And in the course of our deliberations we met with General Peter Schumacher (sp) and Colonel Jerry Boinken (sp), former and present commanders of Delta Force, respectably, the Army's rough equivalent to the FBI's HRT, to review the plan. Their comments were instructive. While indicating that the plan appeared to be sound, one suggestion was that rather than an incremental approach to use -- to the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously.

I preferred the FBI approach, which called for a gradual increase in pressure over time. It seemed to me that that would be best to ensure the safety of those inside. I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that as a result of the initial use of tear gas Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease operations. On the other hand, if Koresh

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and his followers endangered the agents by firing upon them, they were authorized to return the fire.

To the great credit of the FBI, they received substantial fire from within the compound both at the vehicles and at sniper positions surrounding the compound without returning any fire. In fact, throughout the 51 day siege, the FBI never fired a single shot. Instead, when fired upon, the FBI responded by beginning to insert gas throughout the compound consistent with what the Delta Force commanders had suggested.

The commanders also expressed concern about the length of time the HRT had been on the scene in a state of constant readiness, and all expressed the view that the team would have to be pulled back for retraining very quickly if they were going to come back to the scene. All advised that there was not a substitute civil force that could secure the extensive area around the compound that had the expertise of the Hostage Rescue Team.

We continued deliberations. I wanted and received assurances that the gas and its means of use were not pyrotechnic. I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.

I also considered that Koresh had talked about suicide, and that might occur at any time under conditions that the FBI might be less likely to control. Experts, however, advised the Bureau that the chances of suicide were not likely, but I again emphasize that it was something that was considered, something that was considered that might happen at any point along the way, regardless of what the FBI did.

In considering the FBI proposal, I weighed the many concerns of the government with respect to the state of affairs

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inside the compound. They included the well-being of the children in the compound given the deteriorating sanitary conditions; the apparent lack of adequate medical care inside; and reports of sexual and other abuse over the past; the vulnerability of the outer perimeter, which created a threat to public safety and the federal agents at the perimeter -- the outer perimeter was vulnerable because there were, inside the compound, 50-caliber weapons having an effective killing range of 3,000 yards, a distance that would reach from the US Capitol to the White House; our inability to maintain the presence of the HRT on-site indefinitely; and the advice I received that there was a lack of a suitable substitute force that could replace them at the compound and ensure the security of all involved; fourth, the increasing risk as the stand-off continued, of injury to federal agents, whether by accident or by the risk of shooting from the inside.

Since being sworn in as attorney general, I have had numerous conversations with people both inside and outside the Department of Justice concerning the Waco situation. In addition, I directed my staff to keep the White House apprised of ongoing developments. My discussions with representatives at the White House were predicated on the premise that as chief law enforcement officer, the decision on how to proceed was mine. I advised the President on the Sunday before the operation of my decision to authorize the FBI's use of tear gas at the compound, and he said he would support my decision.

I believe we were dealing with a situation that would not resolve itself by mere acquiescence to the stand-off. Negotiations had proven to be fruitless, and despite our best efforts, we could not secure the release of the children. It was a situation that suggested to me that time would only increase the risk to public safety, to the safety of government agents, and to those within the compound, without any realistic expectation that the matter would be resolved peacefully if we did nothing. It was my call, and I made it the best way I know how.

Let me urge that we focus on the future, and to try to determine how we can best avoid the recurrence of this tragedy. In this regard, at the President's request, we in the Department of Treasury are looking at a process whereby the events at Waco will be examined by experts, both within and outside the government to consider the following questions.

One, in the execution of the arrest and search warrants by ATF, were established procedures followed, and if so, were they adequate? Two, is federal law enforcement adequately prepared to negotiate in dangerous situations in terms of training, staffing, and available techniques? Three, is training for the execution of warrants involving barricaded suspects who may be holding innocent third parties adequate for all law

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enforcement agencies? Four, are improvements needed in coordinating the activity of the various investigative agencies? Five, how should federal law enforcement agencies marshal resources in various disciplines, including psychology and psychiatry in situations involving cults and other groups using barricades and holding innocent people? Six, what systems and understandings about command and control should guide the relationships among leaders of the departments, and career officials, and operating units when field operations impose a substantial risk of danger to law enforcement officials and others?

The incident at Waco ended tragically for all involved. I have thought every day since about -- since April 19th about what I might have done differently. I only hope that we can work together to make sure that I never have to make such a decision again.

I would be glad to answer any of your questions.

REP. BROOKS: Well, Ms. Reno, the major focus of today's hearing is the decisionmaking process at the highest levels of the law enforcement community which led to the actions involving the Branch Davidian cult. Could you describe for the committee the major considerations you personally brought to bear in approving the actions leading up to and including the April 19th operation?

ATTY GEN. RENO: The prime concern that I ask is -- the question I kept asking over and over again, Mr. Chairman -- why now, and why not wait? I reviewed statements that he had made about apocalypse at any time -- he could have done this at any time. The FBI advised me that they were in better control, considering the state of readiness of their HRT team, so that that was a definite factor. I reviewed the -- it was important and we spent a lot of time determining the water supply. I thought that might be a way, if the water supply were reduced, that we might be able to force them out. And again and again we went back through trying to observe the level of water in the tanks to see if it might be possible to wait them out in that fashion.

It appeared from everything that we were told, based on our discussion with the negotiator on the scene who advised that negotiations had reached an impasse, that he was going to stay there, and he would not come out voluntarily, and it was

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going to be an indefinite stay that would expose the lives of agents on the perimeter to danger, would threaten the continued safety of all inside. I continued to be concerned about the children. There was no sanitary facility for them. They were dumping their waste. The conditions were increasing in that regard. We had had reports -- as I have pointed out, until you see the children you cannot confirm the reports one way or the other about the abuse of the children.

But the concern I had was that to let this go on indefinitely, where you had dangerous offenders who had killed four agents, injured 16 others, was something that could best be resolved by increasing the pressure, not to make this D Day, but to try to increase the pressure by the use of gas, which I had determined by -- after very careful review, would not be permanently harmful to the children -- that by tear gassing the compound that would be the best way to proceed to increase the pressure to try to force them out.

REP. BROOKS: Now, Mrs. Reno, questions have been raised about the extent to which the White House was involved in the decision-making process relative to the events in Waco. Could you describe the extent and the nature of your contact with the White House during the standoff, and particularly during the days preceding April the 19th?

ATTY GEN. RENO: I kept the White House advised through the White House Counsel's Office during the course of my deliberations after the FBI had made its proposal about the use of gas. There were continued discussions as we developed new information.

On Sunday, prior to April the 19th, I talked with the President, advised him of what we proposed to do, and he gave me his full support.

REP. BROOKS: Would you describe in detail how you kept in touch with the situation in Waco and the individuals with whom you consulted in formulating and approving the actions against the Branch Davidian compound?

ATTY GEN. RENO: The first conversation I had concerning the possible use of tear gas at the compound was with Director Sessions, who said that during the week of April the 5th that he would like to arrange some time to brief me on a proposal that they would like to present. I met with Director Sessions and other representatives of the Department, including Floyd Clarke, Larry Potts, Doug Gow, and there may have been others, but those are the people that I specifically remember.

I was briefed in all details about everything that had been done up to that point in trying to resolve the matter peacefully. We went through it in detail. Then I started asking the questions. What about the gas, would

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it be harmful to the children? Go back and do some more study. I had real concern about that. It was pointed out to me, after they had had the doctor brief me, that the gas was non-lethal, it was tear gas as we understand tear gas, and that members of the United States Army are gassed as part of preparation. So I became comfortable with that. But I was still not comfortable with the primary question of why now, why not wait.

We had explored other possible alternatives. As I suggested to you, the FBI, before I had been sworn in, and then I concurred totally with them, rejected any direct assault on the compound as being far too dangerous for the agents and for those inside the compound.

We asked to meet with military officials. And the general who was the former commander of Delta Force, and the colonel presently commanding the Delta Force, came to Washington and met with us and FBI officials after they reviewed the plan. And we consulted very carefully about that.

One of the points, raised for the first time by the Delta Force commanders and previous commander, was that the HRT had to be at a constant state of readiness and that to keep them on a scene for the length of time that these agents had been on the scene began to raise questions that they could not remain there much longer and still be in the state of readiness that should be expected of an HRT team.

I asked, well, isn't there another team, and was advised no, except for the Delta Force, and then I believe the Navy has a force for marine disasters. We explored the provisions of posse comitatus and became convinced that you could not use the Delta Force in a civilian situation. I asked at that time, well, can't you send in SWAT teams or something like that. I'm not a law enforcement expert, but I was asking every question I knew to ask.

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And they explained and went step by step through the training that the HRT team has in terms of sniper firing and their ability to maintain security. So, I became convinced that if we had to pull back the HRT team and substitute somebody else, we couldn't begin to provide the security for all of those concerned that we would with the HRT.

I continued to be concerned about the water tank because I heard some information that indicated their water supply might be low. We went back in and with the ability of the FBI to determine the level of the water tank from a distance, we were advised that it continued to be replenished and that it looked like they had enough supplies and water to last for over a year.

What concerned me was the fact that even with the HRT team, it was going to be difficult to control a perimeter. If you can imagine having to control a perimeter that extended from here to the White House and the same distance either way, it could be a very difficult situation. People had been able to get in there and people could come out. There could be confrontations.

We reviewed -- because I directly considered the fact that people had talked about the possibility of a mass suicide, and you remember the situation with respect to Jonestown, and that's something I considered. The FBI advised me that its behavioral experts had indicated -- and by the way, Mr. Chairman, I've asked the FBI because I want to be as candid as I possibly can, to interrupt me if I say anything that's inaccurate in any way, and I would ask that because I want to make sure that I lay out the clearest picture possible for you in terms of any advice that they gave me. But we looked at it. They advised me again that their experts had concluded that the chances of a mass suicide were not likely, but if they were, they could happen at any time. And if we let the standoff go on forever, they could happen -- it could happen if you got some rambunctious group in there that wanted to square off against the Davidians, it could happen in any number of ways.

I made -- went step by step again through the decisions, weighing it back and forth, and reached a conclusion that the gas was not lethal, that it would not permanently harm them. By everybody's description, it would be so -- they could last with gas masks for some time, but it would become so uncomfortable that they would come out. I think as a footnote to this, one of the things we didn't count on was that wind. And I think from all -- one of the things that we will have to review and look at and understand is why the gas didn't cause more discomfort immediately.

But those were the factors that led to my decision. And constantly during this time, I was consulting and trying to be available at their request to the director, to Mr. Clarke, Mr. Potts, and Mr. Gow.
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REP. BROOKS: Thank you very much.

In accordance with the rules of the committee, I want to note that -- well, I've asked only three questions -- we want to adhere strictly to the five-minute limit because I want all of the members to have an opportunity to make their positions clear.

Mr. Fish.

REP. HAMILTON FISH, JR. (R-NY): Thank you, Mr. Chairman.

And General Reno, I commend you for your frankness. I would like at the outset to take a step back and ask you a threshold question. What was the reason or perhaps reasons that federal law enforcement personnel were there at the compound in the first place? Was there a serious enough threat posed by the Branch Davidians to justify the BATF raid and, following that, the 52-day stakeout, as well as the FBI action on April 19th?

ATTY GEN. RENO: Congressman, I have focused my attention on Department of Justice activities and on the FBI. And I would refer matters that preceded February 28th to the investigation that will be conducted. I have not reviewed that in terms of making any informed comment on what led up to it.

What I did satisfy myself was that four agents had been killed, 15 had been wounded by very dangerous people, and that the FBI had been called in. When I accepted -- when I took office, that was the situation that I was faced with, and I made a judgment based on all the information that I had that they were indeed dangerous offenders who had knowingly killed federal agents. But at that point, with the tragedy of the agents' deaths, the 15 wounded, the issues with respect to the siege, I did not want to be in the process of second-guessing somebody else.

REP. FISH: Thank you. General Reno.--

REP. BROOKS: Excuse me. Would the gentleman yield one moment?

REP. FISH: Of course.

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EVENTS SURROUNDING THE BRANCH DAVIDIAN CULT STANDOFF IN WACO, TEXAS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

APRIL 28, 1993

Serial No. 95

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

90-379 CC WASHINGTON : 1995

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-047257-1

EXHIBIT

EVENTS SURROUNDING THE BRANCH DAVIDIAN CULT STANDOFF IN WACO, TEXAS

WEDNESDAY, APRIL 28, 1993

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the committee) presiding.

Present: Representatives Jack Brooks, Don Edwards, John Conyers, Jr., Romano L. Mazzoli, William J. Hughes, Mike Synar, Patricia Schroeder, Dan Glickman, Barney Frank, Charles E. Schumer, John Bryant, George E. Sangmeister, Jack Reed, Robert C. Scott, David Mann, Melvin L. Watt, Xavier Becerra, Hamilton Fish, Jr., Carlos J. Moorhead, Henry J. Hyde, F. James Sensenbrenner, Jr., George W. Gekas, Howard Coble, Lamar S. Smith, Steven Schiff, Jim Ramstad, Elton Gallegly, Charles T. Canady, Bob Inglis, and Bob Goodlatte.

Also present: Jonathan Yarowsky, general counsel; Robert H. Brink, deputy general counsel; Daniel M. Freeman, counsel/parliamentarian; Marie McGlone, counsel; Allen Erenbaum, counsel; Chris Cooper, legislative analyst; John D. Cohen, investigator; Linda Jo Shelton, administrative assistant to the general counsel; Mary V. Heuer, administrative staff member; James B. Farr, financial clerk; Ralph Doty, systems coordinator; Teresa Vest, research assistant; Kenneth Prater, assistant publications clerk; Alan F. Coffey, minority chief counsel; Charles Kern III, minority counsel; Ray Smietanka, minority counsel; Kathryn Hazeem, minority counsel; Lyle Nirenberg, minority counsel; and Carmel Fish, minority counsel.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The committee will come to order.

I have called this hearing of the full Committee on the Judiciary to examine the events surrounding the standoff between Federal law enforcement agencies and members of the Branch Davidian cult near Waco, TX.

As the Members well know, hearings at the full committee level are rare enough an occurrence to be called extraordinary. I believe that the subject matter of today's hearing is appropriate for such extraordinary treatment because it cuts across multiple aspects of the committee's broad jurisdiction over law enforcement activities.

While speculative and contradictory theories have abounded, it is only in the past few days that onsite forensic teams have begun to

draw a number of tentative conclusions based on scientific observation and testing. That is all for the best, even if it departs from the scripts of the made-for-television movies already in production.

The basic chronology of events relating to the standoff and its fiery conclusion can be stated succinctly. On February 28, after an extensive investigation pursuant to legal process, a team of agents from the Treasury Department's Bureau of Alcohol, Tobacco and Firearms raided the heavily armed compound, then under control of a cult leader calling himself David Koresh, in order to serve warrants for Federal weapons violations. The raid turned into a fierce gun battle that left 4 BATF agents dead, 15 wounded, and 6 cult members dead.

There ensued a standoff for the next 51 days, during which time the Federal Bureau of Investigation assumed the lead law enforcement responsibility and attempted through a variety of tactics to persuade Koresh to lay down his weapons and let the adult and juvenile cult members leave the compound; all to no avail.

Finally, on April 19, the FBI undertook a major action to inject tear gas into the compound in an effort to drive the occupants out. The effort failed. Instead, Koresh and more than 80 of his followers died as a raging fire consumed all of the compound's buildings in a few short minutes.

However, establishing the baseline chronology of events is not the sole purpose for being here today. Rather, it is to hear from the three law enforcement officials directly responsible for the actions and the choices taken in Waco so that we can understand the decisionmaking process behind the events.

Now, I don't relish playing the part of the omniscient second-guesser when there are still facts to be ascertained, evidence to be adduced, and given the instant experts that pop up everywhere in the press, I may be in a distinct minority. What I care about is whether we have in place in our Federal enforcement agencies the capability and, yes, the creativity to deal with the increasingly disturbing situation of terrorism, whether in the high office towers of our urban centers or in small entrenched pockets of alienated citizens who operate separate and apart from society at large.

If such groups, whether they are called cults or not, pose a direct physical and violent threat to their own members or to others in society, then their operations cannot be ignored or justified through invocations to the great American tradition of the right of each citizen to be left alone. As Oliver Wendell Holmes declared, the essence of a free society is, indeed, the right to be let alone—but not at the expense of the social compact that allows all of us to live together as Americans based on our shared values.

What this committee and the public need to know is how our law enforcement agencies performed during this difficult situation. We need to know how they processed the signals and other information received from Koresh, whether they developed alternative plans of action, how they negotiated, how they prepared, and how they implemented decisions that were made.

The verdict on David Koresh's methods and aims can already be read in the Gallup polls. We are here to seek answers to weightier questions.

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Mr. BROOKS. I am delighted to welcome Attorney General Janet Reno to the committee for her first appearance before us since being sworn in.

Most of us are familiar with her background as a result of her confirmation hearings. However, for those who are not, I will just tell you a little bit about her.

From 1978 until the time of her appointment as Attorney General, Ms. Reno was a State attorney in Miami, FL. She has been a partner in a Miami-based law firm, an assistant State attorney, staff director of the Florida House of Representatives Judiciary Committee. She comes from good Florida stock, feeling every bit at home with alligators as with the more dangerous predators she has encountered on this side of the Potomac.

And, Madam Attorney General, while we regret the sad events that necessitated this hearing, we welcome you. We look forward to your testimony. You may proceed as you see fit.

STATEMENT OF HON. JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE

Ms. RENO. Thank you very much, Mr. Chairman.

Can everybody hear me? I truly appreciate this opportunity to appear before you to discuss the tragic events at the compound in Waco, TX, this past week.

I want to be as open as possible with you and with all the American people about what we knew before; what we knew on that day; and what we know now and as our investigation proceeds. I want to be responsible and accountable to the Congress and to the American people in every way I possibly can.

This is one of the hardest decisions that anybody could ever be asked to make. We deliberated long and carefully before reaching a decision. Nothing we do now can change the suffering felt by the families of the ATF agents or the families of those who perished in the compound; but as you have pointed out so eloquently, we must do everything we can to learn from these events about what we can do in the future to prevent people like David Koresh, or people motivated by other thoughts from causing such a senseless, horrible loss of human life.

On February 28, 1993, 4 agents of the Bureau of Alcohol, Tobacco and Firearms were killed and 16 were injured in a shootout that occurred when they attempted to execute an arrest warrant for Vernon Howell, also known as David Koresh, and a search warrant at the Branch Davidian compound near Waco, TX. The agents were met by a barrage of gunfire from numerous firing points in the compound that lasted 45 minutes, involved thousands of rounds of ammunition, and left the agents dead and injured.

Weapons used by the Branch Davidians included .50-caliber rifles having an effective range of 3,000 yards, a distance from the Capitol to the White House. All of those killed or wounded were shot or injured by homemade handgrenades. While several members of the commune were killed and injured, there was apparently no serious injury to any of the children.

After the shootout, the remaining ATF agents established a protective perimeter around the compound. A few hours later, three Branch Davidians attempted to enter the compound, resulting in a

second shootout with ATF agents in which one Davidian was killed. Attempts were made to further secure the perimeter. ATF officials then requested that the FBI dispatch its Hostage Rescue Team, which we refer to as HRT.

On February 28, 1993, agents of the Federal Bureau of Investigation, including the HRT, arrived on the scene. The FBI found an armed fortress compound consisting of approximately 70 acres located on Route 7 near Waco.

I took office on March 12, 1993. After my FBI clearance, I had been briefed previously by the Acting Attorney General and was thereafter briefed specifically on the situation at Waco.

I was advised that the primary goal of the FBI's Hostage Rescue Team was to negotiate with Koresh to secure the release of the children and the surrender and prosecution of all those who participated in the murder and assault of the Federal agents without further violence or injury to anyone concerned. I concurred that we must try to negotiate to avoid further bloodshed to the extent that we could.

As this situation evolved, the FBI had consistently rejected a direct assault on the compound because of the danger of heavy casualties to the agents and to the children and because of the layout which prevented a surprise assault. I was told, as I was briefed, that the FBI had a trained negotiator on the scene and that they had, and during the course of these deliberations, continued to consult with behavioral experts and others who had knowledge of the cult to determine how best to proceed to negotiate with Koresh.

From the start, the negotiation tactics focused on restricting the activities of those inside the compound and of depriving them of a comfortable environment so as to bring the matter to a conclusion without further violence.

Those inside the compound were advised of the FBI's rules of engagement. Under those rules, the agents conveyed the information that they would not use deadly force against any person except when necessary in self-defense or defense of another, or when they had reason to believe that they or another were in danger of death or grievous bodily harm.

The FBI installed lights to illuminate the compound at night and loudspeakers to ensure they could communicate with all members of the compound at once rather than to rely solely on a single telephone line available to speak to Koresh and those he permitted to talk on the phone. They also used loudspeakers to disrupt their sleep. They cut off their electricity and they sought to restrict communications of those within the compound just to the hostage negotiators.

Additionally, they sent in letters from family members and made other good-faith efforts designed to encourage surrender by those who wished to leave the compound. In particular—and I asked about this during the course of our deliberations—they made repeated efforts to secure the release of the children.

In further efforts to encourage the negotiating process, attorneys representing Koresh and Steve Schneider were allowed to enter the compound or communicate by telephone with them on several occasions. Throughout this 51-day process, Koresh continued to assert that he and others inside would at some point surrender. However,

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Despite all efforts, the negotiators concluded that negotiations were at a standstill and that they had not been able to negotiate a single item with Koresh. Although 21 children and 14 adults had been allowed to leave the compound between February 28 and March 23, 1993, those persons who left the compound did so because Koresh affirmatively wanted them out as they were not fully committed to his cause; they were a drain on his efforts in internal discipline and resources; or he viewed them as potential spokespersons to the media.

During the week of April 5, the FBI advised me that they were developing a plan for the possible use of tear gas in an effort to increase the pressure on those in the compound to surrender. Thereafter, I had a series of meetings with the FBI to discuss the emerging proposal.

The threshold question I asked was whether the gas would cause permanent injury to the children. I did not even want to consider the matter further if we could not be certain about this factor. The FBI assured me that the gas would not cause permanent injury.

I asked them to research further, and subsequently, they arranged for me to meet with Dr. Harry Salem, a top expert in toxicology, who is chief of the Life Sciences Department at the Edgewood Arsenal. He reviewed with me case studies which confirmed that it would not cause permanent injury.

Then the primary question I asked again and again during the ensuing discussion was: "Why now? Why not wait?" I asked about their food and water supply and was told that it could last at least a year or more. I asked that the information about the water supply be checked and doublechecked by observing the level in the water tanks. We explored but could not develop a feasible method for cutting off their water supply.

I asked my staff to have direct personal discussions by phone with the chief negotiator on the scene to satisfy ourselves that we had, indeed, reached an impasse in discussions and in negotiations. After a 2½-hour conversation, that seemed clear. I became convinced that short of allowing David Koresh to go free, he was not coming out voluntarily.

Given that unacceptable result, in light of the fact that he was such a dangerous criminal, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large or the Government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible injuries and attendant injuries and harm.

But we continued to deliberate; and in the course of our deliberations, we met with Gen. Peter Schoomacher and Col. Jerry Boynkin, former and present commanders of Delta Force, respectively, the Army's equivalent to the FBI's HRT, to review the plan. Their comments were instructive.

While indicating that the plan appeared to be sound, one suggestion was that rather than an incremental approach for the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously. I preferred the FBI ap-

cate that it might be going toward the compound, we would get a response from inside the compound, "If you come any further, we will blow those vehicles up."

The military loaned us Bradley fighting vehicles. We intentionally had the barrels removed from these vehicles so they did not present a threat, and offered us the safety and security to begin to maneuver.

On one occasion, David Koresh got on the phone and said that his people were very familiar with the military specifications of a Bradley vehicle and they had weaponry in there that could blow those vehicles 40 or 50 feet into the air. Upon hearing that, we went back to the military and they made available to us two M-1A1 Abrams tanks and also three M-60 combat engineering vehicles.

We initially showed the Abrams tanks to them to let them know, as the Director mentioned, that their Government had the capability anytime that we wanted to, we could drive right into that building. We didn't because we chose not to do that. We chose to try to find a way to peacefully resolve this.

We talked to David Koresh about sending out the children. His response was, "Children are like hostages, they can't think for themselves." He made all kinds of promises to us. I think if you will recall early on he agreed if we would allow him to make a 58-minute tape, that he would come out. He put a preamble to that tape and announced to the world that that is what his intentions were. He broke that promise.

And what we also learned when one of the people did come out, she told us that the plan was that Koresh was going to have handgrenades strapped to his body and come out and surrender to law enforcement on national TV, ignite the handgrenades, blow himself up and the law enforcement officers that were going to arrest him. We also heard about stories inside about where they were trained for three people to stand around a handgrenade to ignite it so all three people could be taken at the same time.

That is the kind of problems that we were dealing with as well as the kind of weaponry that we saw and knew was inside. So you can see over the 50 days we were not just sitting around thinking about what we were going to do or trying to negotiate with people. All of these vehicles were removed from that area to give us access to the compound.

One thing that we did every time we went to make a move, we would tell them ahead of time what our intentions were. Most of the time they would react verbally not to do it, but we did it anyway. And as the Director mentioned also in his statement, at the very outset we told them what the rules of engagement were. We referred to them as the rules of safety. We don't want anybody to get hurt, stay out of the windows, don't put guns in the windows.

Many times in the early days we could see them using their night surveillance opticals to watch us, and we saw weapon barrels come out of the windows. We didn't shoot them. We told them to take them back in, told them exactly where they were. What did they do? They resorted to recessed firing positions where they would darken out the background where you couldn't see them inside.

Mr. HIGGINS. That would be a guesstimate.

Mr. MAZZOLI. Within a 45-minute period, when this fire fight took place, is that—if I were watching a movie, would that be fire pretty steadily for 45 minutes or are they bursts that happen so quickly——

Mr. HIGGINS. It would be bursts, and then I am sure quiet, and bursts. Most police officers, in their entire lifetime, may draw their weapon but never shoot it. So you can imagine a 45-minute to an hour fire fight.

Mr. MAZZOLI. Let me move on to one quick thing, maybe to both of you. Unfortunately, this was printed upside down so I have to look through this thing, but it appears from the picture there and from this photograph that we have that there was a body of water in front of the compound.

Mr. SESSIONS. That is correct.

Mr. MAZZOLI. Because earlier today I asked Ms. Reno about the question of fire equipment availability, and someone said because of the fear of being fired upon, that the firefighters were not there.

But I see a pond of water which could have been maybe replenished or built up in a period of time, because this was called Apocalypse Ranch, which, of course, signifies a kind of apocalyptic end, which could very well be fire, even though we had not anticipated suicide here.

But my question, I guess, is: Was it contemplated that this could have been used for the purpose of being a firefighting pond?

Mr. SESSIONS. That is my understanding, Congressman Mazzoli, but I think Jeff Jamar can answer that because he talked to the chief and knew about the plan as its evolved.

Mr. JAMAR. They brought truck pumps with them to pump from that pond when they came, yes.

Mr. MAZZOLI. Maybe one final question, Mr. Clarke. I recall your saying here because they had the 50-millimeter ammunition, which has a range I think of some 3,000 yards, that people could not get too close, fire equipment could not be brought in for that fear. And yet, if I understand, you say you dismantled fences and were taking cars away right in the shadows of that place.

How did you do that and with what equipment? Was that when the Bradleys were brought in? Was that done by tanks?

Mr. CLARKE. Yes, Congressman Mazzoli, the Bradleys were brought in initially, and when we were informed by the military that the specifics of the Bradleys that we had, they would withstand .50-caliber ammunition—however, we were then informed that he had weaponry in there that could blow the Bradleys 40 or 50 feet into the air—we then brought in the M–60 tanks. They are actually combat engineering vehicles, and it was those vehicles.

Mr. MAZZOLI. That actually pulled away the fences.

Mr. CLARKE. Exactly. During the morning, we did take heavy gunfire, machinegunfire, and we believe .50-caliber rounds were fired that morning.

Mr. MAZZOLI. Was Koresh ever out jogging?

Mr. CLARKE. Excuse me?

Mr. MAZZOLI. Was Koresh ever out jogging?

Mr. CLARKE. Not from February 28 to April 19, he did not.

Mr. MAZZOLI. Thank you.

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Mr. HUGHES. Thank you very much, Mr. Chairman.

I, too, want to welcome Director Sessions and Director Higgins and their colleagues. I really have a great deal of confidence in the expertise of both agencies, so my questioning, like most of my colleagues, is not questioning their expertise. We are trying to learn from this experience.

Director Higgins, I have a number of questions insofar as the February 25 signing of the complaint and the issuance of the search warrant. My question is, the affidavit is replete with substantial evidence. I can't believe that that was just accumulated overnight. When was that evidence compiled?

I mean, there was an awful lot of evidence that goes back to 1992, which suggests that this cult was collecting a lot of ammunition, explosives, and firearms of all kinds.

Mr. HIGGINS. We began to collect the information in, I believe, June 1992 when we were notified by a local sheriff's department that they felt like the compound had received some possible explosive materials and other things. So we began to develop the information then. But what we were dealing with were parts as well as explosive materials that only become violations if you make something out of them.

Mr. HUGHES. I see. When did Bob Rodriguez go in undercover?

Mr. HIGGINS. January 5.

Mr. HUGHES. January 5. When were you able to confirm the information you had collected from neighbors and others that there was this horde of weapons in the compound?

Mr. HIGGINS. Without going into all the specifics, and I think Congressman Fish asked me if we had probable cause by February. Through the miracle of C-SPAN, I was corrected by the headquarters staff almost after it was out of my mouth.

We had a review in the headquarters office in December with respect to whether we had probable cause. We decided at that point we did not, so we continued to gather information. We brought people in from Australia, we got the undercover agent in, we interviewed any number of people, including neighbors. They are all in the affidavit so I won't repeat them.

Mr. HUGHES. When was it determined you had probable cause?

Mr. HIGGINS. I think it was the middle of February.

Mr. HUGHES. Middle of February. Press reports suggested that Bob Rodriguez came out and alerted the ATF to the realization that they had been tipped. Is that accurate?

Mr. HIGGINS. I wouldn't say what is in the press reports because I don't know of everything that has been reported there. As you can see in the affidavit, though, it indicates that he came out and reported some conversations. I have no quarrel with the accuracy. This is one of the issues that I said was going to be reviewed by the Department in response to an earlier question.

Mr. HUGHES. I understand it is going to be reviewed, and I don't want to do anything that is going to compromise your ongoing investigation. My only question is: Is that accurate?

Mr. HIGGINS. What is in the affidavit I think is accurate.

Mr. HUGHES. It is accurate. So you had information that they were aware of what was occurring.

I also understand that you had helicopters in the area, and they took fire before the actual raid. Any substance to that?

Mr. HIGGINS. No substance to that. The helicopters were there. They took fire simultaneously with the raid team.

Mr. HUGHES. There have been some suggestions that ATF agents were not fully briefed insofar as the nature and extent of the weaponry they were to confront, and that agents requested more firepower than their service revolvers, and that was turned down. Any substance to that?

Mr. HIGGINS. No substance to that, and specifically with respect to more firepower than revolvers. In fact, they had more firepower. They had shotguns, MP-5's, and other types of weapons that they had requested.

So the short answer to that is, the raid team planners developed a list of not only the equipment but the ammunition and weapons they needed, and all of those requests were provided.

Mr. HUGHES. I have received information also that when the agents mobilized in Waco, TX, you had 100 agents roughly, many in battle fatigues, and that the population saw this mobilization. It was the talk of the town. Any substance to that?

Mr. HIGGINS. We had a number of agents there. The agents who were actually part of the SRT's trained and stayed in Fort Hood and assembled the morning of the raid, and that was approximately——

Mr. HUGHES. What time was that?

Mr. HIGGINS. I will check and get it exactly. Approximately 8 that morning.

Mr. HUGHES. The raid was at 9:30?

Mr. HIGGINS. Closer to 10, I believe.

Mr. HUGHES. OK. I understand that the agents were using walkie-talkies which were being monitored locally. Any substance to that?

Mr. HIGGINS. No, we had a DES system, which is an encrypted secure system, so nothing to that.

Mr. HUGHES. There also was some information that has come to my attention that once the squad leaders were eliminated, there was no ability to communicate from squad to squad. Any substance to that?

Mr. HIGGINS. Incorrect.

Mr. HUGHES. That is not correct?

Mr. HIGGINS. Not true.

Mr. HUGHES. OK. Did ATF at any time consult with any psychological or psychiatric experts on mind control, cults or what have you?

Mr. HIGGINS. I would have to provide that. I can't say categorically whether we did or not.

[The information follows:]

ATF did not consult with any experts, psychiatric or otherwise, on mind control or cults. However, contact was made with the ATF S/A assigned to the FBI Behavioral Science Unit, Quantico, Virginia.

Mr. HUGHES. Was the Department of Justice in the loop at this point at all?

been able to confirm that any semiautomatic weapons were illegally converted to fully automatic weapons within that compound?

Mr. HIGGINS. I will have to take a pass on that. The search warrant has not been returned yet and the evidence at the scene is still being worked. When that is returned, I think it will be clear in terms of what was there, but I cannot comment in terms of specificity.

Mr. SCHIFF. Can you answer then generally, how difficult is it to convert a semiautomatic and legal weapon to a fully automatic and illegal weapon?

Mr. HIGGINS. Not terribly difficult, given the proper material and books. I could not do it personally, but I am sure with some time either one of us could easily.

Mr. SCHIFF. Mr. Chairman, thank you for recognizing me. I will yield back at this time.

Mr. BROOKS. Mr. Canady, the gentleman from Florida.

Mr. CANADY. Thank you, Mr. Chairman. I would like to follow up on some of the questions about the media policy of the AFT very briefly. I don't want to replow any ground there, but it wasn't clear to me, although I would assume that there is a written media policy.

Mr. HIGGINS. There is a written media policy and I think Congressman Hyde asked for a copy and we will provide a copy to the committee.

Mr. CANADY. I wanted to make sure if it had not been asked for that we would receive that.

I want to similarly ask for a copy of any written media policy that the FBI might have. I think that would be helpful, Director Sessions.

Mr. SESSIONS. I would be pleased to supply that.

Mr. CANADY. Thank you very much.

I would also like to follow up on an issue that was raised earlier about the timing of when you at ATF, Director Higgins, obtained probable cause to arrest Koresh. If I understood your testimony earlier, you indicated that it was not too long before the warrant was actually obtained.

I will tell you, quite frankly, that is at variance with information we were provided in a briefing by persons from your Department. It was my understanding, based on that information, that you had probable cause to arrest him in October.

Would you like to address that?

Mr. HIGGINS. I am not sure of what was said to you in the briefing, but we had a briefing at headquarters, and I believe it was in December, with respect to the probable cause that had been gathered to that point.

It was the decision of our Associate Director reviewing this, and that is who I got my information from, that he was not convinced we had probable cause to do that and asked we get more information. It went back out and we didn't get it until February.

So that is my best information from the person that was part of the information process. If we misled you in our briefings as to other than that, it was unintentional.

Mr. CANADY. So you feel quite confident there was not probable cause to arrest him any time prior to December?

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Mr. HIGGINS. David may want to expand on that.

Mr. CANADY. Mr. Troy.

Mr. HIGGINS. We have informed the committee on that once today.

Mr. CANADY. If Mr. Troy wants to address that, and it is certainly related to Mr. Watt's questions, and we need to make sure we are getting the straight story on that.

Mr. TROY. When you actually have probable cause to effect an arrest can vary greatly in any investigation, and of course we were working with the U.S. attorney's office to get probable cause that was satisfactory to them. We were also developing probable cause satisfactory to our own leadership within ATF.

In addition to that, we had a tactical plan that had to be developed to execute the arrest and search warrants which we had not yet done.

When you put those three together, it is very difficult to pin an exact date and say on this date we had probable cause. We can do that, but we may not have had the other issues in line to actually go forward.

Mr. CANADY. I understand that even though you had probable cause to obtain a warrant, you might not have had a plan together for storming the compound. I understand that issue.

But what I was trying to get to, and which I think is important, is, when you actually had what you needed to get a warrant to arrest him—because that I think is certainly related to whether some attempt should have been made at an earlier point when he was leaving the compound to actually remove him as the leader of that group. Maybe we would have seen a little different scenario following that.

I don't know that it might have turned out the same way. I think that is an issue we have to look at.

Mr. HIGGINS. The best information I had, that was given to me this morning, is that we didn't have it until mid-February, but I will get you the specifics.

Mr. CANADY. I appreciate that very much.

[The information follows:]

ATF first received information regarding Howell's activities on June 4, 1992, from Lt. Gene Barber, deputy sheriff, McLennan County, Texas. The original information received from Lt. Barber was eventually corroborated during June, July, and August 1992. Additional information was developed through interviews with prior members of the Branch Davidian cult and others who had been inside the compound. During this period when probable cause was being fully established the ATF S/A assigned the Vernon Howell investigation stayed in contact with the Assistant U.S. Attorney. As early as the latter part of November 1992, he was told by the Assistant U.S. Attorney that it appeared there was enough probable cause for a historical search warrant. However, ATF did not feel it had enough information to formulate a tactical plan and continued to pursue the investigation. One of the last pieces of information that supported probable cause was obtained on January 25, 1993, during an interview with former cult member David Block in Los Angeles, California. This information dealt with Block's conversations with cult member Donald Bunds, during which Bunds showed him computer drawings of plans for a machinegun and told him of Howell's request for Bunds to help in the manufacture of such weapons.

Mr. CANADY. Let me ask you something else now, Director Higgins. Do you know if there was a listening device placed in the compound prior to February 28 or if any attempt was made to place a listening device in the compound?

Mr. HIGGINS. No, there was not.

Mr. CANADY. Do you believe that the placement of a listening device in the compound might have helped facilitate the planning of the raid and the actual execution of the raid?

Mr. HIGGINS. It might have helped that, but it would have been contrary to the laws of the United States. To plant a listening device, we have to be able to show we cannot gather information in any other fashion and that the listening device is being used to do that.

We were able to gather probable cause following other law enforcement practices. So while I am not an attorney, my understanding is that we could not have used that device given the fact that——

Mr. CANADY. Let me ask you if it had been legal, would it have been helpful?

Mr. HIGGINS. It would have been helpful, especially on the day of the raid if the words, "they are coming, they are coming, and we know they were armed."

Mr. CANADY. OK. Thank you very much. Quickly I have one more question. How many and what governmental agencies were involved in the February 28 raid? I want to know who was involved in any way.

Mr. HIGGINS. We had—in addition to the ATF agents, we had representatives from the Immigration and Naturalization Service. I think there was one agent from the Drug Enforcement Agency. There were officials from the various, from the sheriff's department. I am not sure about Waco.

Mr. CANADY. What about the National Guard?

Mr. HIGGINS. The National Guard.

Mr. CANADY. Let me specifically ask you, when were officials of the National Guard informed about the impending raid and asked to participate?

Mr. HIGGINS. Dave may know the answer. I don't know the date.

Mr. TROY. I don't know the specific date. They were obviously contacted and made part of the raid plan but we would have to get the actual date for you.

Mr. CANADY. If you could provide that to us, I would appreciate it, and also detail their exact role and how many people they had involved in the operation.

Mr. HIGGINS. Absolutely.

Mr. CANADY. Thank you, Mr. Chairman.

[The information follows:]

On February 2, 1993, William R. Enney, Interagency Coordinator, Counterdrug Support, Texas National Guard, was officially notified and briefed on support needs for the upcoming raid.

Mr. BROOKS. Thank you very much.

Mr. Goodlatte, the gentleman from Virginia, is recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Gentlemen, I want to thank you for appearing today and also for the briefings that various of your deputies presented. You have been cooperative and helpful, and this is a difficult situation.

I do think that while the blame here clearly rests with Mr. Koresh, the response did encounter a number of problems. I am concerned about the communication between your agencies. And a

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The threshold question I asked was whether the gas would cause permanent injury to the children. I did not even want to consider the matter further if we could not be certain about this factor. The FBI assured me that the gas would not cause permanent injury. I asked them to research further, and subsequently they arranged for me to meet with [redacted] a top expert in toxicology, who is chief of the Life Sciences Department at the Edgewood Arsenal. He reviewed with me case studies that confirmed that it would not cause permanent injury.

Then the primary question I asked again and again during the ensuing discussion was "Why now? Why not wait?" I asked about their food and water supply and was told that it could last at least a year or more. I asked that the information about the water supply be checked and double checked by observing the level in the water tanks. We explored but could not develop a feasible method for cutting off their water supply.

I asked my staff to have direct personal discussions by phone with the chief negotiator on the scene to satisfy ourselves that we had, indeed, reached an impasse in discussions, in negotiations. After a two and a half hour conversation, that seemed clear.

I became convinced that short of allowing David Koresh to go free, he was not coming out voluntarily. Given that unacceptable result and in light of the fact that he was such a dangerous criminal, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large, or the government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible injuries and attended injuries and harm.

But we continue to deliberate. And in the course of our deliberations we met with [redacted] (sp) and [redacted] (sp), former and present commanders of Delta Force, respectably, the Army's equivalent to the FBI's HRT, to review the plan. Their comments were instructive. While indicating that the plan appeared to be sound, one suggestion was that rather than an incremental approach to use -- to the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously.

I preferred the FBI approach, which called for a gradual increase in pressure over time. It seemed to me that that would be best to ensure the safety of those inside. I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that as a result of the initial use of tear gas Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease operations. On the other hand ...

and his followers endangered the agents by firing upon them, they were authorized to return the fire.

To the great credit of the FBI, they received substantial fire from within the compound both at the vehicles and at sniper positions surrounding the compound without returning any fire. In fact, throughout the 51 day siege, the FBI never fired a single shot. Instead, when fired upon, the FBI responded by beginning to insert gas throughout the compound consistent with what the Delta Force commanders had suggested.

The commanders also expressed concern about the length of time the HRT had been on the scene in a state of constant readiness, and all expressed the view that the team would have to be pulled back for retraining very quickly if they were going to come back to the scene. All advised that there was not a substitute civil force that could secure the extensive area around the compound that had the expertise of the Hostage Rescue Team.

We continued deliberations. I wanted and received assurances that the gas and its means of use were not pyrotechnic. I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.

I also considered that Koresh had talked about suicide, and that might occur at any time under conditions that the FBI might be less likely to control. Experts, however, advised the Bureau that the chances of suicide were not likely, but I again emphasize that it was something that was considered, something that was considered that might happen at any point along the way, regardless of what the FBI did.

In considering the FBI proposal, I weighed the many concerns of the government with respect to the state of affairs

(MORE)

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NBC "MEET THE PRESS"
WITH HOST: TIM RUSSERT
JOINED BY: ED RABEL

GUEST: WILLIAM PERRY, SECRETARY, DEPARTMENT OF DEFENSE

SUNDAY, APRIL 23, 1995

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PLEASE CREDIT ANY QUOTES OR EXCERPTS FROM THIS NBC PROGRAM TO "NBC'S MEET THE PRESS."

MR. RUSSERT: And welcome back to "Meet the Press." With us now, the Secretary of Defense, William Perry, and joining me in the questioning, Ed Rabel, who covers the Pentagon for NBC News.

Mr. Secretary, welcome.

SEC. PERRY: Thanks, Tim.

MR. RUSSERT: A couple questions on Oklahoma City. Timothy McVeigh was a member of the United States military. What can you tell us about his background?

SEC. PERRY: I can't tell you much about it, Tim. He left the military about five years ago. We've turned his records over to the FBI. They have them, so when I tried to get a little more background information on it, I'm absent the records right now.

MR. RUSSERT: Was he involved in the Persian Gulf war?

SEC. PERRY: I don't know that for sure.

MR. RUSSERT: Was he honorably discharged?

SEC. PERRY: Don't know that for sure.

MR. RUSSERT: What about the Nichols (ph) brothers? They also were members of the United States military?

SEC. PERRY: I understand that also. We've also turned their records over to the FBI.

MR. RUSSERT: As secretary of Defense, is it troubling that there's so much discussion in the papers that these recently released erans are -- met in the military and are using some of their skills take part in these kinds of activities?

SEC. PERRY: The people who comprise these terrorist groups all over the world are not necessarily military. Some of them may have
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me from the military. They are generating their own military. This litia is making their own bombs and they're developing their own techniques, so I don't think you need -- I don't believe it is appropriate to couple the militia groups, the terrorist groups, with the U.S. military, and I very much resent any connection between the U.S. military and terrorist groups. The U.S. military, the U.S. Defense Department, is playing an important role -- not the primary role, but an important role -- in trying to counter terrorism.

MR. RUSSERT: In a letter sent to Attorney General Reno in October, however, it was stated -- and there was also a discussion in many publications -- that active duty personnel in the military are actively helping these citizen militias. Do you have any evidence of that?

SEC. PERRY: What soldiers do -- what military people do on their own time is not something we keep records of or maintain control of. We do not have, no -- but to answer your question, we don't have -- I don't have detailed records or information that suggest that point is correct.

MR. RUSSERT: In Michigan, part of the Michigan militia attempted to take over an armory which housed some old Russian tanks. What can you tell us about that?

SEC. PERRY: I don't have any background on that information,

MR. RUSSERT: Will the United States military be more involved in defending federal installations in the future?

SEC. PERRY: The -- the basic problem of a democracy of protecting itself against extremists without giving up its democracies is a very difficult one. The Defense Department, of course, is not the primary vehicle for doing this -- our law enforcement agency is.

We do play, as your question suggests, a supportive role. Our supportive role in Oklahoma City was not only in assisting in the relief efforts and the humanitarian efforts, but also assisting the law enforcement agencies. We do assist law enforcement agencies in many important ways, and I'd be happy to discuss that if you wanted to go into that.

MR. RUSSERT: Please.

SEC. PERRY: We have, for example, a logistics support. Our C-5s flew the crime labs out to Oklahoma City, and we have very substantial logistics support being used in support of both the FBI and the FEMA.

The FEMA, by the way, is doing a magnificent job working this. We have 500 Defense Department personnel in Oklahoma City today, as we ak, including 300 from the Oklahoma National Guard. They're king in search and rescue, they're working in medical relief. But

In the law enforcement, which is the thrust of your question, we have ovided surveillance equipment and we will continue to provide rveillance equipment -- not only as dealing with the investigation after the fact, but in trying to find ways of preventing -- equipment within the laws. There are very strict laws controlling how that can be used relative to U.S. citizens.

And then there's a very important -- very important -- unique role in the Defense Department in preventing the weapons of mass destruction from getting into the hands of terrorists. Nuclear weapons, biological weapons, chemical weapons. Defense Departments all over the world make those weapons and therefore they have a special role in trying to prevent them from getting into the hands of terrorists.

MR. RUSSERT: The United States military was also involved in the planning of the raid in Waco two years ago, is that correct?

SEC. PERRY: We provided technical assistance and equipment to law enforcement agencies in that one, yes, that is correct.

MR. RUSSERT: Is there any indication that this is something more than a domestic terrorist group? Have you sensed any linkage or sponsorship by any foreign government thus far?

SEC. PERRY: I'm not aware of any such linkage, Tim.

MR. RUSSERT: Let's turn --

SEC. PERRY: The FBI is pursuing that, along with many leads, but I am not aware of that linkage.

MR. RUSSERT: Assuming that this particular incident was the result of the sickness of domestic terrorists, there continues, however, to be a threat of international terrorism. How serious is it?

SEC. PERRY: I regard that as one of the more serious security threats facing the nation today, particularly if the international terrorists are able to get their hands on the weapons of mass destruction, as I mentioned earlier, and one of the particular and very specific actions that the Defense Department has taken is trying to keep those weapons out of the hands of terrorist groups -- a very difficult and a very challenging task.

MR. RUSSERT: I am told that in Pentagon planning, we assume that over the next decade a terrorist group will have the capacity and will, in fact, detonate a nuclear weapon. Is that true?

SEC. PERRY: We have contingency plans for many, many different events. That's one particular contingency plan we've studied to know t we can do, first of all, to help prevent it, and what we can do react to it that happened.

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Creation Date : 04/27/95 17:19

From : [redacted] -1

To : [redacted] -2

Subject : Inquiries on Waco/Paramilitary Groups

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[redacted] came by to give us a heads up that JTF-6 and DEP&S have received several media requests on military support to the FBI/ATF Waco operation. He has cautioned people in his office not to represent that JTF-6 support constitutes all of the military support provided. He told them that any comprehensive response should be coordinated with the Army. I told him that DAMO-ODS and NGB would be aware of other support. Apparently there have also been inquiries about a possible JTF-6 buildup for activity against paramilitary groups. Of course, JTF-6 has responded that it has no involvement with these groups.

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22

ACTIVITIES OF FEDERAL LAW ENFORCEMENT AGENCIES TOWARD THE BRANCH DAVIDIANS (PART 1)

JOINT HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIME

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

AND THE

SUBCOMMITTEE ON
NATIONAL SECURITY, INTERNATIONAL
AFFAIRS, AND CRIMINAL JUSTICE

OF THE

COMMITTEE ON
GOVERNMENT REFORM AND OVERSIGHT

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

JULY 19, 20, 21, AND 24, 1995

COMMITTEE ON THE JUDICIARY
Serial No. 72

Printed for the use of the Committees on the Judiciary and Government Reform and Oversight

U.S. GOVERNMENT PRINTING OFFICE
24-809 WASHINGTON : 1996

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-053425-9

beyond that, and talk about removing and destroying files, and that, to me, is somewhat unusual.

(1) Mr. [redacted]. Yes, sir, I think it is. I will note for the record, that as far as I have been able to determine, Treasury has not lived up to the promise to correct the personnel records to reflect the settlement. But leaving that aside, the insistence, by Treasury, on removing these files from the public record, was either unique or rare in the process before the Merit System Board.

(2) Mr. [redacted]. That is my understanding.

(3) Mr. [redacted]. I have limited experience, and I will tell you, I had never heard of doing that, taking a file that had been made a part of a public record in court. Ms. [redacted] is a former judge with the Merit System Board, and I am looking at her, to make sure I am being accurate here. This is, I think, unheard of by her, in several hundred, or even several thousand matters that the Board has considered. (5A)

(5) Mr. [redacted]. Mr. [redacted], I believe your time has expired.

(6) Mr. [redacted]. Who insisted, at Treasury, on that?

(7) Mr. [redacted]. I would just call it rather a monolith. They were just the other side, Mr. [redacted], and they would not settle with us without it, and we did not feel that it was worth fighting with Treasury in order to get our guys back to work.

(9) Mr. [redacted]. OK. I thank the witness, and I appreciate the chairman's indulgence. (11)

(10) Mr. [redacted]. Mr. [redacted], you have 5 minutes.

(13) Mr. [redacted]. Thank you, Mr. Chairman.

I would like to ask Mr. [redacted], we have heard a great deal of information and insinuations in the last few minutes, the last couple hours, about you and your colleagues made up the possibility of the existence of a meth lab in order to justify not having to pay for the support of the National Guard for the helicopter.

You have heard some of this. I am shocked, if that is the case. Let me ask you some specific questions about the possibility of the meth lab.

Did you simply make up the idea of the drug nexus to get support without paying for it?

(14) Mr. [redacted]. I had, first of all, I had nothing to do with that, and I absolutely made up nothing about a drug lab. In fact in our preparations for the raid, we were taking into consideration the possibility that there would be a drug lab, and had DEA agents standing by at the command post to come in, if the lab was found.

(15) Mr. [redacted]. So your men had prepared themselves with whatever equipment, because there are some chemicals that you have to deal with, and so on, and so forth?

(16) Mr. [redacted]. Not specific equipment, but we did discuss the possibility of it being there, and the cautions that need to be taken in the event that a meth lab, a dismantled meth lab was located.

(17) Mr. [redacted]. May I respond to that?

(18) Mr. [redacted]. Yes, sir.

(19) Mr. [redacted]. We felt that the potential existed for a meth lab to be there. Historically, everybody's aware that there had been the components for a lab back in the late 1980's. [redacted] contended that he was going to give that back to the sheriff's department. (19A)

(20) [redacted], the investigating
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(21) Mr. [redacted]. So when you say he w
standing by at?

(22) Mr. [redacted]. The DEA supervis
in Waco, and his people were standin

(23) Mr. [redacted]. I want to go back——

(24) Mr. [redacted]. Can I add a little mor

(25) Mr. [redacted]. I am sorry. Mr. [redacted] (26)

(27) Mr. [redacted]. The information—yo
and explosives investigation. All this
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court records from Michigan that were
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the compound, and he had a—he was t
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(28) Mr. [redacted]. I would like to get back

(29) ask Mr. [redacted] to respond to this, t
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David Koresh con-
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Davey Aguilera, the investigating agent, checked with the sheriff's department and found that no such incident had occurred.

At least one of the receipts that Davey found in his research of things that were coming into the mag bag, into the compound, included a list of assorted glassware and chemicals that he thought might be precursor chemicals. He passed that information to DEA.

At the time of the raid on February 28, we had a DEA lab team supervisor on board in the command post. His lab team was standing by for a call in case we did find those kinds of chemicals or a lab, so that they could take over that very sensitive area of making that area safe while we began our search of the premises.

Mr. CONDIT. So when you say he was standing by, where was he standing by at?

Mr. CHOJNACKI. The DEA supervisor was in the command post in Waco, and his people were standing by at their office, I believe.

Mr. CONDIT. I want to go back——

Mr. SARABYN. Can I add a little more to that.

Mr. CONDIT. I am sorry. Mr. Sarabyn.

Mr. SARABYN. The information—you know, this was a firearms and explosives investigation. All this information about the meth lab came to us from other people in affidavits, there were some court records from Michigan that were about this. All this information, you know, came to us. There was nothing that we sought out.

There was another individual, Mr. Butler, who was a resident at the compound, and he had a—he was there from 1990, or 1992, and he had an amphetamine conviction. He got 3 years.

And you know, a lot of times some of the conversation with the military today, they talked about, "We might have not have been addressing it like a lab case." They work with DEA all the time, and when they are working with DEA, they are focusing on the meth lab because that is what the whole case is about.

Our case was a firearms and explosives case. We were aware it was there, we were taking preparations, but never were we investigating this.

It just turns out the information just kept coming out from ex-Davidians, or whatever, and when they asked us what is there, we just turned over, you know, their criminal histories or the affidavits.

Mr. CONDIT. I would like to get back to that, but I would like to ask Mr. Chojnacki to respond to this, to the planning. Besides the dynamic entry, what other options were considered? Why were the other options rejected, and what would you do different today?

Mr. CHOJNACKI. We had probably considered any gamut imaginable. Some of the people that were on the planning committee came to me afterwards, and said that they were surprised at how much latitude I gave them to free-think the different kinds of techniques that we might exercise.

We had talked about waiting for the arrest warrant to be approved, and trying to take David Koresh off at some other location.

I have heard testimony earlier regarding that kind of scenario, and one of the things that we considered very strongly in that area was that if we had him in our custody, while we still had him in our custody, if his people found out, because of his supporters, who

down the lab. The DEA supervisor was there to initiate that action, if it was actually there.

Mr. BUYER. DEA-certified. The question is OSHA-certified. So you are not OSHA-certified to take down a meth lab. Mr. Sarabyn, are you?

Mr. SARABYN. No, sir.

Mr. BUFORD. I am certified to execute a warrant, secure the premises, and call in the OSHA. I have taken the DEA training on how to secure the area prior to the OSHA team coming in.

Mr. BUYER. With regard to some of the testimony of other witnesses about the dynamic entry and if there is a meth lab, you don't go in shooting, and the concerns, was that talked about in the planning, the tactical planning stage? Yes.

Mr. BUFORD. Yes, sir. Only briefly, because this was a firearms investigation. The meth lab was very secondary and we don't normally investigate meth labs.

It was my understanding that if there was, in fact, a lab there, it would be dismantled and we were taking all precautions. Our agents have had the training. If they saw something that looked like a meth lab, they know to isolate that area and secure it until the proper people can get there.

Mr. BUYER. Were the three of you present in Houston at this meeting when the medic who testified, the panel before us, said that he wrote this paper on how to take down a meth lab, Sergeant Fitts? Were the three of you present at that meeting?

Mr. SARABYN. I was present at that meeting.

Mr. BUYER. Did you receive that report from him?

Mr. SARABYN. No.

Mr. BUYER. You did not?

Mr. SARABYN. Like I said, they normally work with DEA and the whole focus of their search warrant is to get the lab. So when they are working to get assistance, they plan it out. They go through it.

We made all our agents aware that it was there. You know, there are a lot of things volatile. We were going for explosives, also.

Mr. BUYER. Right.

Mr. SARABYN. So obviously, they have to be very careful when they come on that and deal with it. But, we had the people standing by to assist us with that.

Mr. BUYER. All right. Mr. Merletti, are you familiar with any documents out there, that you found in your investigation, with regard to the meth lab?

Mr. MERLETTI. Sir, in our investigation, we did find that there were two DEA agents requested to be at the command post. They were there.

Mr. BUYER. OK.

Mr. MERLETTI. And two others were on call.

Mr. BUYER. All right, that is helpful to me.

The ATF special response teams came from three separate cities, is that correct?

Mr. MERLETTI. Yes, sir.

Mr. SARABYN. Yes, sir.

Mr. BUYER. Had they ever worked together before? Had the response teams worked together?

Mr. CHOJNACKI. The response tea
previous investigations, a few year
Division and the Houston Division
gether in a massive arrest and raid
SRT's at that particular time.

Some of the teams do train toge
training, I think it is usually two
gether to get accustomed to working

Mr. BUYER. All right, I see that
this.

Mr. MCCOLLUM. Thank you very n
I think, Ms. Slaughter, you are n
your 5 minutes?

Ms. SLAUGHTER. I would, thank

Gentlemen, first, I want to say h
and I am continually proud that y
when their Government asks them
and put their lives on the line, that

Mr. Buford, I would really like t
I really just want to let you talk.
here yesterday. Witnesses talked a
you wore and the kind of equipmen
ing it was greatly overdone. And a
there were just paperweights.

I know you made it into the wind
der if you would tell me about the e
and whether or not you even found

Mr. BUFORD. The equipment we
couple—I don't know if ma'am is t
I am from the South. That is what I

Ms. SLAUGHTER. Me, too.

Mr. BUFORD. I have a helmet here
rier that were actually used.

Ms. SLAUGHTER. I would like to s

Mr. BUFORD. I would like to show

Ms. SLAUGHTER. I would like to s

Is it the same equipment, Mr. Bu
killed were wearing?

Mr. BUFORD. The vest that I am
of the Texas Rangers has the helm
and, hopefully, he will have that in

Ms. SLAUGHTER. OK.

Mr. BUFORD. But, we wore a sta
safety goggles, that are to protect
might come along. We wore no K
Balaclava, the ski masks, as many
is just an absolute lie on their part.

We wore the level 3 body armor,
tion. Many of us had ceramic shock
take a high-velocity round, and ov
which plainly identifies us as ATF

The vest itself, this is a level-3
sponse teams use a vest that is lar

17TH STORY of Level 1 printed in FULL format.

JUNE 27, 1995, TUESDAY

SECTION: CAPITOL HILL HEARING

LENGTH: 17557 words

HEADLINE: SENATE JUDICIARY COMMITTEE MEETING
TOPIC: THE DEPARTMENT OF JUSTICE
COMMITTEE CHAIRMAN: SENATOR ORRIN HATCH (R-UT)
WITNESS: ATTORNEY GENERAL JANET RENO
226 DIRKSEN SENATE OFFICE BUILDING

BODY:

(Note: Coverage will begin with Attorney General Reno's testimony.)
ATTY GEN. RENO: Mr. Chairman, members of the committee, it's a great pleasure for me to be back here again, and I thank you for the opportunity to discuss with you the progress that we have made in the Department of Justice over this past year since our last oversight hearing last July.

I am proud that the department has a strong record of accomplishment in meeting the challenges it faced in the past year, and I'm confident that, with your help, that we can continue this record of success in law enforcement and program implementation, not only doing it as we have, but doing it together as best we can.
As you know, Mr. Chairman, just a few weeks ago I had the pleasure of traveling to your home state to attend a tribal justice conference in Salt Lake City. I was deeply impressed with your participation and your concern for the issues at hand. Fundamentally, it is our ability to listen and to respect one another's point of view that will lead to success. It's worked before. It was so evident in the good spirit that we both felt in Salt Lake City, and I know we will continue down this path, for in the end, we all need to work together in a bipartisan effort to confront the challenges before us.
Let me briefly address what we've been doing at the Department of Justice to meet these challenges. Nothing in the department's purview is more important than fighting our nation's crime and violence problem. As I have told this committee before, effective law enforcement responses to violent crime and drug trafficking demand constant coordination and interagency collaboration. At the federal level, as I testified last year, we are working successfully to end the turf wars that have plagued law enforcement for too many years, and I appreciate your kind and thoughtful comments about that effort.
The department is also moving to better assist state and local law enforcement in the fight against crime and violence in our communities.

The strength of this growing partnership, I believe, may best be exhibited in the results we are beginning to see from our anti-violent crime initiative, begun just over one year ago and in operation in all 94 districts. Through this initiative, we worked in genuine partnership with state and local law enforcement, implementing strategies developed at the local level to target the

worst offenders and effectively address the particular area's violent crime problems, including gun crime, rural crime, and violent drug gang activity.
In just this first year, we have seen greatly encouraging results, such as the dismantling of a violent drug gang in Louisiana. There eight gang members were tried in federal court, and another 35 pleaded guilty in state court to drug charges. The neighborhood, which had been terrorized by this gang, experienced a 34 percent decrease in violent crime. And this was a partnership. It didn't make any difference where the cases got tried. It was what was in the best interest of the case in that community.
As you know, since the department's last oversight hearing before this committee, the bipartisan Violent Crime Control and Law Enforcement Act was enacted. This historic piece of legislation, strongly supported by every major law enforcement organization, enacted critical elements of President Clinton's legislative anti- crime program, including federal assistance of unprecedented scope to expand community policing, increase prison space for violent offenders, support drug courts, end violence against women, and help stop crime before it starts.
The department has been implementing this act in a non- bureaucratic and nonpartisan fashion. We have tailored much of our implementation toward the needs of state and local law enforcement. The cornerstone of the act is the president's community policing initiative that will put 100,000 new police officers on the streets to work directly with citizens in the community to reduce and prevent violence.

By cutting through the red tape, by simplifying the process, we already have been able to send notices of awards to more than 6,500 communities across this nation to help them hire nearly 17,000 new police officers. For example, our COPs applications forms for small towns and cities was, as Senator Biden indicated, only one page long so that local sheriffs, small town chiefs would be encouraged to apply. In the coming year, we will continue our implementation effort, and plan to fund 21,000 additional officers, bringing the total for two years to approximately 41,000 new officers hired under the crime act.
The department is committed to being a full partner with state and local governments in the fight to curb violence against women. We've already awarded over 426,000 Violence Against Women grants to almost every state and territory in the country.
An integral part of last year's crime law is the state prison grant program. By this year's June 1 deadline, 89 applications have been received from 38 states for boot camp grants under this program. Future funds will be available to assist states in expanding correctional facility capacity to ensure adequate space for confinement of violent offenders.
The '94 act also includes many important reforms in federal criminal law, including creation of a death penalty for the most heinous crimes; a "three-strikes-and-you're-out" law to incapacitate permanently the most incorrigible, serious, violent offenders; a ban on assault weapons; and other measures to combat firearms violence, violence against women and terrorism. We are vigorously enforcing and otherwise implementing these measures throughout the country.
We are also working to implement the department's drug court grant program, which will hold offenders accountable and expand the availability of this critical link between criminal justice system and effective treatment, which has already proven successful in combatting drug crimes.
Crime prevention is a necessary component of a balanced, comprehensive approach to fighting violent crime in America. The crime law's crime prevention programs

are strongly supported by police, prosecutors and members of both parties, who are working at the local level, who realize that more prisons alone are not the answers to the crime problem facing this country.

Combatting the threat of terrorism on American soil or against Americans is one of the highest priorities of the department. Terrorist activities have claimed an increasing number of lives over the past decade, including those lost in the World Trade Center bombings, the murders outside CIA headquarters and, of course, Oklahoma City. The tragic events of April 19th should remind us that we must never forget that terrorism can strike anywhere and at any time. At the same time, we must do all in our power to prevent such an event from happening again.

Unfortunately, in our open society terrorism is always a possibility. However, there are steps that can be taken and must be taken to provide the department with the personnel, the infrastructure and the equipment needed to detect future terrorist events when they are in the planning stage, or to aggressively investigate and prosecute them if they manage to go undetected. Indeed, the coordination I speak of will only work if we have the resources to pursue and analyze the leads.

To meet future threats of this nature, President Clinton presented to the Congress and the nation a comprehensive and carefully considered program to combat domestic terrorism, to be combined with an international terrorism package he previously submitted to the Hill before the bombing. Through your efforts, Mr. Chairman, Senator Biden, and other members of this committee, as you acknowledged, the Senate has recently passed the terrorism legislation that included most of the president's terrorism package. We greatly appreciate your support, and it was a great opportunity to work together in a thoughtful and bipartisan manner.

Unfortunately, social and economic disruptions stemming from violence and drug abuse continues to plague our country. Although overall drug abuse has declined significantly since the 1980s, we are beginning to witness, as you noted, the development of two disturbing trends -- increased drug use and the perception of danger among the young and increased heroin use, eased by the availability of smokable heroin. We have continued our efforts to attack international and domestic drug trafficking organizations that fuel the violence in our streets and engage in this trafficking.

We are simultaneously fighting three equally dangerous enemies: the Cali cartel, heroin traffickers from Asia, and violent domestic drug gangs. On each of these fronts, we are working with federal, state and local enforcement agencies to identify and dismantle these drug trafficking organizations. As we attain successes against these dangerous enemies, we are attentive to those who would seek to replace them and are poised to devote investigative and prosecutorial resources to address emerging enemies.

We have eliminated so much of the duplication and overlap among the department's investigative agencies. Another example of improved coordination we have already seen is our strategy on the Southwest border, an area of the country that has not received enough attention in the past. Today the FBI, DEA, Border Patrol and Customs are working together with the relevant U.S. attorneys' offices and the Criminal Division in a coordinated initiative to target the major organizations responsible for importing the greatest amounts of cocaine and other drugs across the U.S.-Mexican border.

As we continue to enhance our investigative and prosecutive efforts, we must be

aware of their effects on the prison system. One of the Bureau of Prison's major objectives is to continue to expand prison capacity to keep pace with projected population increases.

I promised this committee two years ago that I would tackle immigration as a serious priority, and I believe I am keeping that commitment. Just recently, I testified before this committee on the progress we have made on this front. The consistent bipartisan support from this and the Appropriations Committee for our enforcement strategy and immigration initiatives have enabled us to increase the number of Border Patrol agents by 40 percent since 1993, and for the first time to equip them with new technology and support so they can do their jobs effectively.

We are the first administration to reimburse states for the costs of incarcerating undocumented aliens. We are working cooperatively with states and localities to verify eligibility for benefit programs of 126 agencies at over 2,000 sites nationwide, and we have nearly tripled the number of criminal alien removals. While we have some differences, I am pleased that the bill approved by the Immigration Subcommittee adopts so much of the enforcement strategy encompassed in the administration's immigration bill, and we look forward to continuing to work with you on this effort.

The administration is committed to the goal of expanding opportunity for all Americans in education, employment, and the economy generally.

There will be no retreat from that commitment. That is why it is imperative that we enforce the civil rights laws of this nation in a fair, firm way, to eliminate discrimination.

Those who question whether discrimination still exists in America need only look at the recent case the civil rights division brought against the Denny's restaurant chain. A situation where a group of secret Service agents, people who put their lives on the line to protect the president, were denied service at the restaurant because they were African-American. Civil Rights Division is addressing discrimination on every front, attacking housing and lending discrimination is a high priority. A record number of new cases under the Fair Housing Act were filed in 1994, and that number will be exceeded this year. Enforcement of the requirements of the National Voter Registration Act has already, since January 1 of this year, resulted in the registration of 2,000,000 new voters. Full implementation of the Americans With Disabilities Act is also important. We have sought to foster voluntary ADA compliance through a toll-free information line, letters and technical assistance guides, and the distribution of question and answer booklets. We have also sent a clear message to those who would commit fraud against the government that we're going to catch you and when we do we will make you pay. This is no more evident in our commitment to reduce health care fraud.

In the last year the Department has taken numerous steps to strengthen our efforts against health care fraud at both the national and the local levels. Our new joint enforcement effort with HHS, Operation Restore Trust, will target fraud in home health care, nursing homes, and the ancillary services in five states.

We're committed to encouraging full use of the Keytam (ph) provisions of the False Claims Act, and we have worked with Senator Grassley over the last year on this important measure. The environment and natural resources division enforcement of numerous environmental laws has upheld our obligation to be stewards of our land and resources for future generations, to level the playing field for all enterprises so that we can eliminate the false choice between the sustained environment and economic advancement, and that we create a sense of

community that makes clear our environmental resources are a shared commodity that we can all rely upon and must respect. Enforcement of our environmental laws has resulted in compliance and corrections of violations, prevention of future harm and hazardous waste cleanup.
A revitalized Antitrust Division has engaged in sound enforcement of the antitrust laws in order to protect competition and consumers in increasingly international and technology-driven markets.
The Tax Division has developed an impressive record of pursuing tax debts owed to the United States and defending the government against unwarranted claims.
On the vital matter of filling judicial vacancies, I commend Chairman Hatch and the whole Judiciary Committee for the work you have done so far this year. In my regular meetings with members of the Judicial Conference, they consistently remind me of the impact of vacancies on the nation's criminal and civil justice system. I know that we can continue to work together to keep up the pace and prevent justice from being hampered by critical judicial vacancies.
This is only a brief summary of the progress we have made in the last year. I believe this is a record of which we can be proud. There is, of course, much more to be done, and I look forward to working with each one of you to build upon this record.
Thank you, Mr. Chairman.
SEN. HATCH: Thank you, General. We'll have -- we'll allow 10 minutes for questioning to each senator.
And perhaps I can begin by just asking, the recent indictments of former Justice Department -- of a former Justice Department official and several other defense attorneys who were formerly assistant U.S. attorneys deeply troubles me, and I think many others throughout our country. It saddens me that former Justice attorneys could be accused of violating the law.
And as you know, we in Congress and many individuals in our stance have certain restrictions placed on us that limit our ability to lobby shortly after we leave Congress. Now, could you discuss with us whether the department has in place any policies to restrict its attorneys' ability to leave the department and then represent individuals or organizations that he or she once investigated?
ATTY GEN. RENO: There are clear, strict provisions in place to prevent a conflict of interest. But more importantly, there are, of course, clear laws in place that prevent a violation of criminal law.

SEN. HATCH: Right.
ATTY GEN. RENO: We will continue to review these laws to make sure -- and these regulations that prevent any conflict of interest or appearance of conflict, and do everything we can to ensure that the real privilege of serving a very great department is not abused by anybody.
SEN. HATCH: Well I think that's good because it concerns me. In fact, I'm concerned on the other side of that equation, too, that here you have criminal defense lawyers who are being indicted, who certainly have a right to represent those who come to them, and those who come to them have a right to be represented under our Constitution. So I'm really concerned. And, of course, not knowing the facts, I have to say that I'm concerned both ways on that issue.
ATTY GEN. RENO: Well, I can only comment by saying we have reviewed the matter very carefully and have tried to do everything we could to make sure that it was based on the evidence and the law.

SEN. HATCH: Sure. I'm sure you have. And I have confidence in your efforts in that regard.
General, casual drug use did decline dramatically through the 1980s and into the

early 1990s. And over the past two years or so, however, almost every available indicator shows that these gains have either stopped or have been reversed, particularly as they apply to young people. Now could you comment on to what do you attribute this reverse in the earlier downward trend that now seems to be going up -- upwards?

ATTY GEN. RENO: I think it's important, because as drug usage went down, what did go up at the same time was violence in this country, and trying to understand this emerging pattern of drug abuse with violence as well is a complicated issue that I think we must address together.

I think it is important that we reaffirm our commitment to education and prevention strategies. And the president has done that. I think it is very, very important that we do everything we can to give our schools, through the Safe and Drug-Free Schools Act, the tools to educate our children about the danger of drugs. And I hope that we will not retreat from that effort.

At the same time, what we have tried to do, in terms of drug enforcement, is recognize the havoc, the violence that it spawns. And through that initiative, the FBI, working with the Drug Enforcement Administration in our anti-violence initiative and through the DEA (METS ?) program, which is a mobile enforcement effort aimed at violence in particular cities, have come together to work with local law enforcement in what has been a very successful effort to rout out these violent drug gangs that contribute so much to violence in our community. And we are continuing that effort as well.

SEN. HATCH: Well, thank you. We think that it's a combination of prevention programs and tough law enforcement that needs to be determined.

I was interested in the Supreme Court's case yesterday, which was somewhat surprising to me, where Scalia and five others basically ruled that there could be a urinalysis of athletes, at least, in the middle and high schools. And I think it's a kind of an indication the court feels this is a big problem in our society and we have to do more about it. ATTY GEN. RENO: Well, as you know, we argued that case successfully.

SEN. HATCH: Yeah, I understand -- (chuckling) -- and I'm proud of you for doing so.

ATTY GEN. RENO: But with respect to your comment --

SEN. HATCH: Yeah?

ATTY GEN. RENO: -- on drug enforcement, what troubled me so much when I came to office with drug -- the drug enforcement initiative is that the DEA and the FBI weren't really working together.

In too many instances, they weren't working with state and local law enforcement. The DEA might be concentrating on a drug kingpin, but then we couldn't get him extradited.

What we have tried to do is develop a comprehensive, vigorous law enforcement initiative that focuses on the kingpins. And we have seen recent results of that effort in Colombia, with the arrest of a major figure in the Cali cartel by Colombian authorities.

We have focused in the Far East, because we are concerned about this heroin problem and we want to make sure that we work together with all concerned -- with the State Department, with other agencies -- to make sure that we follow up on the efforts that have already proven successful to date with the arrest of certain of those involved in the heroin trafficking coming out of Southeast Asia.

And in our initiative on the Southwest border, that's another example. I found, when I came to office, that Customs was doing one thing, DEA another, and the FBI another. We now have a comprehensive enforcement effort on that border.

I'm so proud of what DEA has done, for example, in New England, where they looked at the distribution networks and are working together again with state and local law enforcement.
So I share your concern that law enforcement continue to do everything it can in a comprehensive and coordinated way, both to deal with the traffickers abroad, but then to disrupt the networks that distribute it in this country and then to go after those violent gangs that are involved in drugs, but that spawn the violence which is so terrifying our community.
SEN. HATCH: Well, I want to commend you for your leadership.
And those who do lead the FBI and DEA and Customs -- I think they are coordinating as well as they ever have. And I personally have great admiration for the leaders of those organizations, as you know.
Now General, we've had some exchanges about various indicia of federal law enforcement activity. In my opening statement, I mentioned a decline since 1992 in the number of defendants prosecuted by the federal government for federal narcotics offenses. And although there have been a lot of victories too and a lot of good things that have been -- that have occurred, could you comment on the significance of those figures? I pointed them in my opening remarks that -- (audio break) -- do you have -- could you just comment on that and tell us what you think is going on there?

ATTY GEN. RENO: One of the most disturbing things I learned when I came into office was that too many people played a numbers game. Agencies did their evaluations based on the number of cases brought, too often without consideration as to the nature of the case, whether it was a major case or whether it was a minor single-defendant case. I've even heard comments from some who were involved that numbers towards the end of the fiscal year were given attention so as to make situation look good.
One of the thing I have tried to do in my entire experience in law enforcement is never get caught up in a numbers game, but instead to focus on a results game and try to figure out what is in the best interest of the case, the crime problem, and the community where we're focused.

I have tried to do everything I could to avoid turf battles and credit grabbing, and as an example, in the Louisiana case of which I spoke, that's an example where some cases were better and more appropriately handled in state court and with a conscious, coordinated decision with local authorities we made those judgements. We could have taken those cases and added to our numbers, but that's not in the best interest of the people in the Western district of Louisiana.
Another feature that we've discovered, and I've discovered it even in my home jurisdiction. I used to transfer cases to the U.S. attorney's office, because I could get a larger amount of prison time for armed career criminals. I'm told now by the U.S. attorney and by the state attorney in Miami that there are more prison spaces available under the state system because of state construction and now that in many instances the state attorney is preferring to take the case because she can get the equal time.
We're trying to do it, again, based on what's in the best interest of the case. Instead of taking five little cases we're trying to focus on the drug gang, the violent drug gang, the violent gang, and take out the whole gang in a comprehensive way.
I think we've done a good job of trying to address the problems without getting caught in a false numbers game. We're getting stiffer sentences, we have increased the number of life sentences dramatically over these past two years,

and we're trying to focus on those that are at the heart of the crime problem in this country.
SEN. HATCH: Well, thank you. Let me just point out that one of the things that worried me is -- in discussing this with drug czar Lee Brown -- he told me -- he quoted court personnel from some judicial districts who believed the decline of prosecutions was the result of, quote, "The policies of the new U.S. attorneys who de-emphasize the prosecutions of small scale drug offenders." Unquote. I hope that's not the case, but that's something I just wanted to bring to your attention and hope that you can follow up on.
ATTY GEN. RENO; What we are trying to do, if the small drug case can better be handled in state court --
SEN. HATCH: You'd do it there.
ATTY GEN. RENO: You do it there. If we can handle it better in federal court, we do it there. But the important thing is that we focus federal resources in a combined effort with local government at efforts that cross district lines, that cross jurisdictional lines, that involve violent gangs and that we do it the right way.
SEN. HATCH: Well, thank you. My time is up.
Senator Biden.
SEN. BIDEN: Thank you very much, Mr. Chairman. General, as happy as I am with the way you've run your department, and I think, the way things are moving, I must say -- and for another hearing,just so I don't -- not be misunderstood, I do not think the administration's effort on drugs has been as robust as it should, to use a Washington-type phrase. In other words, I don't think the job's being done like it should. I don't see -- doesn't seem to be an overwhelming interest on the part of the administration to deal with the drug problem, but then again I've been here for six presidents, I've not found one who wants to deal with the drug problem.
But let me say one thing at the outset before I go. I know you don't like the numbers game but if you take a look at the chart up there you will notice that what -- (Audio break) --

If I get a second round, I'll go back to those things.
But I'd like to focus on something that I think you are doing a phenomenal job on, and quite frankly, I'm worried that the Congress may inadvertently or advertently undo what you have begun. Two weeks ago, the House Appropriations Republicans offered this preliminary so- called 602-B allocations of discretionary dollars to the appropriating subcommittees in the House. And as you know, General, this is the first step in the appropriations process, giving each appropriations subcommittee for the public at large sort of a bank account which that subcommittee will have to spend in each of the departments it has jurisdiction over, such as the Justice Department and each of the programs that fall within the Justice Department, such as the FBI, that are within a subcommittee's jurisdiction. So this is sort of the first sign of where the majority party, whether it's Democrat or Republican, and obviously now it's Republican, plans on going.
All the authorization bills are great. All of that's wonderful. We can all talk about how committed we are. Budget resolutions are fine. They don't mean a thing. What really matters is when you get down to the Appropriations committee and the chairman allocates these 602-B allocations. This means you, as the subcommittee chairperson of the committee that has jurisdiction over the Justice Department, gets a dollar amount, a bank account, and you divide that bank account up, you decide how to spend it.

And the House Appropriations Republicans also allocated the $4 billion in the Crime Law Trust Fund available from this year, and almost $1 million from the Crime Law Trust Fund went to the Labor and HHS Education Subcommittee. Translated, this means that the front end of this $4 billion of the Crime Trust Fund, of that that's available to be allocated, only $1 million of it went to the Crime Law Trust Fund that the subcommittee that has jurisdiction over Labor, HHS and Education. And this means, translated again, that there's no way for that subcommittee to fund the several key violence-against-women programs that fall within their jurisdiction, including battered women shelters that the administration has requested $15 million from the trust fund for, enough to provide a week in a shelter -- a typical stay, I might add, for 60,000 battered women and their families. Instead of the $15 million, and the rape education prevention grants, where you ask for $42 million, for a total of $67 million, only $1 million, only $1 million went to that subcommittee from the Crime Trust Fund.

So I notice around here everybody's attacked my crime bill, but they all never attacked the violence against women. They're all for dealing with violence against women and all for dealing with the need for battered women shelters and rape education and all the other things that are in that legislation, yet you-all asked for over $60 million to fund -- no new taxes, just from the Crime Trust Fund, and they allocated only $1 million to the subcommittee that distributes these monies. (Audio break)

ATTY GEN. RENO: (Audio break.) And as I have said on so many occasions, unless we start addressing violence in the home, we are never going to be able to address it on the streets of this country.

The child who watches his father beat his mother comes to accept violence as a way of life. The American Medical Association, physicians across the country are joining in now recognizing that it's no just a criminal justice problem, but it's a public health problem as well and that we all must work together. The International Association of Chiefs of Police, in its report issued last week entitled "Murder in America: Recommendations from the International Association of Chiefs of Police Murder Summit," call for, among other things in its recommendations, that we provide additional shelters for abused women and children. That's what police are saying -- the people who are on the front line.

SEN. BIDEN: Every cop that I have ever spoken to -- and I defy anyone on this committee or in this Congress to give me any evidence to the contrary -- every single solitary one I've ever spoken to, on all the years working on this, say that the single greatest key to whether or not a woman will come forward and proceed with the prosecution against someone who's beaten her is if she has some reason to believe that her children, first, and her, second, can be put in a circumstance where, when he's released on bail, they don't have to share the same damn -- darn house with him or the same environment with him. And everybody talks about the key to this being battered women's shelters, which aren't permanent, which aren't permanent. These are to give people up to an average of a week's stay just to collect themselves, get their family together, and get some help. And so I really hope all those people who say they really care about this legislation, all those people who are back home campaigning about how they are going to fight domestic violence with the police, understand that it is an oxymoron to suggest you support the legislation but will not fund, through an existing trust fund -- no new taxes, an existing trust fund -- will not fund shelters for battered women.

SEN. HATCH: Would the senator yield for one second?

SEN. BIDEN: Yeah.
SEN. HATCH: I want to tell my colleague that I think he's done a singular service in this country in working so hard to pass that legislation, and I'll just tell him flat out right now that I -- you know, I'm outraged by the lack of funding of that program as well, and I'll be happy to help you in this process to get the funding back up there.
SEN. BIDEN: Well, I -- SEN. HATCH: There are a lot of other programs I wish we could raise funding for, too. And you know, we have to face these problems, but I really believe that this is one we just have to do, because it's not just that they prosecute and are willing to testify against a -- (audio break).

SEN. CHARLES GRASSLEY (R-IA): (In progress) -- the Anti- Electronic Racketeering Act of '95, and from sitting on the board of the Office of Technology Assessment, as Senator Kennedy -- and Senator Hatch does as well, and the Office of Technology Assessment has recently indicated that organized crime and that drug cartels are entering the electronic age in a very big way and they're, in the process, making it very difficult to find criminal assets.
I intend that my bill and hope that my bill, as drafted, goes a long ways towards putting a stop to that. The bill would amend RICO to cover criminal activity committed by computer and apply U.S. computer crimes to overseas computer users who use their computers to (commit ?) crimes in our country.
So in announcing that to you, Attorney General Reno, I'd also like to urge my colleagues to take a good look at that bill and see if they could support it.
My first question is a follow-on of my interest in protecting whistle blowers in the federal government. And I've been involved at this over a long period of time, because I think it's important to protect courageous federal workers who stand up against fraud and abuse of government. These good people keep the government accountable, I believe.
I'm sure you know, General Reno, that the General Accounting Office recently issued a report highly critical of the Justice Department of handling such matters. I've looked into the report thoroughly. I've discussed the report with investigators who wrote it.
My inquiries to you have raised a disturbing issue with regard to one of your section chiefs, the chief of child exploitation and obscenity section. I've learned that this individual was promoted after it was revealed that he had disclosed the existence of a confidential informant who was deep undercover in an organized crime family. Obviously, this endangered the informant's life and ruined what promised to be a very successful investigation.
The case involving the undercover agent recently settled for a small fine, so I hope it's appropriate for me to ask you about it. I want to give you an opportunity to say why you promoted this person when you became attorney general.

But regardless of your answer on that, I would like to also follow up -- hopefully with a commitment from you to help me get to the bottom of the entire situation, whether -- (audio break) -- regard to Ketam (ph), I hope you will help me be aware of efforts going on in this town that either want to repeal Ketam or want to modify it to such an extent that it would be inoperative.

I appreciate your department coming out in support of the constitutionality of it, arguing in support of the constitutionality since you've come attorney general, when your predecessors weren't willing to do that. Also, the fact that we've tried to work together over the last two years to modify it to some extent -- those efforts as well.

But remember in this town what you and I see as a good tool for government to use both to supplement your work as well as initiate from outside of your department certain potential publication of fraudulent activity that there are organizations, companies, associations etcetera that want to obliterate the law. So I'm glad that you're finding it a very useful tool because I think at your level in government saying it's a very useful tool will cool some of these efforts to modify it.
Now, my last point. If I could ask about the failure of the Justice Department to appeal the Lamocchia case in Boston? This case has dealt a tremendous blow to copyright protection and I believe it has put American business at an entirely unnecessary disadvantage.
Could I have an explanation for that failure to appeal that case?
ATTY GEN. RENO: I don't have all the details on that Senator but we'll provide that to you as soon as we possibly can.
SEN. GRASSLEY: Okay. Just for clarification, for everybody, the Lamocchia (sp) case ruled that federal prosecutors could not pursue copyright infringements under the wire fraud statute and pursuit of such cases -- is important because unless someone violates copyright laws for economic reasons that person cannot be prosecuted. Computer hackers routinely violate copyright laws for non-economic reasons so wire fraud prosecutions are necessary if copyrighted computer software is to be protected.
Thank you. I yield the floor.
SEN. HATCH: Thank you. If I could just make a clarification and then we're going to go to Senator Kennedy. I've checked on this and have been informed that the budget resolution reported by the conference committee does have full allocation for the Violence Against Women Act.

I'm happy about that. So it appears that the leadership of both houses intend to fund -- fully fund this program. Nevertheless, I intend to work with Senator Biden to make sure that that is followed through on. So I just thought I'd clarify that for the record.
We'll go to Senator Kennedy now. We're in the middle of a vote. Senator Kennedy is going to be the last until Senator Thurman gets back to chair the committee. I have to go over to the negotiations on regulatory reform, so please forgive me for having to do that.
Senator Kennedy.
SEN. EDWARD KENNEDY (D-MA): Thank you very much.
Welcome, General.
One of the very important provisions of our education programs, I think, are the drug-free school programs. As you're aware, that whole drug-free program was eliminated in the House of Representatives under the Republican budget proposal. It was cut $100 million in the Senate by the Senate Republican Budget Committee. It was restored to full funding under the Daschle amendment when we came into the debate on it.
It went to the conference and it came back $236-million reduction, effectively cutting in half the efforts to give help and assistance to local school districts that are trying to deal with the problems of drug abuse and substance abuse in their schools. Now, not all the programs work as well as any of us would like. But nonetheless, being able to appropriate some funds is an indication of where our priorities are. I'm just interested, as we look through a Supreme Court decision yesterday about sports and high schools, and as we're looking over these last indications from your own testimony, whether you think that we ought to be strengthening the drug-free school program rather than abolishing it, as has been suggested by our Republican friends in the House.

ATTY GEN. RENO: That's why I responded to the chairman by saying that it was critically important that we do everything we could to make sure that there was funding under that Safe and Drug-Free Schools Act to address the problems that arise in schools. And so many of those programs do work and are working and I think we have seem them work over -- in past time.

The whole effort against drugs in this country has got to be fought in the classroom, in the home, in law enforcement, in prevention, education and treatment. And we cannot back down from that.
SEN. KENNEDY: Well, it's certainly true that it has to be in the comprehensive approach, and we can't expect just the education in high schools is going to be enough. And I know from past testimony what has been done when you were a prosecutor in Dade County, what was happening in a number of the high schools was enormously important and a good example.
Tomorrow, in our Labor and Human Resource Committee we're going to consider a youth development block grant, and that youth development block grant, which is going to be a block grant back to the states, is going to take all of the money for the drug-free schools and put it into a block grant and send it back under the general heading of a youth development program.

I'm just wondering whether you believe that we ought to keep the designation for the drug-free schools and education program and keep that money targeted or whether you favor that we ought to block-grant that funding and let the states make what judgment they would, whether they would continue that program or not.
ATTY. GEN. RENO: I think it is imperative that we do everything that we can to get monies to states and local governments in ways they can use it for education and prevention in the schools and in programs afternoons and in the evenings. It all goes together when we talk about youth development and the prevention of youth violence which is one of the most critical crime problems we face in this country today. We see younger and younger people and ironically and sadly so often it's not just the illegal drugs, it's alcohol as well which is illegal for these children. We've got to develop comprehensive initiatives that address the drugs, that address the violence, that address the lack of opportunity for these children.
SEN. KENNEDY: Well I appreciate and agree certainly with your priorities in a different area. I commend what the administration has been doing in trying to free our communities from being free-fire zones with the proliferation of guns. With the leadership of the president, yet the Brady Bill that has passed, executive order to restrict the importation of cheap guns from China where we were becoming a dumping ground and the courage that the U.S. president had on the assault weapons provision.
It so happens that under the existing law -- under the current law gun dealers must report to federal, state and local law enforcement agencies whenever an individual purchases more than one handgun in a five-day period. But the state and local law enforcement officials are required by law, required by law to destroy each such form and any record of the contents in no more than 20 days of the date that such reform is received and therefore it makes it extremely difficult in the tracking of illicit guns and the accumulations of various arsenals. Do you think that we -- if they choose that local police should be permitted to maintain records of multiple gun purchases in order to keep track of people who might be stockpiling arsenals engaging in illicit gun trafficking?
ATTY. GEN. RENO: I'd like to respond after more thoughtful consideration. Let me check, Senator, if I may see exactly where we're at with those efforts and get back to you if I may. SEN. KENNEDY: All right.

NOTE: RESUMPTION OF SENATE JUDICIARY COMMITTEE COVERAGE FROM TUESDAY, JUNE 27, 1995
x x x right.
SEN. KENNEDY: On another issue, on immigration, there's a -- we'll be considering both illegal and legal immigration. And one of the proposals that have been made, and which I would agree with, that the incomer's sponsors should be continued to (be deemed ?) when immigrants seek assistance even -- well, when -- consistent so that those that are going to be sponsoring immigrants are going to be providing wherewithal in case there is a deficiency with the immigrant and a need for help and assistance to the immigrant. There's a proposal, though, to continue that responsibility even after the individual becomes a citizen.
My own sense is that having -- once an individual becomes a citizen and runs through the whole process of citizenship -- they can vote, pay taxes, even serve in the military -- that -- whether we ought to continue, whether you have any view as to the constitutionality of that. It seems to me you'd have a second class citizen, effectively, by maintaining that provision if the person is able to qualify and does become a citizen.
ATTY GEN. RENO: Our Office of Legal Counsel has examined this provision in the immigration bill, and it has very serious concerns about its constitutionality as applied to naturalized citizens. This appears -- it would deny, as you know, welfare benefits to certain U.S. citizens because they were born outside the country. This is unprecedented. Various provisions of the law restrict benefits to citizens, but none draw a line between naturalized citizens and native born.
SEN. KENNEDY: Well I think that's the key. I think there's requirements in terms of responsibility which sponsors should have in terms of -- which is going to be significantly expanded and which I support. But the question is when they finally become citizens whether they're going to have -- be recognized with all of both the responsibilities of citizenship and rights of citizenship.
ATTY GEN. RENO: I think it would be a mistake to begin now to relegate naturalized citizens to kind of another status. I had the opportunity Sunday night to stand at Ellis Island, where my father had entered in 1912, and I wouldn't like him to have been treated any different.

SEN. KENNEDY: Just finally on the legal services question, we'll be marking that legislation up very soon -- your own view about the importance of a federal legal service program. One of the options is to block-grant this, have all of the states develop their own program, as versus the legal service program. It seems to me that one of the things that make America America is the Constitution, and for the 40 million Americans to have at least some opportunity to have rights and remedies achieved is something which is rather basic and fundamental. But that has been and is under assault at the present time -- the importance of the integrity of the legal service program and maintaining it.

Could you comment?
ATTY GEN. RENO: The Justice Department and the administration favor reauthorizing the Legal Services Corporation in as strong a form as possible. We believe very, very strongly in the mission of it.
And it is so important. As you point out, there are too many Americans who do not have access to legal services. The law means little more than the paper it's written on. They cannot have confidence in the processes of the Constitution, because they can't gain access to those processes that protect it. I think it is very important that we continue this effort.

Thank you very much.
I think we're in recess till the chair --
ATTY GEN. RENO: Thank you.
SEN. KENNEDY: Thank you.
(Recess.)
SEN. STROM THURMOND (R-SC): The committee will come to order. (Gavel sounds.)
Senator Specter, I believe, is next in (order ?).
SEN. ARLEN SPECTER (R-PA): Thank you, Mr. Chairman. Thank you.
Madame Attorney General, I have two questions for you relating to the incidents at Ruby Ridge and -- one at Ruby Ridge and one at Waco. The question I have with respect to Ruby Ridge relates to the promotion of Mr. Larry Potts to be deputy director of the FBI.
And the sequence of events at Ruby Ridge, as I understand it, were that there had been an initial charge against Mr. Weaver for sale of sawed-off shotguns, later determined on his defense to be an entrapment defense. And Mr. John Magaw, director of the Alcohol, Firearms and Tobacco Unit, confirmed that it was entrapment, although Mr. Magaw characterized it as borderline entrapment.
And then the tragedy at Ruby Ridge involved the killing of a U.S. marshal and the killing of Mr. Weaver's young son, Sam, who was shot in the back, and the killing of Mr. Weaver's wife. And there was a controversy as to -- there is a controversy as to whether there had been a change in the rules of engagement in the FBI standards on deadly force. Special Agent Glenn (sp), who had a key role at Ruby Ridge, now the special agent in charge of the Salt Lake City office, has represented that there had been a change in the rules of engagement. The change of rules, as I understand it, related to deadly force. And Mr. Potts, in a conversation with me last month, May 17th, said to me that there had been no changes in the rules of engagement and there had been no authorization to change the deadly force policy.

Before proceeding to the answer to this question, I'd like to ask my second question because of the time limits. And my question to you on the Ruby Ridge incident is, why was Mr. Potts promoted to deputy director of the FBI while there are so many open questions on Ruby Ridge, including the issue as to whether there is going to be a prosecution by the state prosecutor?
And the second question that I have relates to Waco, and it relates to the use of the CS gas. And I note from the report by Dr. Stone from Harvard the consequences of the use of the gas upon minors, referring to a medical study, refer to the consequences of first degree burns, severe respiratory distress, toxicity, including an enlarged liver, and serious life-threatening symptoms based on medical literature on the effects of that gas on infants, and the fact that the use of that CS gas has been banned under the Paris Chemical Weapons Convention, to which the United States is a party signatory. And my second question is, was the very serious impact of CS gas on children considered in its use at Waco?
ATTY GEN. RENO: With respect to the first question, we had not received Mr. Glenn's (sp) letter before the Potts promotion was made, and what I did in that instance was to look at Mr. Potts' record and to take into consideration that it has been my longstanding policy that when someone is responsible for an organization, they should develop the staffing of the organization, and I deferred to Director Potts -- to Director Freeh.
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With respect to Waco, one of the questions I asked before I ever considered authorizing the use of the gas, was what effect it could have on the children, on elderly people. I was -- the FBI arranged that I would meet with a civilian

scientist who works for the Department of the Army, and I met with him in advance, and he assured me that both in his readings, in his studies that there would be no permanent effect.
Since the question has arisen, we have continued to explore all possible sources of information with respect to the gas, and we continue in that effort to see if Dr. Stone's concerns are valid.
SEN. SPECTER: Were you aware at the time that you authorized the use of the CS gas that it had been banned by the Paris Chemical Weapons Convention?
ATTY GEN. RENO: I had not heard that. I've subsequently heard that the treaty may not be ratified and that there is a law enforcement exception. But I've asked again that all of that be clarified.
SEN. SPECTER: Well, were you aware that -- when you say it hadn't been ratified, were you aware that the United States had in fact signed the Chemical Weapons Convention agreeing to ban CS gas?
ATTY GEN. RENO: As I indicated, previously, I was not aware of it at the time, nor was I advised of the treaty. But as I indicated to you, there -- what I have been advised of since is that there is a law enforcement exception.
SEN. SPECTER: To what extent, Attorney General Reno, had you made an inquiry of the effect of this gas on people generally or infants specifically prior to its use?
ATTY GEN. RENO: Prior to its use, as I indicated when the issue was first raised by the FBI with me, I said, "What about the children? What about elderly people? What effect could it have? Could it have a permanent effect on anyone?" The Army -- the FBI made arrangements for me to meet with Dr. Harry Salem (sp), who is a civilian scientist with the Department of the Army, who I am told, both before and subsequently, is one of the world's experts on toxicity of substances such as this. And I met with him at FBI Headquarters. He advised me of what -- the studies that he had done, and he concluded that it would not have a permanent effect.
SEN. SPECTER: Have you made any follow-up check to see whether or not he was correct?
ATTY GEN. RENO: As I indicated to you in my previous question, what I have done is asked the FBI, asked Director Freeh to do everything they can to pursue all lines of inquiry that indicate that the gas might be harmful, so that we can understand in future situations if there is any new information that should be considered in making any decision affecting CS gas.
SEN. SPECTER: And what has that additional study produced?
ATTY GEN. RENO: To this date, it has not -- I keep checking to see whether they have found additional information. I understand that the latest effort has been made to contact British authorities, but to date I have found nothing that would sustain this as the gas was used, but we want to continue to pursue it.
SEN. SPECTER: So if the question were to come up again today, you'd still use CS gas?
ATTY GEN. RENO: No, sir. What I would do would be to see what the latest information is, look at it all over again, and make the best judgment that I could based on the inquiries that we have made.
SEN. SPECTER: With respect to Deputy Director Potts, Attorney General Reno, when you made the promotion, were you aware of his contention that he had never changed the rules of engagement or did not make any change in the FBI's policy on deadly force?
ATTY GEN. RENO: At the time I'm -- I did not make the promotion. Under the procedure as I understand that it exists between the department and the FBI is that I must approve it. Director Freeh made his recommendation that he be promoted. He felt that it was important and that it was in the best interest of

the agency, and I made -- I was not aware because at that point I was still -- the decisions had been made by the deputy. I did not go into any of the details.
SEN. SPECTER: When you say the decisions had been made by the deputy?
ATTY GEN. RENO: The decisions with respect to the approval of the disciplinary action.

SEN. SPECTER: Well, what was the status with respect to disciplinary action as to Mr. Potts?
ATTY GEN. RENO: We will have the record checked for you as to what discipline was imposed, but that was -- I don't have it with me.
SEN. SPECTER: Well, he had been disciplined, hadn't he?
ATTY GEN. RENO: That is correct.
SEN. SPECTER: Well, when you say that you did not make the promotion but just approved it, if you had disapproved it, the promotion would not have been made.
ATTY GEN. RENO: That's correct, sir. And as I indicated to you, it has been my policy when I have agencies or groups or sections under my authority to do everything I can to defer to the person who is responsible for that agency and the staffing and the promotion in that agency.
SEN. SPECTER: Well, isn't there some limit to that deference, if you find a person is not really qualified for some reason or another, to exercise your authority of approval or disapproval?

ATTY GEN. RENO: Yes, sir, there is.
SEN. SPECTER: One final question. The orange light is on.
Attorney General Reno, it's my understanding that the Department of Justice is not releasing its report on Ruby Ridge because of the possibility that there may be a prosecution by the county attorney of Borders (sic) County, Idaho against federal officials. Have you considered, in approving the promotion of Mr. Potts to be deputy director of the FBI, that it was at least conceivable that he might be subject to prosecution by the local district attorney, which would certainly place under some substantial cloud the approval of his promotion?
ATTY GEN. RENO: I make no judgments as to what happen in a case. What I have tried to do with respect to the local prosecutors, since local laws and state laws may differ from federal laws, is to take no step that would interfere with that investigation.
SEN. SPECTER: Okay, thank you very much.
SEN. THURMOND: Senator Kohl.
SEN. HERB KOHL (D-WI): Thank you very much.
Attorney General Reno, as you know, Attorney General, I remain concerned about Milwaukee's low ratio of assistant U.S. attorneys to population because it seems clear that Wisconsin is not receiving its fair share of resources. We all understand why those American cities with severe crime problems, like New York, Miami or Los Angeles, have a higher ratio of federal prosecutors. But districts located in places like Burlington, Vermont, Charles Town, West Virginia, Cheyenne, Wyoming, Mobile, Alabama, Sioux Falls, South Dakota and Tulsa, Oklahoma, all have at least twice the number of prosecutors per one million residents as the Milwaukee, Wisconsin office, and in some cases closer to three times that of Milwaukee. Overall, of the 94 U.S. attorneys offices, Milwaukee's Eastern District of Wisconsin comes in 81st, and the Western District is even lower.
It is my understanding that the Department of Justice is currently considering several new allocated model options. When can we expect that one of these new model options will go into effect?

ATTY GEN. RENO: When I took office I was concerned because there did not seem to be any model or any formula for the allocation of monies, and there were disparities between a number of different districts. I had been used to a more orderly allocation in my experience between prosecutors in Florida. And so this is one of the first areas that we looked at.

We went to the Attorney General's Advisory Committee, composed of U.S. attorneys who are representative of different districts across the country, large and small. And we sought to develop an allocation formula.
A preliminary model was submitted to the Bureau of Justice Statistics to review. They issued a preliminary report -- the BJS did -- in January of '95, in which they identified substantial flaws in the model and recommended that outside consultants be employed. The final version of that report is pending.
The United States attorneys' response to the preliminary report recommended that before deciding on the parameters of the next step, any further effort to develop a model, whether based on external or internal factors, should not -- should cover not only the United States attorneys' offices, but also the FBI and the DEA, because you can't allocate for U.S. attorneys if you have different allocations or different disparities with respect to the investigative agencies. So we're trying to do it in an orderly way. It is of prime concern to me.
I can't give you a date, sir, but what I will ask is for my staff to try to keep you as updated as possible.
I've had an opportunity to visit the office in Eastern District. I had an opportunity to take questions and answer their concerns. And I know their concerns, and it is something that we are pursuing.
SEN. KOHL: Is it something that perhaps in 1995 we could hope to see some progress, some resolution? I'd hate to leave it so open- ended that it might be -- you know, two years from now or three years from now we're still thinking about it.
ATTY GEN. RENO: One of the things that I've tried to do is to keep deadlines. I can tell you, sir, that it is on what I -- what is called, in my office -- sometimes with not absolute happiness -- is my "get-back list." And this is one of those items very much on the get- back list, so I'm not going to let it get lost.
SEN. KOHL: Good. All right.
Earlier this year the Supreme Court struck down the Gun-Free School Zones Act in U.S. versus Lopez (sp). When the Gun-Free School Zones Act was first drafted in 1989, only a handful of states had laws barring guns in school zones. Since that time, most states have enacted laws similar to the federal statute. However, not every state has done so, and state laws, as you know, vary tremendously. For example, in Alabama you could carry a gun into school so long as you do not intend to cause bodily injury. In short, the laws are a hodgepodge.
Despite this, some have claimed that we do not need a federal law when there are so many state laws. Do you feel that there is still value in having a state -- a federal law?
ATTY GEN. RENO: Yes, sir, very much so, for many of the reasons you cite. And we have proposed a new version, which we believe is within Congress's power under the commerce clause. It would apply only to firearms that have moved in or affect interstate commerce, and I don't -- we conclude that adding that jurisdictional element will not substantially restrict the prosecutions under the statute, but it would protect it from a commerce clause attack.
SEN. KOHL: As you know, Senator Specter and I have introduced a new version of the Gun-Free School Zones Act designed to insure it's constitutional. Are you

familiar with what we've introduced? And are you satisfied that it will accomplish the objective?
ATTY GEN. RENO: I have not seen it directly, Senator, but let me make sure that staff has worked with yours and Senator Specter's staff to make sure that any concerns we might have are addressed.

SEN. KOHL: Good. All right.
Attorney General Reno, I want to talk briefly about a deep concern that I have and I believe that you share over the use of secrecy agreements in litigation. Currently many judges approve these agreements almost routinely without consideration of public health and safety. As a result, numerous secrecy agreements have had grave consequences: to cite just a few examples, silicone breast implant litigation, DES litigation and heart valve litigation. And in all of them, the secrecy kept people from learning about the dangers that they faced. A few people have told me that we should wait for the judicial conference to act on this matter, but the conference has been meeting about and studying this issue for five years. It has played ping pong with the protective orders issue and, consequently, with public health. The conference has had a lot of meetings but taken little action. Former Judge Mikva testified at a 1994 hearing that, and I quote, "This problem is too important to leave to the rule changers."
Given the five-year delay by the conference, do you agree that Judge Mikva probably has a good point?
ATTY GEN. RENO: I think we can work together. Judge Mikva and I have talked about it. This is an issue very much of concern to me, and I would like to pursue it with you and see if we can get something done.
SEN. KOHL: As you know, we've talked about it on several occasions and haven't really made the kind of progress that I think either of us would like to see made. Is there some hope that we can move ahead expeditiously?
ATTY GEN. RENO: I think we can work together on it. As you know, we've put an awful lot of effort into it. Frank Hunger worked with you and your staff. We had worked through the rules enabling process to promote the amendment, and we will continue to work with you in every way we can.
SEN. KOHL: All right.
Another question. As you know, I'm concerned about the Justice Department's travel budget, which is estimated to be $198 million in fiscal year 1995. I believe that if you send more attorneys to the field as opposed to having them shuttled between Washington and the areas where they do the bulk of their work, then significant savings to the taxpayer would result. Just by comparison, the Department of Health and Human Services, an agency employing 30 percent more people than the Department of Justice, spends 25 percent less money on travel than Department of Justice. And even if you spread the $200 million travel budget over each and every Justice Department employee, including every janitor, every clerk and every typist, that still works out to $2,000 in travel expenses per employee, or more than $26,000 for every attorney employed by the Department of Justice.
My question is, wouldn't it be more cost-effective if the department transferred some of the 2,000 attorneys in Washington to the field offices across the country, where the bulk of law enforcement actually gets done?
ATTY GEN. RENO: As part of the department's National Performance Review, the associate attorney general has undertaken a review of the litigating functions of the department.

Part of it involves a survey of the litigating functions in Washington, DC in

the divisions based here versus the functions performed by the 94 United States attorneys. The expected outcome of this review will be an assessment of the appropriate assignment of cases between the United States attorney and Washington-based legal divisions. Based on the results of the first phase, the second phase will analyze our organizational structure and whether or not we are organized in the most efficient manner both in terms of cases and geographic location of our attorney workforce. We share your concern, and I will ask the associate attorney general to keep you advised and to let you know of the current status.
SEN. KOHL: Well, as I understand it, we have 2,000 attorneys here and 4,000 out across the country, and I feel that that is not a good balance. Is -- you know, this question of -- and we've talked about it before; studying it and getting back to each other on it is -- I wonder how we can come to some kind of a resolution other than that's simply the way the Department of Justice wants it to be?
ATTY GEN. RENO: Well I don't want it to be that way, so it depends on how long I've got to try to change things.
SEN. KOHL: Would you like to see more attorneys out in the field?
ATTY GEN. RENO: I think I should withhold judgment until we do the study and do it the right way. Certainly my reaction, when I see people traveling to one area that has a lot of environmental prosecution or litigation is, can't we better allocate resources there? But then when I see issues arising across the country that require an expertise and don't want to have -- if one person can handle it from Washington rather than having 10 people at 10 different sites across the country, I want to make sure we do it in a business- like way based on solid facts.
SEN. KOHL: All right. I thank you very much.
And I thank you, Mr. Chairman.
SEN. THURMOND: Senator DeWine?
SEN. MIKE DEWINE (R-OH): Thank you, Mr. Chairman.
Attorney General, welcome. You're getting there. We're moving down the aisle here. Let me ask you about the Office of Intelligence Policy and Review. And let me summarize my question this way. It is my understanding that now, for the first time, wiretap -- the final sign- off on wiretap authority is being done by a political appointee, and that traditionally in the department that was not true, this was kept out of politics, this was done at the professional level. I wonder if you could comment on that and whether or not you have any plans to change that?
ATTY GEN. RENO: Well, with respect to wiretap authority, that's done through the Criminal Division with career employees, and the head of the Office of Intelligence Policy Review is a career lawyer.

SEN. DEWINE: Is currently a career lawyer?
ATTY GEN. RENO: That's correct.
SEN. DEWINE: And who is that?
ATTY GEN. RENO: That's Richard Scruggs.
SEN. DEWINE: And he is a career lawyer?
ATTY GEN. RENO: That's correct.
SEN. DEWINE: Do you know how long he's been with the department?
ATTY GEN. RENO: No, I don't.
SEN. DEWINE: Let me ask you about the -- to follow up a little the testimony that -- questions that were asked by Senator Biden as well as Senator Hatch. We got into a -- you got into a discussion about statistics and criminal prosecution, specifically in the area of career criminals' gun-related offenses.

And first, let me congratulate you on your comments about cooperation between the Justice Department and local prosecutors. Of course, you spent many years as a local prosecutor and I think you understand the frustration that many times is felt by local prosecutors when they deal with the FBI or with the Justice Department, and I think we've made a great improvement over the last few years in that area in the last decade or so, and I commend you for continuing to try to work in that area.
I would like, though, to ask you specifically about what was formerly known in the Bush administration as Project Trigger Lock, where armed career criminals were targeted by the Justice Department and actual statistics were kept every month in regard to how many people the federal prosecutors, Justice Department, actually prosecuted. It's my understanding that you now have a program that you call the Anti-Violent Crime Initiative, which you've talked about this morning, and encompassed in that -- it's much broader than Project Trigger Lock.
And I understand the argument in regard to the keeping of statistics, and that if a prosecution occurs, it doesn't matter, maybe, whether it occurs at the local level or whether it occurs at the federal level, but I read the report that you -- your department put out, and really, besides some anecdotal evidence, there's no way to really tell what your department is doing as far as federal prosecutions of career criminals, specifically those who use a gun. And I wondered if there's any -- if you do still keep those statistics and if you can tell us what has happened in the last few years. I'm talking just about federal prosecution.
ATTY GEN. RENO: My understanding is that Trigger Lock prosecutions are reduced because in many instances, for example, state courts are taking those -- I cited to you my experience -- I used to take Trigger Lock cases to federal court because I could get more time.

I'm told now that with the construction of prisons in Florida and revised statutes, the local prosecutor can do it and would much prefer to do it. And what we try to do in these cases is do it based on what's in the best interest of the case and what's in the best interest of the community.
We'll be happy to furnish you with the Trigger Lock information --
SEN. DEWINE: Yeah, I don't think anyone's going to quarrel with that statement.
ATTY GEN. RENO: Okay.
SEN. DEWINE: My only, I guess, issue or question is, if you don't -- you do actually still keep those statistics, though, is that --
ATTY GEN. RENO: My understanding is that we do, and I'll be happy to furnish whatever we have to you.
SEN. DEWINE: Appreciate that. And you believe that they will show that as far as federal prosecutions, those are down?
ATTY GEN. RENO: Yes, sir.
SEN. DEWINE: But your argument -- or to finish that, you would basically say that this is a cooperative effort, basically, between the state and local?
ATTY GEN. RENO: My argument is -- and you understand it better than anybody else -- if you, as the local prosecutor, have the case and can get the time and know the detectives and can handle it better, you will handle it better there. What has impressed me, because I meet -- you describe it as anecdotal, but what impresses me as I meet with the National Association of Attorneys General, the National District Attorneys Association, the Sheriffs Association, the International Association of Chiefs of Police, they're all telling me that finally we are working together, we're not grabbing the credit, we're trying to handle the case based on the right way to do it.
SEN. DEWINE: And I don't think anybody certainly can quarrel with that. I'll be

anxious to see, you know, see the statistics, and would appreciate that. I have no further questions, Mr. Chairman. Thank you.
SEN. THURMOND: Senator Feinstein?
SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman.
Attorney General, I want to thank you for that 40 percent increase in Border Patrol. I believe you know, and I confirmed for the fourth time last week, that it is making a difference on the Southwest border. And although we have a long way to go, I think the difference is really quite profound.
Having said that, I also want to thank you for your help with the assault weapons legislation. I've been watching that legislation carefully. As you know, your department will be, in six years, doing a report on the impact that the legislation has. One of the things that concerns me is that certain manufacturers are working to get around the legislation by changing some of the design of these weapons to move around it. And what I would like to ask you is if you have any findings in that regard at this point, and if not, if you would watch that area carefully.

ATTY GEN. RENO: We will watch that carefully with the Bureau of Alcohol, Tobacco and Firearms. I have no findings at this point, but I will ask my staff to be in regular consultation with your staff as we develop any information that is appropriate.
SEN. FEINSTEIN: I'd appreciate that very much. The subject that I wanted to talk to you about this morning is in the area of narcotics, but slightly different. I have a real problem, but it's not with your department, it's with Treasury on the so-called Line Release Program on the southwest border which has about 10,000 large container trucks that are licensed to go back and forth across the border. And one of the problems its developing is a major methamphetamine problem in California, where some 13,00 pounds of methamphetamine were seized in California in 1994, with a wholesale value of $33.4 million. This represents a 518 percent increase since 1991.
Mexico national poly-drug organizations over the past three years have replaced outlaw motorcycle gangs as the predominant methamphetamine producers, traffickers and distributors in my state.
A week ago a delegation of narcotics officers and Justice Department -- the head of the narcotics division of the California Department of Justice -- visited me and presented a major description of the scenario that was taking place, and stated that the Western United States market is saturated with high purity methamphetamine. The price for methamphetamine at all levels is declining. I have those specific statistics. Large scale production laboratories operating in California are found to produce 20 to 100 pounds of methamphetamine during each manufacturing process.
Now, the chemicals necessary for methamphetamine production, which are controlled in California, are smuggled to the United States across the United States-Mexican and the United States-Canadian borders. There is no control on hydriodic acid in Canada, and Mexico is the major conduit for ephedrine.

The production of methamphetamine using pseudoephedrine, red phosphorus, and iodine crystals is replacing ephedrine and hydriodic acid, which are more strictly controlled. Iodine and red phosphorous are the two ingredients necessary to clandestinely manufacture hydriodic acid.
Iodine -- there's a 978 percent increase in cash sales within the last three years; red phosphorous, a 226 percent increase in cash sales within the last three years.
And -- now where am I going with this? Where I'm going with it is whether your

department would be willing to give a good look at precursor chemicals, the federal threshold for regulation of these chemicals, and present to this committee -- and specifically to me, if you will -- any recommendations you might have for licensing and regulation of the sale of some of these precursor chemicals in the United States.
ATTY GEN. RENO: Senator, as I had indicated earlier, we have tried to develop a comprehensive initiative along the border that combines the DEA and the FBI in an excellent working relationship and they working with the six United States attorneys representing the districts along the border.
I have been in conversation with Administrator Constantine about this issue. I do not have a report from him that is current. When we get back to the office, I will check and we will try to update you and work with you in every way that's proper and appropriate.
SEN. FEINSTEIN: I would very much appreciate that. I'm in the process of trying to put together some legislation on precursor chemicals, and so I would very much appreciate that help.
And I will send you a full packet of facts -- not my facts, but narcotics officers' facts, as developed in California.
My major concern, in terms of the border, is that precursor chemicals in large amounts from Mexican cartel families are crossing the border, I think -- some of them through the line-release program. They then go to what are essentially Mexican-run labs in rural areas and are put together in large batches of methamphetamines, which are then distributed throughout the United States.

The point I'm making is that it is becoming a major narcotic problem and I think one that we need to work together to see that we do our utmost to discourage. The other point that I wanted to make is on -- in the issue of -- I think we still have a weakness in drugs coming across the border, cocaine and other related substances, and I would certainly welcome your department's help in that regard.
ATTY GEN. RENO: As you know, we've discussed this and this is very much a part of our whole southwest border initiative.
SEN. FEINSTEIN: And I thank you very much, and once again I'd like to reiterate my thanks for your help with Border Patrol and immigration. I think it's been a major change since I first came to the Senate, and I very much appreciate it. Thanks, Mr. Chairman.
SEN. THURMOND: Madame Attorney General, we're glad to have you with us. We appreciate your presence.
ATTY GEN. RENO: Thank you, sir.
SEN. THURMOND: I think you said before this subcommittee last year that, and I quote, "Nothing is more important to me than making sure that children are protected, particularly protected from the awfulness of child pornography." End quote. I think every American is concerned with this issue. Recently we have been faced with the spread of child pornography on the Internet. The Senate recently adopted an amendment to punish those who make obscene material available on the Internet.
Madame Attorney General, would you please tell this committee whether you support the recently passed Exon amendment, which is designed to protect America's children? Also, will you please tell the committee what steps the Department of Justice is taking to prevent the distribution of pornography on the Internet and to prosecute those responsible for such distribution?
ATTY GEN. RENO: With respect to the Exon legislation, what we have tried to do, we have some enforcement concerns, and we are trying to work with all concerned

to make sure that we come up with a bill that's constitutional, that is enforceable, and that can achieve the aim that you and I share of protecting our children from pornography wherever it is.
With respect to the whole issue of Internet, I have asked the Department of Justice's Criminal Division to look at what can be done to work with all concerned, and they are at this point trying to review any particular case that may arise.
SEN. THURMOND: Madame Attorney General, as you know, I am the chairman of the Judiciary Committee's Antitrust Subcommittee.

I have several questions relating to the Antitrust Division at the Department of Justice. First, I have been told that the number of grand jury investigations of the Antitrust Division has declined substantially. Can you please give us your views on the importance of criminal penalties to deterring antitrust violations, and whether there has been a decision to reduce or limit criminal enforcement of our antitrust laws?
ATTY GEN. RENO: I think it's very important. Anne Bingaman, the assistant attorney general in charge of the Antitrust Division --
SEN. THURMOND: Speak in a louder -- there are a lot of people back there.
ATTY GEN. RENO: Anne Bingaman, the assistant attorney general of the Antitrust Division and I have conferred from the -- actually the moment she came into office, talking about how important criminal prosecutions can be in antitrust enforcement generally. The number of criminal antitrust cases has declined, but the significance of the cases has increased, generally larger in geographic scope involving more overall dollars of commerce against bigger companies, and increasingly with international implications. In fact, almost 50 percent of our current grand juries are investigating cartel activity that is national or international in scope. We have referred a large number of local conspiracies to other enforcement agencies in order to concentrate our resources on national and international conspiracies. And it is, we feel, a more productive use of the limited resources in an era of budgetary constraints.
SEN. THURMOND: As you may know, improving the process for analyzing mergers under the antitrust laws has been one of my priorities this year as the chairman of the Antitrust Subcommittee. I have been encouraged by the responses to my concerns by the Justice Department and the Federal Trade Commission. Progress was made when the agencies announced the (Haas-Scott-Rodina ?) pre-merger program improvements in late March. Then last week, the commission responded to a letter from me by issuing two additional policy statements in order to lessen burdens on merging parties and achieve greater uniformity with Justice Department procedures. Would you please give us your views on these changes? And will you continue to work with us to further improve this important aspect of antitrust law?
ATTY GEN. RENO: As you know, Mr. Chairman, the department and the FTC have worked hard to harmonize procedures and we think that this is a very important effort. We look forward to looking with the new team at the FTC, and we are certainly receptive to suggestions and will work with you.

I don't have the details on the new suggestions. I will make sure that Anne Bingaman gets back to you and lets you know exactly how we view these new proposals from the FTC.
SEN. THURMOND: She worked with us well on the telecommunications bill and she's a very fine lady.
What can you tell us about the actions of the Antitrust Division concerning the air carrier decisions to cap the fees paid to travel agents? As you are no

doubt aware, that action has raised tremendous concerns among travel agents nationwide, and they have brought their concerns to the Congress.
ATTY GEN. RENO: I can tell you that the department is following that matter closely. I cannot go into the details with you at this point because it is pending. As you know, in February Delta announced that it would cap travel agent commissions on higher-priced airline tickets. Other airlines, including American, United, Continental, USAir and Northwest, subsequently announced that they would take similar actions. The Antitrust Division received complaints from travel agents that the airlines colluded in reaching their decisions to limit travel agent commissions. The Antitrust Division instituted an investigation to determine whether the airlines engaged in conduct in violation of the federal antitrust laws.
We will take appropriate enforcement action if the investigation reveals violation of the antitrust laws, but the fact is that several airlines quickly matched a change in commission structure. The fact that that happened does not establish an antitrust violation. We will review the matter very carefully and take appropriate action based on the evidence and the law.
SEN. THURMOND: Madame Attorney General, in your 1993 confirmation hearings, you said the drug czar should play an extraordinarily important role in coordinating budgets, in coordinating priorities, and in developing your plan for fighting drugs. Have matters developed as you had hoped? The reason I ask this is that I understand there has been talk about a reorganization that would give the Justice Department more control over the drug czar's current functions. The Cox News Service reported on June 2nd that the FBI and Drug Enforcement Administration recently dispatched a joint letter to the White House proposing to shut down the drug czar's office and divide its functions and funding. A Scripps-Howard piece dated May 7th claims that many in the Justice Department believe the Clinton administration asked for the letter. Does such a letter exist? And if so, could the committee be provided with a copy?
ATTY GEN. RENO: There is not a letter suggesting that the drug czar's office be shut down.

What has been discussed, Mr. Chairman, is an effort to make sure that law enforcement is coordinated and yet that there is, at the same time, a balance between law enforcement and other agencies, both with respect to prevention, education, and treatment.
And I think we can work with Director Brown. I've had a good working relationship with him, and I think we can continue to work together to insure we have an organized law enforcement effort and that there is not fragmentation or duplication, while at the same time making sure that we address a balanced effort in terms of drug enforcement, prevention, and treatment.
SEN. THURMOND: Would federal drug law enforcement efforts be better served by reorganization or realignment? If so, what specifically is envisioned and how would it be accomplished?
ATTY GEN. RENO: I've tried to pursue everything that I do in Washington based on what should I do now. I hear an awful lot of talk about restructuring and reorganizing. And some people see that as a means of solving problems. I think it's important that we work together. And it has been my personal position that I work with all concerned, with what we have, to get the job done.
SEN. THURMOND: If any changes are planned, would you please brief the committee before anything is set in concrete?
ATTY GEN. RENO: You better be sure, Mr. Chairman, I'll do that.
SEN. THURMOND: (Chuckles.) At this point in your tenure as attorney general, what do you view as your primary goals and priorities for the department in the

future?
ATTY GEN. RENO: I think it -- one of my primary goals, as set forth, is to continue to do everything I can to eliminate the turf battles, to bring federal and local law enforcement together in a coordinated attack against violence, against drugs, against crimes that undermine the very fabric of this nation, and that includes, as we have so tragically seen, organized, vigorous, vigorous effort against terrorism. I think that has to be one of our great priorities. At the same time, I think it is important that we make sure that the laws of this land are used the right way, that we advise people when there are laws that are going to be enforced that will prevent discrimination, so that people can understand and that the laws don't seem confused and strange to them.
But when those people continue to violate the law after we've tried to work with them, I want to use as vigorous action as I can that is consistent with the Constitution and the laws, whether it be in protecting people from discrimination and making sure this nation's interests are protected in civil jurisdiction, making sure that the antitrust laws of this nation are enforced the right way, and making sure that our air, our water, our beautiful land is protected against environmental harm.

SEN. THURMOND: I've got another (forum ?). I've got to leave.
Senator Brown, would you take over the chair, please?
And, Senator Feingold, you're next.
SEN. RUSSELL FEINGOLD (D-WI): Thank you very much, Mr. Chairman.
And Madame Attorney General, I, too, want to thank you for your hard work and your patience here today. I would like to pursue an issue that is of interest to me and to the senator from Vermont, my friend who is also on this committee, the Communications Decency Act, so-called Exon Amendment, which the distinguished senator from South Carolina just referred to. We attempted on the floor to mitigate the possible problems that the Exon Amendment could cause, and lost 84 to 16. It was overwhelming. But I got the feeling if the amendments had been positioned differently there might have been quite a different result. And since that time, Madame Attorney General, the speaker of the House, Representative Gingrich, has indicated a very similar series of concerns about the constitutionality and practicality of the Exon Amendment.
As I said on the floor, I share the goal, as I know you do, of helping parents to protect their children from material they view is inappropriate. I am, however, deeply concerned that we do it in a manner that is the least restrictive and maintains constitutional protections. I'm afraid that the Exon Amendment will create a myriad of problems, not only constitutionally but in application as well, as I think you alluded to in your response to the distinguished senator from South Carolina's question.
So to begin, I ask you as a prosecutor, what practical problems are there with imposing a criminal sanction against a defendant who, despite his total lack of knowledge as to who might view his message, is charged with transmitting indecent material on the Internet?
ATTY GEN. RENO: We're going to have to review all of the issues, and I think it's important because we've got First Amendment issues, we've got enforcement issues, we've got proof issues that will be vital to a successful enforcement of a sound law that we can all agree on. And I'd like to work with you -- I think our staffs are already working together -- to make sure that we focus on these problems and that we try to develop solutions that will protect our children.
SEN. FEINGOLD: Isn't it fair to say, though, Madame Attorney General, that there are practical problems with a criminal statute that could pose this kind of penalty on someone who has a total lack of knowledge as to who might view what

that person is communicating?
ATTY GEN. RENO: That is correct. And those are the issues that we need to work through and to make sure that we address, because as a prosecutor, nothing is more frustrating than to prosecute somebody, get them convicted, and then see the law held unconstitutional when we know we could have taken steps to make it better and sounder and still have an impact.

SEN. FEINGOLD: Thank you for that response and at least to another area that I know you'll be wanting to deal with and that's rather tricky in the area and that's defining the relevant community. In the area of indecency generally legislators and scholars and citizens groups talk a lot about so-called community boundaries. We define what is indecent by applying so-called community standards, which usually means a consideration of the standards of the jurisdiction in which a case arises. But given the nature of the Internet, which transcends and in fact lacks traditional community and state boundaries, it even lacks national boundaries, how will we determine which community is the appropriate one in these cases for establishing the community standard for indecency?
ATTY GEN. RENO: I think this is obviously one of the issues that is going to have to be addressed. I think that in this age of emerging technology both in terms of national, what is a community nationally -- and then international implications, it staggers the imagination sometimes as to what technology has done and I think again it's going to take all of us working together to come up with a solid product.
SEN. FEINGOLD: In your view, is it possible that this new technology could render the notion of community standards less relevant than it has been in the past?
ATTY GEN. RENO: These are the issues that we're going to have to address. In a mobile nation, in nation that can communicate as it does today -- but I think our ultimate goal has got to be how do we protect our children in the right way?
SEN. FEINGOLD: I agree with that and that raises another issue having to do with this, which in a sense this Exxon amendment could create one law for the Internet which is wholly inapplicable to the rest of society. It creates a different standard for materials solely because they appear on a computer screen, as opposed to being in a book, for example. Under the legislation individuals will be subject to criminal penalties if they made heir materials and publications available on computer networks to which minors had access. However, the same material, under the law ,would be protected in a book store or a library.
in my view this inequity is unjustified and it's cause for concern. In your view, Madame Attorney General, is this separate standard consistent with our constitutional system, and is the distinction between the means of conveying the materials -- that is, the distinction between computers versus traditional print -- sufficient to justify this rather starkly differing standard?
ATTY GEN. RENO: I think these are the issues that we have to address. I mean, the whole issue with respect to television programming at hours that children have access to it. We have got to look at the whole picture and see what we can come up with, whether it be technology or a law that protects our children according to the constitution.
SEN. FEINGOLD: Given the current language of the Exxon amendment, however, do you believe it would withstand constitutional scrutiny?
ATTY GEN. RENO: As I've expressed, we have serious concerns, but we want to work together to try to address those concerns.

SEN. FEINGOLD: Thank you. And let me ask one more question on this subject. There are many issues, as you have indicated, but perhaps the fundamental flaw in the Exon legislation -- and it goes to your primary goal, which is protecting kids from this material -- is its failure to recognize the unique nature of the Internet, choosing instead to regulate more like broadcast or telephones. It has long been established that government infringement into speech be accomplished in the least restrictive means. It's a constitutional standard. In this regard, I understand that software does exist -- and is consistently being developed -- which allows parents and employees to screen out objectionable services on the Internet. Given the presence of this software -- and what is certain to be the emergence of additional capabilities in this regard -- and coupled with the constitutional concerns, don't you think that rather than criminalize this activity, it would be better to first fully explore alternative means that are just as effective to prevent this kind of access for kids, as opposed to going forward with the Exon amendment?
ATTY GEN. RENO: I think it's -- as I understand it from my staff, there is extensive exploration underway now as to what can be done technically to limit it. You still have the concern of the large number of children who do not have proper parental supervision that exists with respect to regular television programming. All of these issues have got to be addressed to protect the children and yet at the same time to insure adherence to the Constitution. And I think it's going to be a very difficult issue, but a very important issue for us to face, both in terms of technology and in terms of the law.
SEN. FEINGOLD: I very much appreciate those answers. And I will move on to another topic, but I do appreciate your candor.
One area which both you and the DEA have been very supportive of is in regards to the efforts that I and my colleague, Senator Kohl, have made to obtain DEA agents for Northeastern Wisconsin to help combat the growing flow of methecathanone (sp), or CAT, as it is commonly known. This problem is, I think, disproportionately affecting the upper Midwest, but the potential for it to spread to the other parts of the country is quite clear.
At present it is my opinion -- and, I'm certain, that of Senator Kohl -- that the state of Wisconsin is sorely lacking in terms of help in this area. In response to the needs of Northeastern Wisconsin, we have been working with the DEA to get additional manpower. It's my understanding that it is the intention of the DEA to have agents in place by this fall, by September, with additional agents subsequently being added. What kind of assurances can you give me that the necessary resources will be made available and that these new agents will in fact be in Green Bay, Wisconsin, this fall?
ATTY GEN. RENO: As I understand it -- and I can't give you the exact date, but that -- the DEA has agreed to put four additional agents in Wisconsin, and I will personally put that on what I referred to as my get-back list to make sure we try to do just that.

SEN. FEINGOLD: I'm pleased to be on this list and I think I'm going to create such a list in my own office, after listening to you today.
ATTY GEN. RENO: You've been on the list before, Senator. (Laughter.) I think everybody on this committee has. Because --
SEN. FEINGOLD: Let me just clarify one other item --
ATTY GEN. RENO: Because we do have a great respect for your inquiries. They're helpful to us, and we try to make sure we respond in a forthright way.
SENATOR FEINGOLD: You always have, and -- let me just clarify one point on the DEA issue. We have really a starkly low number of folks in this area in Wisconsin. We only have eight DEA agents, and compared to other states --

smaller states -- the figures are really quite startling. Sixty-four agents for Massachusetts, which is a larger state, but that's a much larger figure. Fifteen for Indiana. 40 for Missouri -- we are very low. Extremely -- almost embarrassingly low number of people that we have to combat this problem.
It's essential that we maintain the current number of agents in Wisconsin and not have there be a shift within Wisconsin to accommodate our concerns in Green Bay. So is it your intention that the additional agents for Northeastern Wisconsin will not result in a loss of people in another region of the state?
ATTY GEN. RENO: That is my understanding and we will clarify that and confirm it with you, because as I mentioned earlier to Senator Kohl I had the chance to visit in the Eastern District to listen to assistant United States attorneys make their positions known, had a chance to talk with Mr. Schneider (sp), and had a chance to talk with the investigative agencies as well. And it is so important not just that we keep our staffing strong and enhance it in Wisconsin, but that we do everything we can to link districts together, because the impact of Chicago is felt in Milwaukee, and so it's important that the investigative agencies work together in understanding the region-wide consequences of actions taken. That's what we're doing across the country through DEA and FBI's cooperation with local law enforcement and we want to continue that effort.
SEN. FEINGOLD: We appreciated your visit to the Eastern district and the notion of regionalism is terribly important when you look at an issue like CAT (sp) which apparently came in from Upper Michigan into Wisconsin.
Apparently my time is up so I would submit for the record some additional questions on rural crime initiatives and community policing, and I thank you very much for your answers.
I thank you very much for your answers.
Thank you, Mr. Chairman.
SEN. HANK BROWN (R-CO): Madame Attorney General, we appreciate not only your coming here and your responsiveness, but your ability to stick it out -- this gets to be a long process and your perseverance is appreciated as well.
I want to direct your attention to what I think is a difficult area, affirmative action. It's my understanding that the Department of Justice had filed a brief that addressed that subject in the Adarand case, and specifically that the Department of Justice has argued for intermediate scrutiny for federal affirmative action programs.

The Court, of course, held, as you're well aware, that they want to require a higher standard, that is strict scrutiny, for these federal affirmative action programs. And after the opinion was announced, the president stated that the holding was consistent with his policy.
That raises, in my mind at least, the question, if the strict scrutiny was consistent with the president's policy, how is it that the Department of Justice had filed a brief advocating intermediate scrutiny?
ATTY GEN. RENO: I think what the president was referring to is that efforts against the vestiges of discrimination that exist in this country is consistent with his policy. And I think it's important to understand just what Justice O'Connor was saying. She said, "We wish to dispel the notion that strict scrutiny is strict in theory but fatal in fact." She went on to say, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." And I think the president and the Justice Department agree.
She said, "As recently as 1987, for example, every justice of this Court agreed that the Alabama Department of Public Safety's pervasive, systematic and

obstinate discriminatory conduct justified a narrowly tailored race-based remedy. When race-based action is necessary to further a compelling" --
SEN. BROWN: Attorney General, let me -- because our time is limited, let me go on if I could.
ATTY GEN. RENO: Okay.
SEN. BROWN: The question I had was --
ATTY GEN. RENO: Well, the question is --
SEN. BROWN: The Department of Justice had advocated strict intermediate scrutiny. The Court had ruled on strict scrutiny. Or perhaps that was the point of your reading the opinion was that you feel the Court did not come down for strict scrutiny?
ATTY GEN. RENO: I think what the president was saying, and as I was going to finish with reference to strict scrutiny, is the Court continued to recognize that affirmative action is a valid tool to eliminate vestiges of discrimination and that we should study it with strict scrutiny, but it's still a viable, viable option.
SEN. BROWN: Does this mean that the president favors intermediate scrutiny, as the Department of Justice had advocated, or favors strict scrutiny as the Court --
ATTY GEN. RENO: The Department of Justice, based on the case law, advocated intermediate scrutiny. The Department of Justice and the administration are now reviewing Adarand and the response to it.

We expect to provide extensive legal guidance to all the agencies involved next week.
The bottom line is that a program that uses race in decision- making is valid if it is narrowly tailored to serve a compelling interest. And we will be working with the agencies involved to make sure that this guidance is available, that the court's opinion is implemented, and that we carry forward, doing everything we can to make sure that the vestiges of discrimination to which Justice O'Connor referred continue to be addressed.
SEN. BROWN: Does the department support the use of racial quotas?
ATTY GEN. RENO: No.
SEN. BROWN: I have gone through a number of, I guess, statements or requirements -- one, I think, just recently, from the Department of Transportation.
Let me quote it to you. This is from the Department of Transportation and the Federal Aviation Administration. "More than half of the GS-15 management positions recently filled through air traffic national selection system were minorities and females. This is in line with air traffic's commitment to fill one out of every two vacancies with a diversity selection." Do you favor that policy as articulated by the Department of Transportation?
ATTY GEN. RENO: As I indicated, what we are now engaged in is an analysis of Adarand, and we will be circulating guidance to all the agencies, including the Department of Transportation. And we will then be working with them to understand just what is necessary to comply with Adarand and the strict scrutiny test announced by Justice O'Connor.
SEN. BROWN: Well, I --
ATTY GEN. RENO: Until that's done, I don't think it would be appropriate for me to comment about a program that I'm not personally familiar with.
SEN. BROWN: I can understand that. You've indicated to me you're opposed to quotas. Their quote is: "This is in line with air traffic's commitment to fill one out of every two vacancies with a diversity selection." Wouldn't you agree that suggests a quota? ATTY GEN. RENO: What we're trying to do, sir, is to take the language of Adarand, apply it, based on the facts of particular cases. And

so rather than prejudge something based on very limited information, I think it's more important that we apply the Adarand test and do it the right way after proper review.
SEN. BROWN: I can appreciate that you might want to review this department policy specifically. I would just -- it seems to me a fair question. If the administration's opposed to quotas and yet have a policy that imposes them, something's wrong. And I think that's a fair question.

LANGUAGE: ENGLISH

LOAD-DATE: June 29, 1995

Thank you very much.
I think we're in recess till the chair --
ATTY GEN. RENO: Thank you.
SEN. KENNEDY: Thank you.
(Recess.)
SEN. STROM THURMOND (R-SC): The committee will come to order. (Gavel sounds.)
Senator Specter, I believe, is next in (order ?).
SEN. ARLEN SPECTER (R-PA): Thank you, Mr. Chairman. Thank you.
Madame Attorney General, I have two questions for you relating to the incidents at Ruby Ridge and -- one at Ruby Ridge and one at Waco. The question I have with respect to Ruby Ridge relates to the promotion of Mr. Larry Potts to be deputy director of the FBI.
And the sequence of events at Ruby Ridge, as I understand it, were that there had been an initial charge against Mr. Weaver for sale of sawed-off shotguns, later determined on his defense to be an entrapment defense. And Mr. John Magaw, director of the Alcohol, Firearms and Tobacco Unit, confirmed that it was entrapment, although Mr. Magaw characterized it as borderline entrapment.
And then the tragedy at Ruby Ridge involved the killing of a U.S. marshal and the killing of Mr. Weaver's young son, Sam, who was shot in the back, and the killing of Mr. Weaver's wife. And there was a controversy as to -- there is a controversy as to whether there had been a change in the rules of engagement in the FBI standards on deadly force. Special Agent Glenn (sp), who had a key role at Ruby Ridge, now the special agent in charge of the Salt Lake City office, has represented that there had been a change in the rules of engagement. The change of rules, as I understand it, related to deadly force. And Mr. Potts, in a conversation with me last month, May 17th, said to me that there had been no changes in the rules of engagement and there had been no authorization to change the deadly force policy.

Before proceeding to the answer to this question, I'd like to ask my second question because of the time limits. And my question to you on the Ruby Ridge incident is, why was Mr. Potts promoted to deputy director of the FBI while, there are so many open questions on Ruby Ridge, including the issue as to whether there is going to be a prosecution by the state prosecutor?
And the second question that I have relates to Waco, and it relates to the use of the CS gas. And I note from the report by Dr. Stone from Harvard the consequences of the use of the gas upon minors, referring to a medical study, refer to the consequences of first degree burns, severe respiratory distress, toxicity, including an enlarged liver, and serious life-threatening symptoms based on medical literature on the effects of that gas on infants, and the fact that the use of that CS gas has been banned under the Paris Chemical Weapons Convention, to which the United States is a party signatory. And my second question is, was the very serious impact of CS gas on children considered in its use at Waco?
ATTY GEN. RENO: With respect to the first question, we had not received Mr. Glenn's (sp) letter before the Potts promotion was made, and what I did in that instance was to look at Mr. Potts' record and to take into consideration that it has been my longstanding policy that when someone is responsible for an organization, they should develop the staffing of the organization, and I deferred to Director Potts -- to Director Freeh.
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With respect to Waco, one of the questions I asked before I ever considered authorizing the use of the gas, was what effect it could have on the children, on elderly people. I was -- the FBI arranged that I would meet with a civilian

scientist who works for the Department of the Army, and I met with him in advance, and he assured me that both in his readings, in his studies that there would be no permanent effect.
Since the question has arisen, we have continued to explore all possible sources of information with respect to the gas, and we continue in that effort to see if Dr. Stone's concerns are valid.
SEN. SPECTER: Were you aware at the time that you authorized the use of the CS gas that it had been banned by the Paris Chemical Weapons Convention?
ATTY GEN. RENO: I had not heard that. I've subsequently heard that the treaty may not be ratified and that there is a law enforcement exception. But I've asked again that all of that be clarified.
SEN. SPECTER: Well, were you aware that -- when you say it hadn't been ratified, were you aware that the United States had in fact signed the Chemical Weapons Convention agreeing to ban CS gas?
ATTY GEN. RENO: As I indicated, previously, I was not aware of it at the time, nor was I advised of the treaty. But as I indicated to you, there -- what I have been advised of since is that there is a law enforcement exception.
SEN. SPECTER: To what extent, Attorney General Reno, had you made an inquiry of the effect of this gas on people generally or infants specifically prior to its use?
ATTY GEN. RENO: Prior to its use, as I indicated when the issue was first raised by the FBI with me, I said, "What about the children? What about elderly people? What effect could it have? Could it have a permanent effect on anyone?" The Army -- the FBI made arrangements for me to meet with Dr. Harry Salem (sp), who is a civilian scientist with the Department of the Army, who I am told, both before and subsequently, is one of the world's experts on toxicity of substances such as this. And I met with him at FBI Headquarters. He advised me of what -- the studies that he had done, and he concluded that it would not have a permanent effect.
SEN. SPECTER: Have you made any follow-up check to see whether or not he was correct?
ATTY GEN. RENO: As I indicated to you in my previous question, what I have done is asked the FBI, asked Director Freeh to do everything they can to pursue all lines of inquiry that indicate that the gas might be harmful, so that we can understand in future situations if there is any new information that should be considered in making any decision affecting CS gas.
SEN. SPECTER: And what has that additional study produced?
ATTY GEN. RENO: To this date, it has not -- I keep checking to see whether they have found additional information. I understand that the latest effort has been made to contact British authorities, but to date I have found nothing that would sustain this as the gas was used, but we want to continue to pursue it.
SEN. SPECTER: So if the question were to come up again today, you'd still use CS gas?
ATTY GEN. RENO: No, sir. What I would do would be to see what the latest information is, look at it all over again, and make the best judgment that I could based on the inquiries that we have made.
SEN. SPECTER: With respect to Deputy Director Potts, Attorney General Reno, when you made the promotion, were you aware of his contention that he had never changed the rules of engagement or did not make any change in the FBI's policy on deadly force?
ATTY GEN. RENO: At the time I'm -- I did not make the promotion. Under the procedure as I understand that it exists between the department and the FBI is that I must approve it. Director Freeh made his recommendation that he be promoted. He felt that it was important and that it was in the best interest of

At this time, a number of things were readily apparent to me. Most important, I was convinced that, short of allowing David Koresh to go free, he was not coming out voluntarily. Given that unacceptable result, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large, or the government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible attendant injuries and harm.a-a

In the course of our deliberations, we met with General Peter Schoomacher and Colonel Jerry Boynkin, former and present Commanders of Delta Force respectively, the Army's rough equivalent to the FBI's HRT, to review the plan. Their comments on the plan were instructive. While indicating that the plan appeared to be sound, one suggestion was that, rather than an incremental approach to the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously. I preferred the FBI approach which called for a gradual increase in pressure over a period of time. It seemed to me that would best ensure the safety of those inside, particularly the children. I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that, as a result of the initial use of teargas, Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease the operation. On the

other hand, if Koresh and his followers endangered the agents by firing upon them, they were authorized to return the fire. To the great credit of the FBI, they received substantial fire from within the compound, both at the vehicles and at sniper positions surrounding the compound without returning any fire. In fact, throughout the 51-day siege, the FBI never fired a single shot. Instead, when fired upon, the FBI responded by beginning to insert gas throughout the compound.

The Commanders also expressed concern about the length of time the HRT had been on the scene in a state of readiness and all expressed the view that the team would have be pulled back for retraining. All advised that there was not a substitute civil force that could secure the extensive area around the compound that had the expertise of the HRT.

I wanted and received assurances that the gas and its means of use were not pyrotechnic. I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.

I also considered that Koresh had talked about suicide and that might occur at anytime under conditions that the FBI might be less likely to control, but that experts had advised the Bureau that the chances of suicide were not likely.

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I. Preamble

The Justice Department's official investigation published on October 8th together with other information made available to the panelists present convincing evidence that David Koresh ordered his followers to set the fire in which they perished. However, neither the official investigation nor the Dennis evaluation has provided a clear and probing account of the the FBI tactics during the stand-off and their possible relationship to the tragic outcome at Waco. This report therefore contains an account based on my own further review and interpretation of the facts.

I have concluded that the FBI command failed to give adequate consideration to their own behavioral science and negotiation experts. They also failed to make use of the Agency's own prior successful experience in similar circumstances. They embarked on a misguided and punishing law enforcement strategy that contributed to the tragic ending at Waco.

As a physician, I have concluded that there are serious unanswered questions about the basis for the decision to deploy toxic C.S. gas in a closed space where

there were 25 children, many of them toddlers and infants.

This report makes several recommendations, first among them is that further inquiry will be necessary to resolve the many unanswered questions. Even with that major caveat, I believe the Deputy Attorney General's suggestions for forward looking changes are excellent and endorse them. This report makes further specific recommendations for change building on his proposal.

II. Introduction

A: Explanation for the delay in the submission of this report

This past summer, the Justice and Treasury Departments appointed a group of panelists, each of whom was to prepare a forward-looking report suggesting possible changes in federal law enforcement in light of Waco. For reasons set forth below, I decided that before submitting a report based on my particular professional expertise, it was necessary to have a complete understanding of the factual investigation by the Justice Department. Having now had the opportunity to read and study that report and the Dennis Evaluation, I concluded that I did not yet have the kind of clear and probing view of events that is a necessary prerequisite for making suggestions for constructive change. Deputy Attorney General (DAG) Philip Heymann therefore made it possible for me to pursue every further question I had with those

directly responsible for the Justice Department's factual investigation and with the FBI agents whose participation at Waco was relevant to my inquiry. Their cooperation allowed me to obtain the information necessary for this report.

The Justice Department has sifted through a mountain of information, some of which, in accordance with Federal Statute, can not be publicly revealed. This evidence overwhelmingly proves that David Koresh and the Branch Davidians set the fire and killed themselves in the conflagration at Waco, which fulfilled their apocalyptic prophecy. This report does not question that conclusion; instead, my concern as a member of the Behavioral Science Panel is whether the FBI strategy pursued at Waco in some way contributed to the tragedy which resulted in the death of twenty-five innocent children along with the adults. The Justice Department Investigation and the Dennis Evaluation seem to agree with the FBI commander on the ground, who is convinced that nothing the FBI did or could have done would have changed the outcome. That is not my impression.

I therefore decided it was necessary to include in this report my own account of the events I considered critical. I have attempted to confirm every factual assertion of this account with the FBI or the Justice Department. Although,

in my discussions with the Justice Department, I encountered a certain skepticism about what I shall report here, I was quite reassured by interviews with the FBI's behavioral scientists and negotiators, who confirmed some of my impressions and encouraged my efforts. Because they share my belief that mistakes were made, they expressed their determination to have the truth come out, regardless of the consequences. I hope that this report will bolster the FBI and its new Director's efforts to conduct their forthcoming review of Waco, which has not yet begun. I also hope that my report and suggestions for change will in some measure enable the FBI to work more effectively with the Justice Department, the Attorney General, and other law enforcement agencies.

B. Mandate to the panel as I understood it

The mandate to the panelists was "to assist in addressing issues that Federal Law Enforcement confronts in barricade/hostage situations such as the stand-off that occurred near Waco, Texas...." Specifically, my sub-group (Ammerman, Cancro, Stone, Sullivan) was directed to explore: "Dealing with persons whose motivations and thought processes are unconventional. How should law enforcement agencies deal with persons or groups which thought processes or motivations depart substantially from ordinary familiar

behavior in barricade situations such as Waco? How should the motivations of the persons affect the law enforcement response? What assistance can be provided by experts in such fields as psychology, psychiatry, sociology, and theology?" [1]

There seemed to be two premises in this request by the Deputy Attorney General (DAG). The first premise was that Waco had been a tragic event, so it was important for the agencies and the people involved to examine the evidence, evaluate their actions, and initiate change based on those conclusions. Second, although there were questions about the psychiatric status of David Koresh, the DAG's use of the term, "unconventional," indicated that we were also broadly to consider groups with "belief systems" that might cause them to think and behave differently than ordinary criminals and therefore to be more difficult for law enforcement to deal with and understand. As I understood it, the Branch Davidians' religious beliefs were considered unconventional," which was not intended to be a pejorative term, but rather a descriptive one. The panelists were also told that there was concern among federal law enforcement officials that more such "unconventional" groups might, in the near future, pose problems for which law enforcement's standard operating procedures might not be suitable.

Given this important responsibility and the fact that we were asked to make recommendations "[c]oncerning the handling of incidents <u>such as the Branch Davidian Standoff in Waco, Texas</u>" (emphasis added), I felt unprepared to go forward without a thorough grasp of the events and decisions that led to the tragedy. However, the Justice Department was still in the preliminary stage of their own fact-gathering investigation at our panel briefings in early July. Hoping to convey the particular issues of concern to me, I prepared a preliminary report based on the initial briefings. Since the factual information I wanted and needed was still being gathered by the Justice Department, I did not attend the subsequent special briefings arranged for the panel at Quantico, Virginia. Because of my reticence to furnish a report based on incomplete information, the DAG and I resolved that I would submit my report subsequent to the completion of the Justice Department's factual inquiry. I have now had the opportunity to review the following documents:

1. 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, September, 1993;

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1. Memorandum of June 25, 1993

2. Report to the Deputy Attorney General on the Events at Waco, Texas, February 28 to April 19, 1993 (Redacted Version), October 8, 1993;

3. Edward S.G. Dennis, Jr., Evaluation of the Handling of the Branch Davidian Stand-off in Waco, Texas, February 28 to April 19, 1993 (Redacted Version), October 8, 1993;

4. Deputy Attorney General Philip B. Heymann, Lessons of Waco: Proposed Changes in Federal Law Enforcement October 8, 1993;

5. Recommendations of Experts for Improvements in Federal Law Enforcement After Waco.

As previously mentioned, the Justice Department and the FBI have answered my further questions, supplied me with documents, and helped me explore issues of greatest relevance to my inquiry.

II. Account of the Events at Waco

The FBI replaced the BATF at the Branch Davidian compound on the evening of February 28 and the morning of March 1. There had been casualties on both sides during the BATF's attempted dynamic entry. David Koresh, the leader of the Branch Davidians, had been shot through the hip, and the situation was in flux. It would become, as we have been told, the longest stand-off in law enforcement history. The FBI, with agents in place who were trained for rapid intervention, was locked into a prolonged siege. The

perimeter was difficult to control, the conditions were extreme, and the stress was intense. Furthermore, the FBI's people had inherited a disaster that was not of their own making. "Under the circumstances, the FBI exhibited extraordinary restraint and handled this crisis with great professionalism" the Dennis Evaluation concludes. While this may be true from the perspective of experts in law enforcement, it does not contribute to establishing a clear explanation of what happened at Waco from a psychiatric and behavioral science perspective. The commander on the ground believes that the FBI's actions had no impact on David Koresh. He and others who share his opinion will likely disagree with the account that follows, which is the product of my own current understanding of the events.

Phase I

During the first phase of the FBI's engagement at Waco, a period of a few days, the agents on the ground proceeded with a strategy of conciliatory negotiation, which had the approval and understanding of the entire chain of command. They also took measures to ensure their own safety and to secure the perimeter. In the view of the negotiating team, considerable progress was made - for example, some adults and children came out of the compound; but David Koresh and

the Branch Davidians made many promises to the negotiators they did not keep. Pushed by the tactical leader, the commander on the ground began to allow tactical pressures to be placed on the compound in addition to negotiation: e.g., turning off the electricity, so that those in the compound would be as cold as the agents outside during the twenty-degree night.

Phase II

As documented in the published reports and memoranda, this tactical pressure began at the operational level over the objections of the FBI's own experts in negotiation and behavioral science, who specifically advised against it. These experts warned the FBI command abut the potentially fatal consequences of such measures in dealing with an "unconventional" group. Their advice is documented in memoranda. Nonetheless tactical pressure was added. Without a clear command decision, what evolved was a carrot-and-stick, "mixed-message" strategy. This happened without outside consultation and without taking into account that the FBI was dealing with an "unconventional" group.

Although this carrot-and-stick approach is presented in the factual investigation as though it were standard

operating procedure for law enforcement and accepted by the entire chain of command, it was instead, apparently, the result of poor coordination and management in the field. Negotiators and tactical units were at times operating independently in an uncoordinated and counterproductive fashion.

Phase III

During the third phase of the stand-off, the FBI took a more aggressive approach to negotiation and, when that failed, gave up on the process of negotiation, except as a means of maintaining communication with the compound. By March 21, the FBI was concentrating on tactical pressure alone: first, by using all-out psycho-physiological warfare intended to stress and intimidate the Branch Davidians; and second, by "tightening the noose" with a circle of armored vehicles. The FBI considered these efforts a success because no shots were fired at them by the Branch Davidians.

This changing strategy at the compound 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. When the

fourth and ultimate strategy, the insertion of C.S. gas, was presented to Attorney General Reno, the FBI had abandoned any serious effort to reach a negotiated solution and was well along in its strategy of all-out tactical pressure, thereby leaving little choice as to how to end the Waco stand-off. It is unclear from the reports whether the FBI ever explained to the AG that the agency had rejected the advice of their own experts in behavioral science and negotiation, or whether the AG was told that FBI negotiators believed they could get more people out of the compound by negotiation. By the time the AG made her decision, the noose was closed and, as one agent told me, the FBI believed they had "three options - gas, gas, and gas."

This account of the FBI's approach at Waco may not be correct in every detail. It is certainly oversimplified, but it has been confirmed in its general outline by FBI behavioral scientists and negotiators who were participants at Waco. This account with their assistance brings into focus for me the critical issues about law enforcement response to persons and a group whose beliefs, motivations, and behavior are unconventional.

III. Analysis

A. The FBI's behavioral science capacity
1. FBI expertise in dealing with persons whose motivations and thought processes are unconventional.

The evidence now available to me indicates that, contrary to my previous understanding and that of the other panelists, the FBI's 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 Branch Davidians. The FBI has excellent in-house behavioral science capacity and also consulted with reputable experts outside the agency. Panelists may have been misled, as I was, by FBI officials at the original briefings who conveyed the impression that they considered David Koresh a typical criminal mentality and dealt with him as such. They also conveyed the impression that they believed his followers were dupes and he had "conned" them. Based on reports and interviews, the FBI's behavioral science experts who were actually on the scene at Waco had an excellent understanding of Koresh's psychology and appreciated the group's intense religious convictions.

My preliminary report of August 3 emphasized at some length those aspects of David Koresh's clinical history and psychopathology that contradicted the simplistic and

misleading impression given at the first briefings. Much more information has been made available about his mental condition, his behavioral abnormalities, his sexual activities, and his responses under stress. All of this evidence is incompatible with the notion that Koresh can be understood and should have been dealt with as a conventional criminal type with an antisocial personality disorder. However, the evidence available does not lead directly to some other clear and obvious psychiatric diagnosis used by contemporary psychiatry. Nonetheless, based on the FBI's in-house behavioral science memoranda and other information from outside consultants, 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.

This is not to suggest that David Koresh did not dominate and exploit other people. He was able to convince husbands and wives among his followers that only he should have sex with the women and propagate children. He convinced parents on the same religious grounds to permit him to have sex with their young teen-age daughters. He studied, memorized, and was preoccupied with Biblical texts

and made much better educated people believe that he had an enlightened understanding of scripture and that he was the Lamb of God. His followers took David Koresh's teachings as their faith. He exacted strict discipline from adults and children alike while indulging himself.

Whatever else all this adds up to, it and other information clearly demonstrate as a psychological matter that Koresh had an absolute need for control and domination of his followers that amounted to a mania. He also had the ability to control them. The intensity and depth of his ability and need to control is attested to by everyone in the FBI who dealt with him, from negotiators and behavioral scientists to tactical agents and the commander on the ground.

Unfortunately, those responsible for ultimate decision-making at Waco did not listen to those who understood the meaning and psychological significance of David Koresh's "mania." Instead they tried to show him who was the "boss."

What went wrong at Waco was not that the FBI lacked expertise in behavioral science or in the understanding of unconventional religious groups. Rather the commander on

the ground and others committed to tactical-aggressive, traditional law enforcement practices disregarded those experts and tried to assert control and demonstrate to Koresh that they were in charge. There is nothing surprising or esoteric in this explanation, nor does it arise only from the clear wisdom of hindsight. As detailed below, the FBI's own experts recognized and predicted in memoranda that there was the risk that the active aggressive law enforcement mentality of the FBI -- the so-called "action imperative" would prevail in the face of frustration and delay. They warned that, in these circumstances, there might be tragic consequences from the FBI's "action imperative," and they were correct.

2. Evaluating the Risks of Mass Suicide

As I have previously stated, there is, to my mind, unequivocal evidence in the report and briefings that the Branch Davidians set the compound on fire themselves and ended their lives on David Koresh's order. However, I am also now convinced that the FBI's noose-tightening tactics may well have precipitated Koresh's decision to commit himself and his followers to this course of mass suicide.

The official reports have shied away from directly confronting and examining the possible causal relationship

between the FBI's pressure tactics and David Koresh's order to the Branch Davidians. I believe that this omission is critical because, if that tactical strategy increased the likelihood of the conflagration in which twenty-five innocent children died, then that must be a matter of utmost concern for the future management of such stand-offs.

Based on the available evidence and my own professional expertise, I believe that the responsible FBI decision makers did not adequately or correctly evaluate the risk of mass suicide. The Dennis Evaluation's executive summary concludes that "the risk of suicide was taken into account during the negotiations and in the development of the gas plan." It is unclear what "taken into account" means. The questions that now need to be explored are:

> how was the risk of suicide taken into account?
> and how did the FBI assess the impact of their show-of-force pressure tactics on that risk?

Gambling with death.

There is a criminology, behavioral science, and psychiatric literature on the subject of murder followed by

suicide, which indicates that these behaviors and the mental states that motivate them have very important and complicated links. Family violence often takes the form of murder followed by suicide. Multiple killers motivated by paranoid ideas often provoke law enforcement at the scene to kill them and often commit suicide. Even more important is what has been called "the gamble with death." Inner-city youths often provoke a shoot-out, "gambling" with death (suicide) by provoking police into killing them. The FBI's behavioral science unit, aware of this literature, realized that Koresh and his followers were in a desperate kill-or-be-killed mode. They were also well aware of the significance and meaning of the Branch Davidians' apocalyptic faith. They understood that David Koresh interpreted law enforcement attacks as related to the prophesied apocalyptic ending.

In moving to the show of force tactical strategy, the FBI's critical assumption, was that David Koresh and the Branch Davidians, like ordinary persons, would respond to pressure in the form of a closing circle of armed vehicles and conclude that survival was in their self-interest, and surrender. This ill-fated assumption runs contrary to all of the relevant behavioral science and psychiatric literature and the understanding it offered of Koresh and the Branch Davidians.

Furthermore, there was direct empirical evidence supporting the assumption that the Branch Davidians, because of their own unconventional beliefs, were in the "gamble with death" mode. The direct evidence for this was their response to the ATF's misguided assault. They engaged in a desperate shootout with federal law enforcement, which resulted in deaths and casualties on both sides. The ATF claims gunfire came from forty different locations. If true, this means that at least forty Branch Davidians were willing to shoot at federal agents and kill or be killed as martyr-suicide victims defending their "faith." The idea that people with those beliefs expecting the apocalypse would submit to tactical pressure is a conclusion that flies in the face of their past behavior in the ATF crisis. Past behavior is generally considered the best predictor of future behavior.

Willing to kill but not cold-blooded killers

The BATF investigation reports that the so-called "dynamic entry" turned into what is described as being "ambushed". As I tried to get a sense of the state of mind

and behavior of the people in the compound the idea that the Branch Davidians' actions were considered an "ambush" troubled me. If they were militants determined to ambush and kill as many ATF agents as possible, it seemed to me that given their firepower, the devastation would have been even worse. The agents were in a very vulnerable position from the moment they arrived. Yet, as ordered, they tried to gain entry into the compound in the face of the hail of fire. Although there is disagreement, a senior FBI tactical person and other experts confirmed my impression of this matter. The ATF agents brought to the compound in cattle cars could have been cattle going to slaughter if the Branch Davidians had taken full advantage of their tactical superiority. They apparently did not maximize the kill of ATF agents. This comports with all of the state-of-mind evidence and suggests that the Branch Davidians were not determined, cold-blooded killers; rather, they were desperate religious fanatics expecting an apocalyptic ending, in which they were destined to die defending their sacred ground and destined to achieve salvation.

The tactical arm of federal law enforcement may conventionally think of the other side as a band of criminals or as a military force or, generically, as the aggressor. But the Branch Davidians were an unconventional

group in an exalted, disturbed, and desperate state of mind. They were devoted to David Koresh as the Lamb of God. They were willing to die defending themselves in an apocalyptic ending and, in the alternative, to kill themselves and their children. However, these were neither psychiatrically depressed, suicidal people nor cold-blooded killers. They were ready to risk death as a test of their faith. The psychology of such behavior-together with its religious significance for the Branch Davidians - was mistakenly evaluated if, not simply ignored, by those responsible for the FBI strategy of "tightening the noose." The overwhelming show of force was not working in the way the tacticians supposed. It did not provoke the Branch Davidians to surrender, but it may have provoked David Koresh to order the mass-suicide. That, at least, is my considered opinion.

The factual investigation reports in detail the many times negotiators asked Koresh and others in the compound whether they planned suicide. Also documented are Koresh's assurances that they would not kill themselves. Such questions and answers are certainly important from a psychiatric perspective in evaluating a patient's suicidal tendency. But the significance of such communication

depends on the context, the relationship established, and the state of mind of the person being interviewed. The FBI had no basis for relying on David Koresh's answers to these questions. Furthermore, his responses provided no guidance to the more pertinent question: - "What will you do if we tighten the noose around the compound in a show of overwhelming power, and using CS gas, force you to come out?'

The psychology of control

The most salient feature of David Koresh's psychology was his need for control. Every meaningful glimpse of his personality and of day-to-day life in the compound demonstrates his control and domination. The tactic of tightening-the-noose around the compound was intended to convey to David Koresh the realization that he was losing control of his "territory," and that the FBI was taking control. The FBI apparently assumed that this tactic and the war of stress would establish that they were in control but would not convey hostile intent. They themselves truly believed these tactics were "not an assault," and because the Davidians failed to respond with gunfire, the FBI considered their tactics effective and appropriate. The commander on the ground now acknowledges that they never

really gained control of David Koresh. But, in fact, my analysis is that they pushed him to the ultimate act of control -- destruction of himself and his group.

The FBI's tactics were ill considered in light of David Koresh's psychology and the group psychology of the people in the compound. The FBI was dealing with a religious group, with shared and reinforced beliefs and a charismatic leader. If one takes seriously the psychological syndrome of murder/suicide gamble with death and the group's unconventional belief system in the Seven Seals and the apocalypse, then you may conclude, as I have, that the FBI's control tactics convinced David Koresh that, in this situation, he was becoming hopeless and helpless -- that he was losing control. In his desperate state of mind, he chose death rather than submission. When the FBI thought they were at last taking control, they had in fact totally lost control of the stand-off.

3. The Waco tactics in light of the group psychology of the FBI

If this had been a military operation, the Waco conclusion would have been a victory. The enemy was destroyed without a single loss of life for the FBI. This situation, however, was not a military operation. The

question is: did a "military" mentality overtake the FBI? We were told that the FBI considers a conflict which results in any casualties on either side a failure. The law enforcement experts on the panel agreed.

There is little doubt that the FBI inherited a terrible situation. Federal agents had been killed and wounded, and there were killed and wounded Branch Davidians in and around the compound. The FBI knew that they were in a dangerous situation, and that they confronted a group of religious fanatics who were willing to kill or be killed. The FBI's initial decision to mount a stand-off and negotiate was a remarkable exhibition of restraint under the circumstances. In retrospect, tactical units will wonder whether an immediate full-scale dynamic entry by an overwhelming force would have produced less loss of life.

The FBI stand-off, we were repeatedly told, was the longest in law enforcement history. The costs in money and manpower were mounting and, Waco had the media impact of the Iran Hostage taking as the days mounted. The FBI was under enormous pressure to do something. Given what I believe the FBI's group psychology to have been, the desultory strategy of simultaneous negotiation and tactical pressure was enacted as a compromise between doing nothing (passivity)

and a military assault (the action imperative). The appeal of any tactical initiative to an entrenched, stressed FBI must have been overwhelming. It may have better suited their group psychology than the group psychology of the unconventional people in the compound they wanted to affect. Given the escalating pressure to act, the final tightening-the-noose" and C.S. gas strategy must have seemed to the tacticians a reasonable compromise between doing nothing and overreacting.

This analysis of the FBI's group psychology is not intended as a matter of placing blame. If it is accurate, it at least points to what might be done differently in the future. The FBI should not be pushed by their group psychology into misguided ad hoc decision making the next time around.

B. Failure to use behavioral science capacity

1. Failure of coordination between tactical and negotiating arms of the FBI

Throughout the official factual investigation, there are references to the failure of communication between the tactical and negotiation arms of the FBI. The commander on the ground thinks that the official investigation and evaluation exaggerate the extent and significance of that

failure. I disagree. The situation can only be fully appreciated by a thoroughgoing review of the documents. Consider the Memo of 3/5/93 from Special Agents Peter Smerick and Mark Young on the subject, "Negotiation Strategy and Considerations." The memorandum not only defines the basic law enforcement priorities at Waco in the identical fashion as the after-the-fact panel of law enforcement experts, also anticipates most of the panel's own behavioral science expertise and retrospective wisdom. Agents Smerick and Young were not Monday morning quarterbacks as we panelists are; they were members of the F.B.I. team on the field of play. The basic premise of their overall strategy was:

1. Insure safety of children [emphasis in original], who are truly victims in this situation.
2. Facilitate the peaceful surrender of David Koresh and his followers.

The agents went on to emphasize that the strategy of negotiations, coupled with ever-increasing tactical presence was inapplicable. They wrote, "In this situation, however, it is believed this strategy, if carried to excess, could eventually be counter-productive and could result in loss of life." p. 2, Memo of 3/5/93. The agents also were fully aware that Koresh's followers believed in his teachings and would "die for his cause." They were fully aware,

therefore, of the religious significance of the Branch Davidians' conduct and attitudes and were sensitive to all of the concerns emphasized by the religious experts on the panel in their reports. They suggested that the F.B.I. should consider "offering to pull back, only if they release more children" (emphasis in original). The agents further recommended that, "since these people fear law enforcement, offer them the opportunity of surrendering to a neutral party of their choosing accompanied by appropriate law enforcement personnel."

These agents recognized that although some in the F.B.I. might believe the Davidians were "bizarre and cult-like," the followers of Koresh "will fight back to the death, to defend their property [described elsewhere by the agents as sacred ground, the equivalent of a cathedral to Catholics, etc.] and their faith" (emphasis added). Memo of Smerick and Young 3/7/93.

My reading of these memos indicates that these agents had placed the safety of the children first, exactly as did AG Reno. They recognized that it was not a traditional hostage situation, as the British law enforcement expert on the panel, C.E. Birt, repeatedly emphasized during our briefings of July 1 and 2, when he found it necessary to

correct the misrepresentation of the briefer. They warned against the carrot-and-stick approach, which was employed and has been criticized by several of the panelists in their reports. Professor Cancro speaks of it as a "double bind," a term used by behavioral scientists to describe a mixed message for which there is no correct response and which, as a result, creates anxiety and agitation in the recipient of the message.

The factual investigation does not explain how or why these expert opinions of behavioral scientists and negotiations within the FBI were overridden. The Justice Department emphasized that these same agents whose views I have described gave quite contradictory views the very next day. When I asked whether the Justice Department's fact-finders had questioned these agents as to why they had changed their views, no adequate answer was given. I therefore pursued that inquiry with the agent who authored the two reports. He made it quite clear that the contradictory suggestions were offered only in response to an expression of dissatisfaction with the previous recommendations. Although the commander on the ground and the official investigation disagree with my view, I have concluded that decision-making at Waco failed to give due

regard to the FBI experts who had the proper understanding of how to deal with an unconventional group like the Branch Davidians.

2. Was tactical strategy appropriate with so many children in the compound?

The pressure strategy as we now know it consisted of shutting off the compound's electricity, putting search lights on the compound all night, playing constant loud noise (including Tibetan prayer chants, the screaming sounds of rabbits being slaughtered, etc.), tightening the perimeter into a smaller and smaller circle in an overwhelming show of advancing armored force, and using CS gas. The constant stress overload is intended to lead to sleep-deprivation and psychological disorientation. In predisposed individuals the combination of physiological disruption and psychological stress can also lead to mood disturbances, transient hallucinations and paranoid ideation. If the constant noise exceeds 105 decibels, it can produce nerve deafness in children as well as in adults. Presumably, the tactical intent was to cause disruption and emotional chaos within the compound. The FBI hoped to break Koresh's hold over his followers. However, it may have solidified this unconventional group's unity in their common misery, a phenomenon familiar to victimology and group psychology.

When asked, the Justice Department was unaware whether the FBI had even questioned whether these intentional stresses would be particularly harmful to the many infants and children in the compound. Apparently, no one asked whether such deleterious measures were appropriate, either as a matter of law enforcement ethics or as a matter of morality, when innocent children were involved. This is not to suggest that the FBI decision-makers were cold-blooded tacticians who took no account of the children; in fact, there are repeated examples showing the concern of the agents, including the commander on the ground. Nevertheless, my opinion is that regardless of their apparent concern the FBI agents did not adequately consider the effects of these tactical actions on the children.

3. The plan to insert CS gas

During U.S. military training, trainees are required to wear a gas mask when entering a tent containing CS gas. They then remove the mask and, after a few seconds in that atmosphere, are allowed to leave. I can testify from personal experience to the power of C.S. gas to quickly

inflame eyes, nose; and throat, to produce choking, chest pain, gagging, and nausea in healthy adult males. It is difficult to believe that the U.S. government would deliberately plan to expose twenty-five children, most of them infants and toddlers, to C.S. gas for forty-eight hours. Although it is not discussed in the published reports, I have been told that the FBI believed that the Branch Davidians had gas masks and that this was one of the reasons for the plan of prolonged exposure. I have also been told that there was some protection available to the children, i.e covering places where the seal is incomplete with cold wet towels can adapt gas masks for children and perhaps for toddlers though not for infants. The official reports are silent about these issues and do not reveal what the FBI told the AG about this matter, and whether she knew there might be unprotected children and infants in the compound.

The written information about the effects of C.S. gas which was presented to the AG has been shared with the panelists. We do not know whether she had time to read it. Based on my own medical knowledge and review of the scientific literature, the information supplied to the AG seems to minimize the potential harmful consequences for infants and children.

Scientific literature on C.S. gas is, however, surprisingly limited. In the sixties, the British Home office, commissioned the Himsworth Report, after complaints about the use of C.S. gas by British troops in Londonderry, Ireland. The report is said by its critics to understate the medical consequences. The published animal research on which the report is based acknowledged that at very high exposure, which the authors deemed unlikely, lethal effects were produced. The researchers assumed (as did the Himsworth report) that C.S. gas would be used primarily in open spaces, to disperse crowds, and not in closed areas.

The AG's information emphasized the British experience and understated the potential health consequences in closed spaces. The AG also had a consultation with a physician; but the exact content of that discussion has not been reported, and the available summary is uninformative. The FBI commander on the ground assures me that the agency has detailed, ongoing expertise on C.S. gas and its medical consequences. If so, no such FBI information was supplied in the written material to the AG or subsequently to this panelist.

Based on my review, the American scientific literature on the toxic effects of C.S. gas on adults and children is also limited. Of course, there has, been no deliberate experimentation on infants. The Journal of the American Medical Association published two articles in recent years in which physicians expressed concern about the use of C.S. gas on civilians, including children in South Korea and Israel. Anecdotal reports of the serious consequences of tear gas, however, approved as early as 1956. Case reports indicate that prolonged exposure to tear gas in closed quarters causes chemical pneumonia and lethal pulmonary edema. Gonzalez, T.A., et al, Legal Medicine Pathology and Toxicology East Norwalk, Conn: Appleton Century Crofts, 1957). According to a 1978 report, a disturbed adult died after only a half-hour exposure to C.S. gas in closed quarters. Chapman, A.J. and White C. "Case Report: Death Resulting from Lacrimatory Agents," J. Forensic Sci., 23 (1978): 527-30) The clinical pathology found at autopsy in these cases is exactly what common medical understanding and ordinary pulmonary physiology predicts would follow prolonged exposure in closed quarters.

The potential effects of C.S. gas are easily explained. C.S. gas causes among other things, irritation and inflammation of mucus membrane. The lung is a sack full of

membranes. The inhalation of C.S. gas would eventually cause inflammation, and fluid would move across the membranes and collect in the alveoli, the tiny air sacks in the lungs that are necessary for breathing. The result is like pneumonia and can be lethal. Animal studies are available to confirm that C.S. gas has this effect on lung tissue. Ballantyne, B. and Callaway, S., "Inhalation toxicology and pathology of animals exposed to omicron-chlorobenzylidene malonitrile (CS)," Med. Sci. Law, 12 (1972): 43-65. The Special Communication published in J.A.M.A 220 (1993): 616-20 by Physicians for Human Rights reported that its teams, investigating the use of C.S. gas in South Korea and Panama, found "skin burns, eye injuries and exacerbations of underlying heart and lung disease . . . on civilians at sites far removed from crowd gatherings." Dermatologists have reported blistering rashes on skin exposed to self-defense sprays, which use the same C.S. gas. Parnaix-Spake, A. et al, "Severe Cutaneous Reactions to Self-Defense Sprays, Arch. Dermatol 129 (1993): 913.

The medical literature does contain a clinical case history of a situation that closely approximates the expected Waco conditions. Park, S.and Giammona, S.T., "Toxic Effects of Tear Gas on an Infant Following Prolonged

Exposure," Amer. J. Dis. Child 123,3 (1972). A normal four month-old infant male was in a house into which police officers, in order to subdue a disturbed adult, fired canisters of C.S. gas. The unprotected child's exposure lasted two to three hours. Thereafter, he was immediately taken to an emergency room. His symptoms during the first twenty-four hours were upper respiratory; but, within forty-eight hours his face showed evidence of first degree burns, and he was in severe respiratory distress typical of chemical pneumonia. The infant had cyanosis, required urgent positive pressure pulmonary care, and was hospitalized for twenty-eight days. Other signs of toxicity appeared, including an enlarged liver. The infant's delayed onset of serious, life-threatening symptoms parallels the experience of animal studies done by Ballantyne and Calloway for the Hinsworth Report. The infant's reactions reported in this case history were of a vastly different dimension than the information given the AG suggested.

Of course, most people without gas masks would be driven by their instinct for survival from a C.S. gas-filled structure. But infants cannot run or even walk out of such an environment; and young children (many were toddlers) may be frightened or disoriented by this traumatic experience. The C.S. gas tactics, planned by the FBI, and

approved by the AG, would seem to give parents no choice. If they wanted to spare their inadequately protected children the intense and immediate suffering expectably caused by the C.S. gas, they would have had to take them out of the compound. Ironically, while the most compelling factor used to justify the Waco plan was the safety of the children, the insertion of the C.S. gas, in my opinion, actually threatened the safety of the children.

The Justice Department has informed me that because of the high winds at Waco, the C.S. gas was dispersed; they believe it played no part in the death by suffocation, revealed at autopsy, of most of the infants, toddlers, and children. The commander on the ground, however, is of the opinion that the C.S. gas did have some effect, because the wind did not begin to blow strongly until two hours after he ordered the operation to begin. As yet, there has been no report as to whether the children whose bodies were found in the bunker were equipped with gas masks. Whatever the actual effects may have been, I find it hard to accept a deliberate plan to insert C.S. gas for forty-eight hours in a building with so many children. It certainly makes it more difficult to believe that the health and safety of the children was our primary concern.

The commander on the ground has informed me that careful consideration was given to the safety of the children, and that the initial plan was to direct the gas at an area of the compound not occupied by them. We will never know whether that plan would have worked: the Branch Davidians began to shoot at the tank like vehicles inserting the gas canisters, and C.S. gas was then directed at all parts of the compound, as previously decided in a fall back plan recommended by military advisers.

IV. Recommendations

A. The Deputy Attorney General's formulation and recommendation

The DAG has, in his overview, outlined the critical elements to be considered in dealing with a situation like Waco in the future. This is an excellent formulation. Based on what I have learned and what I have described above, I strongly endorse his formulation and the recommendations which follow. However, unlike the other panelists in my group, I am impressed that the FBI has adequate in-house expertise to deal with unconventional groups like the Branch Davidians. Furthermore it seems clear that at Waco, the FBI, was suffering from information overload, if from anything. Thus, I believe that the <u>crisis management</u> capacity (see DAG recommendations) and what I

would describe as <u>information management</u> have to be the particular focus for future change.

B. Recommendations of this panelist

1. Further investigation is necessary

One might think that the highest priority after a tragedy like Waco would be for everyone involved to consider what went wrong and what would they now do differently. I must confess that it has been a frustrating and disappointing experience to discover that the Justice Department's investigation has produced so little in this regard. The investigators have assured me that everyone involved was asked these questions and that few useful responses were given. An undercurrent of opinion holds that everything depends and will depend in the future on the commander on the ground. SAC Jamar, the commander on the ground, knows that he is on the spot and that there are those who point to his position as the weak link at Waco. When I asked him what went wrong and what should be done differently, he candidly acknowledged his difficult position; but he emphasized how much was still unknown about what happened, and that he still had not met with the FBI Waco negotiators to discuss their views of what happened. His basic conclusion in retrospect, however, was that nothing the FBI had done at Waco made any real impact.

His opinion is that Koresh sent people out because he didn't want them, and not because of the FBI's consciliatory negotiation strategy. His opinion is that Koresh ended it all in mass suicide not because of the FBI tactical strategy, but because that was always his intention. His deep and serious concern about his responsibilities was impressive and he made it convincingly clear how much more I and the other experts needed to know about the facts. On this, he was preaching to the converted. There is no doubt in my mind that much more needs to be known about Waco. In my opinion, it is now time for the FBI itself, with the help and participation of outside experts, to take on that responsibility. Indeed, that is my first recommendation. I agree with the FBI's commander on the ground that we still do not know enough about what happened at Waco. We need to know more, not in the spirit of who is to blame, but in the spirit of what went wrong that can be made right. What can we learn from a careful study of David Koresh and the Branch Davidians that will help us in learning about other unconventional groups? What can the FBI learn about its own behavior at Waco that will help in the future?

Just as I believe the FBI has more work to do, I believe the Justice Department has work to do as well. No

clear picture has emerged of how and on what basis the AG made her decision. Given on my current information about C.S. gas, it is difficult to understand why a person whose primary concern was the safety of the children would agree to the FBI's plan. It is critical that in the future, the AG have accurate information, so that she can make an informed decision. If the only information she was given about C.S. gas is what has been shown to the panelists then, given my current understanding, she was ill advised and made an ill-advised decision. None of these matters have been clarified. Certainly for its own effective functioning, the Justice Department needs to sort this out for the future.

The sequence of decision making set out in the earlier account indicates that the FBI had already moved very far down the branch of the decision tree before consulting the AG. This made it difficult for her to make any other choice. Presumably, others in the Justice Department had been involved every step of the way. Like the FBI, they need to re-examine their own behavior, the channels of communication, the processing of information, and what went wrong or needs to be done differently in the future. I assume that the DAG's recommendation of a "senior career official" within the Justice Department, who maintains "a familiarity with the resources available to the FBI," is a forward looking solution to some of these problems.

2. The FBI needs to make better use of past experience and existing behavioral science capacity.

As we have been told, the commander on the ground was not selected because of his past experience in standoffs or because of his knowledge of unconventional groups. He was the special agent in charge of the geographical area in which the action took place. The DAG has recommended a different command structure. Nonetheless, the FBI had a situation room in Washington and a command structure in place at Waco which could have brought the agency's past experience to bear. At the first briefings, when asked to describe their most successful resolution of a standoff with an unconventional group, an FBI official reported the successful use of a third party intermediary (negotiator). When I subsequently inquired about the FBI's previous experience with the successful use of CS gas, the example given was a prison riot.

These examples speak for themselves and suggest to me that in making decisions at Waco, the FBI did not make the best use of its own past experience. The commander on the ground believes his decision to allow lawyers and the local sheriff to meet with Koresh is an example of using a third-party intermediary. However, in their own highly successful

resolution of a stand-off with an armed unconventional group, the FBI used a fellow member of the religious faith as the intermediary. This option was apparently rejected at Waco for reasons that I find unconvincing.

The DAG has recommended that a computer database of past stand-offs be developed. The critical importance of this is to insure that the FBI makes better use of its own experience. It will be important for the FBI to distinguish between unconventional groups and prison populations in deciding which tactical measures are strategically and ethically appropriate.

3. The FBI needs a clear policy on third party negotiators/intermediaries

The FBI has well-rained negotiators whose skills are impressive. Nonetheless, there came a time at Waco when the FBI's frustration led them to introduce a new negotiating approach. They changed from a conciliatory, trust-building negotiator to a more demanding and intimidating negotiator. The change had no effect and may have been counterproductive. The negotiators also tried, at times, to talk religion with Koresh but concluded that this was not productive.

Some FBI negotiators are convinced that they could have gotten more people out of the compound if the FBI had stayed the course of conciliatory negotiation. Whether or not that is true, the FBI reached a point where tactical strategy became the priority and negotiation under those circumstances became ineffective.

It is my recommendation that this point of change be defined as a red light, a time when the decision makers in future standoffs should consider the use of a third party negotiator/intermediary. The red light should go on when the commander on the ground or the chain of command begins to feel that FBI negotiation is at a stand still.

The FBI negotiation and behavioral science experts should, at the least, develop a policy in consultation with experts on when they might consider the use of third party negotiators/intermediaries. The current working policy seems to be that third party negotiators are counterproductive. The experience justifying that policy needs to be reviewed in light of Waco. It was a significant omission at Waco not to involve as a third-party negotiator/intermediary a person of religious stature familiar with the unconventional belief system of the Branch Davidians.

4. The FBI and the Justice Department need a systematic policy for dealing with information overload in a crisis

A critical element of crisis management based on my analysis of what happened at Waco is information management. Information overload allows decision-makers to discount all of the expert advice they are given and revert to their own gut instincts. Alternatively - as I believe we learn from Waco - the decision-makers can insist on being given advice compatible with their gut instinct. In my opinion, the gut instinct that prevailed at Waco was the law enforcement mind-set, the action-control imperative.

If, as the DAG recommends, the FBI develops a network of academic experts in behavioral science, religion, sociology, and psychiatry, the FBI can certainly expect an information overload in the next crisis. The problem will be how to manage the expert information overload. This is a complex problem that requires careful consideration by appropriate experts. However, one pattern that emerged from my understanding of Waco needs to be changed. The official investigation lists all kinds of experts who allegedly were consulted or who took it upon themselves to offer unsolicited advice. It is almost impossible to determine what all this adds up to. 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 Branch Davidians. The investigators at the Justice Department disagree with this conclusion. My concern about this is not a matter of fault-finding: it is critical to my concern about information management in a crisis. The question is: what counts as a consultation with the FBI? One has the impression from the Waco experience that a variety of agents were talking to a variety of experts, and that some of these contacts were listed as consultations. We are not told how those contacts or consultations were sorted through. Who in the process would decide what was relevant and important and what irrelevant and unimportant.

In any event, the prevailing pattern in the information flow during the crisis was for each separate expert to offer the FBI an opinion. As a preliminary matter, it seems to me important for the FBI to establish who the relevant experts are and then arrange through conference calls or more high-tech arrangements for sustained dialogue among them, to understand and clarify the dimensions of their disagreements and, when possible, to achieve consensus. Information should be exchanged and differences directly confronted in the circle of consultants; they should not vanish in the information overload.

5. The FBI needs a better knowledge base about the medical consequences of C.S. gas.

As discussed above, it is my opinion that the AG was not properly informed of the risks to infants and small children posed by CS gas. This is not to imply that the FBI intentionally misled her. Indeed, the FBI may not have had the proper medical information. The use of CS gas is, in any event, a controversial matter, and although it is understandable that the Justice Department investigation did not explore medical considerations, a careful evaluation is clearly indicated. The FBI, the Justice Department, and all of law enforcement that uses CS gas ought to have as clear an understanding of its medical consequences as possible. The hasty survey of the medical and scientific literature done for this report is hardly definitive. These matters should be sorted out so that the AG clearly understands what the use of CS gas entails.

6. The FBI needs a specific policy for dealing with unconventional groups.

The basic conclusion of my account and analysis is that the standard law enforcement mentality asserted itself at Waco in the tactical show of force. The FBI should be aware of its own group psychology and of the tendency to carry out

the action imperative. Doubtless, that imperative is appropriate in dealing with conventional criminals; it may be necessary even in dealing with unconventional groups. However, the lesson of Waco is that once the FBI recognizes that it is dealing with an unconventional group, those who urge punishing tactical measures should have to meet a heavy burden of persuasion. When children are involved, the burden should be even heavier and ethical considerations, which need to be formulated, would come into play.

VI. Final Word

The events at Waco culminated in a tragic loss of life - on that everyone involved in law enforcement and in the official inquiry agree. There is a view within the FBI and in the official reports that suggests the tragedy was unavoidable. This report is a dissenting opinion from that view. There is obviously no definitive answer; but my account and analysis tries to emphasize what might have been done differently at Waco, and what I believe should be done differently in the FBI's future dealings with unconventional groups. I endorse the DAG's recommendations for change and offer additional suggestions. Although such a determination falls outside my province, it is my considered opinion that the failings of the FBI at Waco involve no intentional misconduct.

STATUTES RELATED TO MILITARY SUPPORT TO BRANCH DAVIDIAN OPERATIONS

[redacted]

NATIONAL DEFENSE AUTHORIZATION ACT OF 1991

Section 1004 of the National Defense Authorization Act of 1991 authorized the Secretary of Defense to provide the support of active military units for the counterdrug activities "of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency."[29] In 1993, when the Davidian operations occurred, the Act limited active military support for counterdrug activities to the following nine categories:[30]

- Maintenance and repair of equipment made available to a federal department or agency or to a state or local government by the DOD.
- Maintenance, repair, and upgrading of non-DOD equipment to ensure that such equipment will be compatible with equipment used by DOD.
- Transportation of personnel, equipment, or supplies.

[redacted]

[29] P.L. 101-510, Div. A, Title X, § 1004, as amended. Congress extended the authority through 1999. See P.L. 103-337, Div. A, Title X, § 1011(a).

EXHIBIT D

[30] On November 30, 1993, Congress added a tenth purpose for which the Secretary may provide support—aerial and ground reconnaissance. P.L. 103-160, Div. A, Title XI, § 1121(b).

- Establishment and operation of bases of operation or training facilities.

- Training of law-enforcement personnel, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

- Detection, monitoring, and communication of movement of air, sea, and surface traffic.

- Construction of roads and fences and installation of lighting to block drug-smuggling corridors across international boundaries of the United States.

- Establishment of command, control, communication, and computer networks to improve integration of law-enforcement, active military, and National Guard activities.

- Provision of linguist and intelligence analysis services.

10 U.S.C. §§ 371–382

Sections 371–382 of Title 10 of the U.S. Code authorize the Secretary of Defense to provide certain types of support of active military units to federal, state, or local law-enforcement officials. LEAs are not required to reimburse DOD for the support if it (1) is provided in the normal course of military training or operations, or (2) results in a benefit to the DOD that is "substantially equivalent" to that which would otherwise be obtained from military operations or

training.[31] Otherwise, DOD must be reimbursed as required by the Economy Act.[32] Title 10 [redacted] authorizes the following types of support:

- Any information collected during the normal course of training or operations that may be relevant to a violation of any federal or state law within the jurisdiction of the officials supported.

- Equipment (including associated supplies or spare parts), base facilities, or research facilities.

- Training in the operation and maintenance of equipment provided by DOD.

- Relevant expert advice.

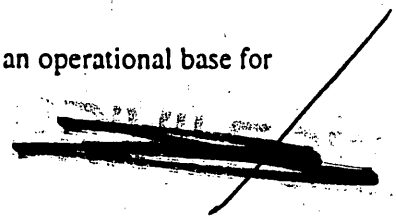
- Maintenance of equipment.

- The operation of military equipment for purposes of (1) monitoring of air and sea traffic; (2) [illegible] initial detection occurred outside the United States; (3) aerial surveillance; (4) interception of vessels or aircraft detected outside the land area of the United States; (5) facilitating

[31] 10 U.S.C. § 379.

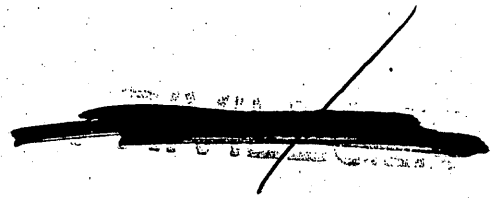
[32] The Economy Act, 31 U.S.C. 1535, generally mandates prompt repayment for goods and services provided by one agency to another. [redacted]

communications with federal LEAs; and (6) transporting and staffing an operational base for civilian law-enforcement personnel.[33]



32 U.S.C. 112

Under 32 U.S.C. 112, the Secretary of Defense may provide funds to the governor of a state who submits a drug interdiction and counterdrug activities plan that meets certain statutory requirements. To obtain funding, a state's plan must specify how National Guard personnel and equipment will be used in drug interdiction and counterdrug activities. Plans must also certify that the use of the National Guard of the state is consistent with state law, and that the activities included in the plan serve a state law-enforcement purpose. If a state's plan is approved and DOD provides funding, the state may use the funds to pay expenses related to the use of its National Guard personnel (while not in federal service) and equipment for drug interdiction and counterdrug activities.[34] DOD considers support requests that are not specifically included in the original plan on a case-by-case basis if accompanied by a certification from the relevant state's attorney general that the operations requested are consistent with state law.[35] LEAs are not required to reimburse the National Guard for this support.



[33] See 10 U.S.C. § 374. Federal LEAs responsible for enforcing the Controlled Substances Act (21 U.S.C. § 801 et seq), certain Immigration and Naturalization Act provisions (8 U.S.C. § 1324–1328), section 401 of the Tariff Act of 1940, and the Maritime Law Enforcement Act may request such aid.

[34] The Act defines "drug interdiction and counter drug activities" as "the use of National Guard personnel in the drug interdiction and counter-drug law enforcement activities authorized by the law of the State and requested by the Governor of the State."

[35] National Guard (AR) 500–2. National Guard Regulation 500-2.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1990[36]

[redacted]

Section 1208 of the National Defense Authorization Act[37] allowed DOD to give federal and state agencies equipment—free of charge—that the Secretary of Defense had declared excess to the military's needs. Under this statute, the Secretary of Defense must also determine that the equipment is suitable for use in counterdrug activities.

[redacted]

[36] P.L. 101-189.

[37] Now codified, as amended, at 10 U.S.C. § 2576a.

REIMBURSEMENTS TO THE MILITARY FROM THE ATF AND FBI FOR ASSISTANCE TO THE BRANCH DAVIDIAN OPERATION

Support	Recipient	Reimbursement
Aircraft		
Active Army—3 UH-1 utility helicopters and 3 CH-47 helicopters	FBI	$375,179
Active Air Force—C-141 transport of FBI's hostage rescue team (and its equipment) to and from Waco	FBI	73,112
Vehicles		
Texas National Guard—2 M-35A2 2½-ton cargo trucks with transport trailers, 5 M-818 5-ton tractor trucks with trailers, 12 M-1009 high-mobility multi-purpose wheeled vehicles	ATF	6,858
Texas National Guard—10 M-2 Bradleys (infantry fighting vehicles), 3 M-332 tractor trailers, 5 M-728 combat engineer vehicles, 1 M-88A1 tracked recovery vehicle (tank retriever), miscellaneous vehicles	FBI	174,313
Active Army—8 M-998 high-mobility multi-purpose wheeled vehicles, an M35A2 2½-ton cargo truck, 2 5-ton trucks, 14 heavy equipment transports, miscellaneous vehicles	FBI	15,466
Equipment		
Texas National Guard—unrecovered photographic and observation equipment, 100 canteens, 50 first-aid dressings, 130 empty magazines for M-16A1 rifles, assorted field clothing	ATF	5,022
Texas National Guard—16 helmets, 13 helmet covers, 12 M-16A1 rifle slings, 54 empty magazines for M-16A1s, an M-25A1 protective mask, 180 tent pins	FBI	5,190
Active Army—2,488 gal. of generator fuel, fencing, 200 sandbags, 6 boxes of chemical lights, cellular-phone charges	FBI	5,523
Supplies		
Texas National Guard—286 cases of field rations; 2,036 gallons of diesel fuel	ATF	17,015
Texas National Guard—62 cases of field rations; 10,529 gallons of diesel fuel; transportation costs of tracked vehicles	FBI	19,133
Personnel (per diem, transportation, and travel costs)		
Active Air Force—electronic jammers and travel costs	FBI	34,340
Active Army—liaison to LEAs and HQs; maintenance of aircraft, vehicles, and equipment; operation of equipment, local transportation costs for DOD personnel	FBI	16,135
Uniformed Services University of the Health Sciences—24-hr medical control, 24-hr clinic, drafting of Waco medical plan	FBI	Reimbursed 133 staff-days[a]
Total of known amounts reimbursed		**$747,286**

[a] A flat rate plus all travel was used under a memorandum of understanding between the two parties. All travel vouchers were sent directly to the FBI for payment; FBI paid for expendable medical supplies.

DISCREPANCIES IN BILLING THE FBI FOR MILITARY SUPPORT FOR THE BRANCH DAVIDIAN OPERATION

Undercharges	Amount
Active Army used the wrong flying-hour rates when determining charges for: • flights by UH-1 helicopters for transport, deployment, medical evacuation support, and recovery • flight by CH-47 helicopter on medical standby	$73,073
Active Army did not bill for the loss of two night-vision goggles	9,168
Active Army did not bill for 40-mm grenade-launcher ammunition (200 target-practice rounds, 50 illumination rounds, and 250 high-explosive rounds)	5,066
Active Army did not bill for 9 cases of field rations consumed by Army personnel while supporting the siege	164
Active Army (Special Operations) did not bill for the following services provided during the siege: • observers and technical liaisons to the FBI's hostage rescue team • operation of classified/special equipment • training federal agents in use of classified equipment	10,793
Total undercharges	**$98,264**
Overcharges	
Texas National Guard overcharged for vehicular parts	41
Texas National Guard overcharged for the loss of 8 Kevlar ground-troop helmets	498
Total overcharges	**$539**
Net undercharges	**$97,725**

COUNTERDRUG SUPPORT PROVIDED TO BRANCH DAVIDIAN OPERATION

Support	Recipient	Cost	Authority for waiver
Alabama National Guard			
2 overflights for reconnaissance photography of the compound	ATF	$1,238	32 U.S.C. § 112 (counterdrug)
Subtotal		1,238	
Active Army (Joint Task Force Six)			
Counterdrug training • Communications • Medical evacuation • First aid • Firing-range support • Minor construction	ATF	5,610	10 U.S.C. § 377 (substantial training benefit) P.L. 101-510 § 1004 (b) 4-5 10 U.S.C. § 373
Subtotal		$5,610	
Texas National Guard			
UC-26 aircraft • 4 overflights of the compound for reconnaissance photography • 1 flight in support of siege	ATF	8,032[a]	32 U.S.C. § 112 (counterdrug)
Helicopter flights in support of warrant service	ATF	15,388[a]	32 U.S.C. § 112 (counterdrug)
Helicopter flights in support of siege	ATF	2,454	32 U.S.C. § 112 (counterdrug)
Personnel services in siege • Liaison, command and control • Helicopter flight crews, drivers of various vehicles • Vehicle and equipment maintenance	ATF and FBI	102,301[c]	32 U.S.C. § 112 (counterdrug)
Fuel for non-tracked vehicles	ATF and FBI	410	32 U.S.C. § 112 (counterdrug)
Landline and cellular-telephone service	ATF and FBI	1,995	32 U.S.C. § 112 (counterdrug)
Subtotal		130,580	
Total amount of expenses waived by the military		**$137,428**	

[a] Includes costs for flying hours, personnel, and special maintenance contract.

[b] Includes repair of gunshot damage sustained in warrant service.

[c] Total pay, per diem, and travel (896 staff-days). All personnel were in Title 32 (counterdrug program) status.

COMMENTS FROM THE DEPARTMENT OF DEFENSE

COMMENTS FROM THE BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS

(703183)

ATF NEWS

Washington, DC 20226 24 Hour Telephone: (202) 927-8500

For Immediate Release Feb. 28, 1993

Four ATF Agents Dead, 13 Wounded
In Shootout Today Near Waco, Texas

Washington--Four special agents of the Bureau of Alcohol, Tobacco and Firearms were killed today and 13 were wounded as agents and Texas peace officers served warrants at a ranch near Waco to recover machine guns and explosive devices [redacted] announced. ATF enforces federal firearms and explosives laws.

ATF agents and Texas officers came under heavy, sustained fire as they approached the ranch compound occupied by members of a religious sect called the Branch Davidians. One member of the sect is thought to be dead and others in the ranch compound are reported to be wounded.

Director [redacted] said the names of agents killed and wounded in the Texas firefight today would be released as soon as their families are notified.

"We are deeply saddened," said [redacted] "Our hearts go out to these brave agents who died today in the line of duty, and to their families."

"Today's events point up the fact that law enforcement officers across America place their lives on the line every minute of every day," said [redacted]. "The shootings remind us that the price of protecting the public safety can be high. But the public must be protected," [redacted] continued, "and law enforcement officers will continue to do their duty."

-more-

2 of 3

At 4:30 p.m. today (Eastern time), agents were negotiating with members of the Branch Davidians at the besieged ranch compound near Waco. Agents hope to arrange a surrender without further injury or loss of life.

[redacted] said the public could expect a full report on today's operation in Texas.

-and-

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Department of the Treasury Bureau of Alcohol, Tobacco and Firearms

ATFNEWS

Washington, DC 20226 24 Hour Telephone: (202) 927-8500

Biographical Information on ATF Agents Who Were Killed

Special Agent [redacted] of the ATF Houston Field Division worked out of the Houston Post of Duty. Born December 18, 1960, he graduated from Southwest Texas State University in San Marcus, Texas, with a B.S. in Criminal Justice, in December of 1986. Before joining ATF in Houston in July of 1990, he worked for 3 years as a special agent with Defense Investigative Service.

Special Agent [redacted] of the New Orleans Field Division worked out of the Little Rock, Arkansas Post of Duty. Born March 1, 1966, he worked for ATF for 4 years, entering duty on October of 1988. Special Agent [redacted] a graduate of Florida State University, was from Jackson, Mississippi, and is survived by his wife.

Special Agent [redacted] of the New Orleans Field Division worked out of the New Orleans Post of Duty. Originally from Lake Charles, Louisiana, the 30-year-old special agent was a graduate of McNeese State University and had been with ATF for over 5 years. He is survived by his wife and 2 sons.

Special Agent [redacted] of the New Orleans Field Division worked out of New Orleans Field Division, and he has been an ATF agent for over 3 years. The 28-year-old was from Elizabethon, Tennessee, and a graduate of Eastern Tennessee State University. He was a veteran of Desert Storm. Special Agent [redacted] is survived by his wife.

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ATF NEWS

Washington, DC 20226

24 Hour Telephone: (202) 927-8500

For Immediate Release

Feb. 28, 1993

Statement of Treasury Secretary [redacted]
Regarding Deaths of ATF Agents in Waco

Washington--"My thoughts and prayers are with the families of these brave agents of the Bureau of Alcohol, Tobacco and Firearms. Their deaths bring a profound sense of sorrow and loss. But I have a strong sense of pride too, for the selfless and heroic way in which they and their fellow agents carried out their duty in the face of great danger."

The Bureau of Alcohol, Tobacco and Firearms is the agency of the Treasury Department which enforces Federal firearms and explosives laws.

B2

At 4:30 p.m. today (Eastern time), agents were negotiating with members of the Branch Davidians at the besieged ranch compound near Waco. Agents hope to arrange a surrender without further injury or loss of life.

[redacted] said the public could expect a full report on today's operation in Texas.

-end-

3 of 3

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

HEARING TO RECEIVE TESTIMONY FROM
THE UNIFIED COMMANDERS ON THEIR MILITARY STRATEGY AND
OPERATIONAL REQUIREMENTS, AND THE DEFENSE
AUTHORIZATION REQUEST FOR FISCAL YEAR 1994
AND THE FUTURE YEARS DEFENSE PROGRAM

Wednesday, April 21, 1993
Washington, D.C.

A Y

Chairman Nunn: Thank you all for your testimony. We will have all the statements incorporated in the record as submitted, without objection.

Let me start with our usual procedure here.

[redacted] in his press conference yesterday, President Clinton mentioned that the military had been consulted during the stand-off with the group in Waco, Texas. Were personnel from the Special Operation Forces, from your command, involved in any way in trying to resolve that stand-off?

[redacted] Not in resolving it, Mr. Chairman. We did provide three technicians to the FBI. This was after the initial assault took place and when ~~where~~ the four ATF law enforcement ~~agency~~ members lost their lives.

Approximately two to three weeks ~~at least~~ after that, ~~or it was~~ when the FBI employed ~~out and~~ the hostage rescue team and who ~~was~~ given primary responsibility, ~~for that~~ they asked for technical assistance in installing video surveillance devices between observation posts. That was approved appropriately and we did provide that assistance.

But we were not involved in developing the plan.

Chairman Nunn: Were your people ever called on? Were you ever called on to give any assessment to the Defense Department or to the Justice Department, or to the Treasury Department, for that matter, since they were all involved, as

1 to what contribution the Special Operations Forces could make
2 to that situation?
3 General Stiner: No, sir.
4 Chairman Nunn: So you really weren't called on for
5 either a plan or resources, or even an assessment?
6 General Stiner: No, not in that context. It was
7 requested just last Tuesday that [redacted]
8 [redacted], who used to command one of our Special Operations
9 Forces and who is now the Assistant Division Commander of the
10 First Cav Division at Ft. Hood, Texas, and the current
11 commander of one of our surgical units accompany the commander
12 of the FBI's hostage rescue team to Washington to brief the
13 Attorney General on that plan.
14 They were not asked to cast judgment on the adequacy of
15 the plan or anything of that nature.
16 During the briefing, they were asked if they had ever
17 been exposed to the effects of CS gas and they indicated that
18 they had and described the symptoms. There was also an expert
19 present, a doctor who had been involved in development and
20 experimentation on this, who answered questions.
21 That was the total extent of our involvement.
22 Chairman Nunn: But your command was never asked for
23 input --
24 General Stiner: It was not.
25 Chairman Nunn: -- into either planning or what resources

1 you had that could be used in this unique set of
2 circumstances?
3 General Stiner: No, sir. It was not.
4 Chairman Nunn: Do you know, General Stiner, whether the
5 FBI and the Justice Department, who were, I understand, in
6 charge of the operation, had any understanding of what Special
7 Operations Forces can do? Do you know—on-your own whether
8 they know that?
9 General Stiner: Yes, they do. In fact, we have provided
10 training assistance to the FBI's hostage rescue team on other
11 occasions.
12 Chairman Nunn: Let me ask each of you this question. We
13 alerted you to this when Senator Thurmond and I apprised you
14 and advised you of our interest.
15 How do you rate the personnel morale under your commands
16 today and what recommendations do you make to this committee
17 for anything that you think is essential in our considerations
18 in making sure that the morale of our military forces does not
19 deteriorate?
20 I noticed, [redacted] that you mentioned that we are
21 standing, in your words, "On the brink of a degradation in
22 readiness." I consider that, and I'm sure you do, having
23 listed these points, to be rather significant.
24 So I would asked each of you about the morale of your
25 military forces. [redacted] let's start with you.

:om: BOCOM2> [redacted] (14)
:bject: SASC TESTIMONY
:: [redacted] (15)
::
:nt: 28/04/93
:ceived: 28/04/93

BOCOM3> [redacted] (16)

CINCS WORD AT SASC

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(1) [redacted] PER OU CONVERSATION HERE IS A WRAPUP OF THE QUESTIONS ASKED DURING INC TESTIMONY BEFORE THE SASC 21 APR 93 -- THIS IS NOT A TRANSCRIPT BUT A ECOLECTION FROM NOTES TAKEN DURING THE TESTIMONY.

(2) [redacted] (TO (3) [redacted]) REFERRING TO THE STANDOFF IN WACO, WERE SPECIAL PERATIONS PEOPLE PROVIDED/CONSULTED?

(4) [redacted] THREE SOF PEOPLE WERE PROVIDED TO ASSIST WITH VIDEO URRVIELLANCE, OTHERWISE NOT INVOLVED

(5) [redacted] WERE SOF CALLED ON BY DOD, JUSTICE DEPT, FBI, FOR CONSULTATION ON HE PLAN?

(6) [redacted] A FORMER (7) [redacted] WAS CONSULTED REF THE S GAS.

(8) [redacted] SO, YOU WERE NOT ASKED FOR RESOURCES OR PLANNING?

(9) [redacted] NO, WE WERE'NT INVOLVED IN THAT

(10) [redacted] DOES THE JUSTICE DEPT AND FBI KNOW OF SOF CAPABILITIES?

(11) [redacted] YES - THERE ARE TRAINING EXCHANGES BETWEEN THE VARIOUS AGENCIES.

(12) [redacted] - FYI, I AM ALSO PROVIDING A CY OF THE PUBLISHED HEARING SUMMARY.

AM AVBL AT YOUR CONVENIENCE FOR ANY OTHER INFO YOU MAY NEED.

'R

(13) [redacted]

40-5180

other hand, if Koresh and his followers endangered the agents by firing upon them, they were authorized to return the fire. To the great credit of the FBI, they received substantial fire from within the compound, both at the vehicles and at sniper positions surrounding the compound without returning any fire. In fact, throughout the 51-day siege, the FBI never fired a single shot. Instead, when fired upon, the FBI responded by beginning to insert gas throughout the compound.

The Commanders also expressed concern about the length of time the HRT had been on the scene in a state of readiness and all expressed the view that the team would have be pulled back for retraining. All advised that there was not a substitute civil force that could secure the extensive area around the compound that had the expertise of the HRT.

I wanted and received assurances that the gas and its means of use were not pyrotechnic. I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.

I also considered that Koresh had talked about suicide and that might occur at anytime under conditions that the FBI might be less likely to control, but that experts had advised the Bureau that the chances of suicide were not likely.

2

AG RENO'S PREPARED TEXT.

At this time, a number of things were readily apparent to me. Most important, I was convinced that, short of allowing David Koresh to go free, he was not coming out voluntarily. Given that unacceptable result, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large, or the government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible attendant injuries and harm.a-a

In the course of our deliberations, we met with General Peter Schoomacher and Colonel Jerry Boynkin, former and present Commanders of Delta Force respectively, the Army's rough equivalent to the FBI's HRT, to review the plan. Their comments on the plan were instructive. While indicating that the plan appeared to be sound, one suggestion was that, rather than an incremental approach to the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously. I preferred the FBI approach which called for a gradual increase in pressure over a period of time. It seemed to me that would best ensure the safety of those inside, particularly the children. I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that, as a result of the initial use of teargas, Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease the operation. On the

HOUSE JUDICIARY COMMITTEE TESTIMONY

OF

ATTORNEY GENERAL JANET RENO

APRIL 28, 1993

Good Morning Mr. Chairman and Members of the Committee. Thank you for affording me the opportunity to appear before you to discuss the tragic events which occurred at the Branch Davidian Compound in Waco this past week. I want to be as open as possible with you and all the people about what we knew before and during the day of April 19 and what we know today.

This was one of the hardest decisions anyone could make. We deliberated long and carefully before reaching the decision. Nothing we do can change the suffering felt by the families of the Agents killed or injured or of the families of those who perished in the compound. We must do everything we can to learn from these events about what we can do in the future to prevent people like David Koresh from causing such a senseless, horrible loss of life.

On February 28, 1993, four agents of the Bureau of Alcohol, Tobacco and Firearms were killed and sixteen were injured in a shootout that occurred when they attempted to execute an arrest warrant for Vernon Howell, AKA David Koresh, and a search warrant at the Branch Davidian compound near Waco, Texas. The Agents were met by a barrage of gunfire from numerous firing points in the compound that lasted 45 minutes, involved thousands of rounds of

ammunition, and left four agents dead and sixteen agents injured. Weapons used by the Branch Davidians included 50-caliber rifles having an effective range of 3000 yards. All of those killed or wounded were shot or injured by homemade hand grenades. While several members of the commune were killed and injured, apparently there were no serious injuries to any of the children.

After the shootout, the remaining ATF agents established a protective perimeter around the compound. A few hours later, three Branch Davidians attempted to enter the compound, resulting in a second shootout with ATF agents in which one Davidian was killed. Attempts were made to further secure the perimeter. ATF officials then requested that the FBI dispatch its Hostage Rescue Team (HRT).

On February 28, 1993, agents of the Federal Bureau of Investigation, including the HRT, arrived on the scene. The FBI found an armed fortress, a compound consisting of approximately seventy acres located on Rt. 7 near Waco.

I took office on March 12, 1993. I had been briefed previously by the Acting Attorney General and was thereafter briefed specifically on the situation at Waco. I was advised that the primary goal of the HRT was to negotiate with Koresh to secure the release of the children and the surrender and prosecution of all those who participated in the murder and assault of the federal agents without further violence or injury to anyone concerned.

Concern was expressed for the children but I concurred that we must try to negotiate to avoid further bloodshed. As this situation evolved, the FBI had consistently rejected a direct assault on the compound because of the danger of heavy casualties to the agents and the children.

I was told that the FBI had a trained negotiator on the scene and that they were consulting with behavioral experts and others who had knowledge of the cult to determine how best to proceed to negotiate with Koresh.

From the start, the negotiation tactics focused on restricting the activities of those inside the compound, and depriving them of a comfortable environment so as to bring the matter to a conclusion without further violence. Those inside the compound were advised of the FBI's rules of engagement. Under those rules, agents would not use deadly force against any person except as necessary in self-defense or defense of another, when they had reason to believe that they or another were in danger of death or grievous bodily harm.

The FBI installed lights to illuminate the compound at night and loudspeakers to ensure that they could communicate with all members of the compound at once, rather than having to rely solely on the single telephone line available to speak to Koresh and those he permitted to talk on the phone. They also used the loudspeakers

to disrupt their sleep, cut off their electricity, and sought to restrict communications of those within the compound to the hostage negotiators. Additionally, they sent in letters from family members, and made other good faith efforts designed to encourage surrender by those who wished to leave the compound. In particular, the negotiators made repeated efforts to secure the release of children.

In further efforts to encourage the negotiating process, attorneys representing Koresh and Steve Schneider were allowed to enter the compound or communicate by telephone with them on several occasions. Even promises made to these attorneys since were broken.

Throughout this 51-day process, Koresh continued to assert that he and the others inside would at some point surrender. However, the FBI advised that at no point did he keep his word on any of his promises. Despite all efforts, the negotiators concluded that negotiations were at a standstill and they had not been able to successfully negotiate a single item with Koresh. Although 21 children and 14 adults had been allowed to leave the compound between February 28 and March 23, 1993, those persons who left the compound did so because Koresh affirmatively wanted them out as they were not fully committed to his cause, they were a drain on his efforts at internal discipline and resources, or he viewed them as potential spokespersons to the media.

During the week of April 5, the FBI advised me that they were developing a plan for the possible use of teargas in an effort to increase the pressure on those in the compound to surrender. Thereafter, I had a series of meetings to discuss the emerging FBI proposal to utilize non-lethal teargas.

The threshold question I asked was whether the gas could cause permanent injury to the children. I did not even want to consider the matter further if we could not be certain about this factor. The FBI assured me that the gas would not cause permanent injury. I asked them to research further and subsequently they arranged for me to meet with Dr. Harry Salem, a doctor who reviewed case studies with us that confirmed that it would not cause permanent injury.

Then, the primary question I asked again and again during the ensuing discussion was "Why now?", "Why not wait?". I asked about their food and water supply and was told that it could last at least a year or more. I asked that the information about the water supply be checked and doublechecked by observing the level in the water tanks. We explored but could not develop a feasible method for cutting off their water supply.

I asked my staff to have direct discussions with the chief negotiator to satisfy ourselves that we had indeed reached an impasse in negotiations.

At this time, a number of things were readily apparent to me. Most important, I was convinced that, short of allowing David Koresh to go free, he was not coming out voluntarily. Given that unacceptable result, allowing the status quo to remain was not going to lead to an ultimate peaceful resolution and eliminate any risk to the safety of the innocent children in the compound, the public at large, or the government agents at the scene. On the contrary, the passage of time only increased the likelihood of incidents and possible attendant injuries and harm.a-a

In the course of our deliberations, we met with General Peter Schoomacher and Colonel Jerry Boynkin, former and present Commanders of Delta Force respectively, the Army's rough equivalent to the FBI's HRT, to review the plan. Their comments on the plan were instructive. While indicating that the plan appeared to be sound, one suggestion was that, rather than an incremental approach to the use of the gas as proposed by the FBI, gas should be inserted into all portions of the compound simultaneously. I preferred the FBI approach which called for a gradual increase in pressure over a period of time. It seemed to me that would best ensure the safety of those inside, particularly the children. I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that, as a result of the initial use of teargas, Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease the operation. On the

other hand, if Koresh and his followers endangered the agents by firing upon them, they were authorized to return the fire. To the great credit of the FBI, they received substantial fire from within the compound, both at the vehicles and at sniper positions surrounding the compound without returning any fire. In fact, throughout the 51-day siege, the FBI never fired a single shot. Instead, when fired upon, the FBI responded by beginning to insert gas throughout the compound.

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I wanted and received assurances that the gas and its means of use were not pyrotechnic. I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response if we should go forward.

I also considered that Koresh had talked about suicide and that might occur at anytime under conditions that the FBI might be less likely to control, but that experts had advised the Bureau that the chances of suicide were not likely.

In considering the FBI proposal, I weighed other concerns of the government with respect to the state of affairs inside the compound. They included:

(1) the well-being of the children in the compound, given the deteriorating sanitary conditions, the apparent lack of adequate medical care inside, and reports of sexual and other abuse;

(2) the vulnerability of the outer perimeter, which created a threat to public safety and the federal agents at the perimeter. The outer perimeter was vulnerable because there were inside the compound .50 caliber weapons having an effective killing range of 3000 yards, a distance that would reach from the U.S. Capitol to the White House;

(3) our inability to maintain the presence of the HRT on site indefinitely, and the lack of a suitable substitute force that could replace them at the compound; and

(4) the increasing risk, as the standoff continued, of injury to federal agents, whether by accident or by the risk of shooting from inside the compound.[1]

Since being sworn in as Attorney General, I have had numerous conversations with people both inside and outside the Department of Justice concerning the Waco situation. In addition, I directed my

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[1] During the final week of the standoff, one of the FBI helicopters struck a wire during an operation to put in a SWAT team to locate a trespasser near the compound. Remarkably, there were no fatal injuries. In the assessment of the military, the continued use of our HRT equipment in Waco enhanced the risk of accident significantly.

staff to keep the White House apprised of ongoing developments. My discussions with representatives at the White House were predicated on the premise that, as chief law enforcement officer, the decision how to proceed was mine. I advised the President on the Sunday before the operation of my decision to authorize the FBI's use of teargas at the compound, and he said he would support my decision.

It is difficult to summarize the events other than to emphasize that I believed we were dealing with a situation that would not resolve itself by mere acquiescence to the standoff. Negotiations were proven to be fruitless and, despite our best efforts, we could not secure the release of the children. It was a situation that suggested to me that time would only increase the risk to public safety, to the safety of government agents and to those within the compound, without any realistic expectation that the matter would be resolved peacefully if we did nothing. It was my call and I made it the best way I know how.

Let me urge that we focus on the future and try to determine how best we can avoid a recurrence of this tragedy. In this regard, at the President's request, Secretary Bentsen and I are developing a process whereby the events at Waco will be examined by experts both within and outside government to consider the following questions:

(1) In the execution of the arrest and search warrants by ATF, were established procedures followed and, if so, were they

adequate?

(2) Is federal law enforcement adequately prepared to negotiate in dangerous situations, in terms of training, staffing, and available techniques?

(3) Is training for the execution of warrants involving barricaded suspects who may be holding innocent third parties adequate for all law enforcement agencies?

(4) Are improvements needed in coordinating the activities of the various investigative agencies?

(5) How should federal law enforcement agencies marshal resources in various disciplines, including psychology and psychiatry, in situations involving cults and other groups using barricades and holding innocent people? and

(6) What systems and understandings about command and control should guide the relationships among leaders of the Departments and career officials in operating units when field operations impose a substantial risk of danger to law enforcement officials and others?

The incident at Waco ended tragically for all involved. I have thought every day since April 19 about what I might have done differently. I only hope that I will never have to make such a decision again.

I would be glad to answer any questions at this time.

Federal News Service

JULY 31, 1995, 2:45 P.M. MONDAY - 11:02 Eastern Time
SECTION: CAPITOL HILL HEARING

LENGTH: 4326 words

HEADLINE: JOINT HEARING OF THE
CRIME SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE AND
THE NATIONAL SECURITY INTERNATIONAL AFFAIRS AND CRIMINAL
JUSTICE SUBCOMMITTEE OF THE
HOUSE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE
SUBJECT: **REVIEW OF SIEGE OF BRANCH DAVIDIANS' COMPOUND IN WACO, TEXAS** CHAIRED BY: REPRESENTATIVE BILL MCCOLLUM (R-FL) AND
REPRESENTATIVE BILL ZELIFF (R-NH)
WITNESS: **ALLEN HOLMES, ASSISTANT SECRETARY OF DEFENSE FOR SPECIAL OPERATIONS AND LOW INTENSITY CONFLICT**
2154 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC AFTERNOON SESSION PLEASE NOTE: THIS IS A RESEND WITH .
BODY:

REP. ZELIFF: Ambassador Holmes, if you'd be willing to take your seat at the table. Are we all set?
The Joint Oversight Committee studying the Waco situation will now come to order.
I'm very happy to welcome back Ambassador H. Allen Holmes. Mr. Holmes currently serves as the assistant secretary of special operations and low intensity conflict. In his current capacity he is responsible for the overall supervision including oversight of policy and resources of the special operations and low-intensity conflict activities at the Department of Defense. Mr. Holmes previously served as a U.S. Ambassador to Portugal from 1982 to 1985. I know you appeared before us last week. We have some additional questions that we'd like to ask you and we thank for coming back.
I understand that you have an opening statement. Okay, before you start if you would it's customary to swear you in so if you'd please stand, raise your right hand.
Do you solemnly swear that the testimony your about to give these subcommittees is the truth, the whole truth and nothing but the truth?
MR. HOLMES: I do.
REP. ZELIFF: Thank you very much. Please be seated. Let the record show that the answer is in the affirmative.
Ambassador, please proceed with your statement.
MR. HOLMES: Thank you, Mr. Chairman.

I'm here before you again to help you and the American people understand fully the role of the Defense Department in supporting civil authorities -- REP. ZELIFF: Excuse me one second, there's a --

REP. : (Off mike.)

REP. ZELIFF: Do you have copies of the statement that you can pass out? MR. HOLMES: I can -- we can make copies subsequently.

REP. ZELIFF: All right, thank you very much. Please proceed. MR. HOLMES: I'm here before you again to help you and the American people understand fully the role of the Defense Department in supporting civil authorities in general and, in particular, the support that the Department gave to the Federal Bureau of Investigation in Waco, Texas, in March and April of 1993.

As I explained during my testimony on July 20th, the Congress has vested the Secretary of Defense with several means of providing assistance to civilian authorities and law enforcement agencies. You will recall that during the session on the 20th, the focus was on the so-called drug Nexus (sp) and the fact that certain types of the Department's support may be available on a non-reimbursable basis. I noted at the time though that much of the day-to-day support that the department gives to federal, state and local law enforcement agencies is provided pursuant to statutes that require agencies to reimburse the department for their use of our equipment and the services of our personnel. As is the case with many departments of the federal government, DOD has well-defined authority, for example in chapter 18 of title 10 of the U.S. Code, we're under the economy act in title 31 of the Code to provide support to other agencies on a reimbursable basis.

On February 28th, 1993, and during the weeks that followed the Department received numerous requests for support from the Department of Justice, specifically from the FBI for assistance at WACO. We responded to these requests by providing the equipment and expert advice pursuant to the Secretary's statutory authority. The support included two M-1 Abrams tanks, five combat engineer vehicles and 10 Bradley fighting vehicles that were operated by FBI personnel. While DOD personnel were present at Waco, they did not perform law enforcement functions. The support provided was totally consistent with our statutory authority and with the Congressional intent that DOD's equipment be used in a manner that ensures its return to the Pentagon in a combat-ready status. We are still working on a response to the chairman's request for a list of the equipment provided by DOD to law enforcement. But I can give you the following general summary.

As I mentioned, DOD support to the FBI, including tanks, CEVs and Bradleys. Additionally, we provided about 12 HMMWVs, helicopters for both observations and possible medical evacuation and some heavy trucks. They were either loaned to the FBI under the economy act and operated by FBI personnel or in the case of stand-by medical equipment, offered with the understanding that DOD's costs would be reimbursed. Although DOD personnel provided maintenance and training with respect to those vehicles, no DOD personnel operated these vehicles as part of the FBI's law enforcement activities during this period, including on April 19th.

In fact the department was meticulous in advising the military personnel who provided support as to the legal limitations on that support.

We also provided some specialized support. The FBI asked for and we provided certain specialized equipment. We provided special video equipment and prototype automated reconnaissance equipment, again operated by FBI personnel to assist the FBI in its operations. Although throughout the period as many as 10 DOD technicians, active military or civilians, advised the FBI on the installation, capabilities or use of this equipment, no DOD personnel directly participated in any law enforcement operations involving the use of this equipment. In addition, from March 10 to 17, we provided equipment to interfere with television reception within the compound and we provided civilian personnel support to operate that equipment. The equipment was removed from Waco on March 18.

Finally, at the FBI's request, recognizing the potential for injuries resulting from the FBI operations, the department, as it does in other civilian operations ranging from natural disasters to crisis situations, provided medical support to the FBI. Under a 1991 Memorandum of Agreement between the Uniformed Services University for Health Sciences, which is DOD's medical school, and the FBI's hostage rescue team, we provided a team of medical specialists who would be ready to provided emergency medical care to any casualties of the law enforcement operations. These medical professionals were located in the vicinity of the Branch Davidian compound but did not directly participate in the law enforcement operations. As an added precaution, the FBI requested and we made available three medical evacuation helicopters and medical personnel on standby at Fort Hood, Texas should they be needed. They never left Fort Hood. The department provided other support to the FBI during March and April of 1993, such as gas masks, night vision devices and training. I reiterate, though, that no DOD personnel performed any law enforcement functions. For example, we provided essential driver training to ensure that the FBI personnel were properly quanned to operate the vehicles we provided. We also provided maintenance support and emergency medical support. Our support to the FBI was within congressionally directed limits and in keeping with Congress' intent that we share our specialized expertise and resources with civil authorities. Finally, I know there are questions among members of the joint committee concerning a meeting of four DOD personnel with the attorney general and others on April 14, 1993, and particularly the role of two Army officers consulted by the attorney general.

The Department of Justice requested that the two Army officers attend the meeting, and DOD approved the request. Before coming to Washington, one of the officers flew to Waco, visited the area adjacent to the compound, and met with an FBI representative. They then overflew the compound in a helicopter before boarding an FBI aircraft to fly to Washington.

At the meeting the attorney general's questions centered on two general areas: the effects and risks associated with CS gas, and the plan that the FBI had prepared. You have received testimony from one of the four DOD participants in that meeting, Dr. Harry Salem , a civilian employee of the Army, as to the information he provided about CS gas.

As for the two Army officers, they related that they had experience with CS as a result of their military training. They advised the attorney general that people's reactions to CS will vary. Some may panic. Others may try to continue to function normally by using expedients such as wet cloths to overcome the effects of the gas. When asked by the attorney general about the FBI's plan, one of them pointed out that they were not qualified to pass judgment on law enforcement operations. They were not authorized to, and they did not approve or disapprove the plan.

The two officers did point out that the plan differed from what they would plan if this had been a military operation. They emphasized that military operations call for the application of surprise, speed, and violence of action. In that light, they pointed out that in military operation CS gas would be inserted into the whole compound at once, not incrementally, as planned by the FBI.

With respect to these Army officers, I am convinced that they acted professionally and appropriately at all times.

I will conclude by stressing that the department takes its statutory authority seriously. We are fully aware of the special charge given us by the Congress and the American people to support civil authorities. In this case, our support complied with that charge, and none of the DOD personnel who assisted law enforcement agencies during this difficult episode participated directly in any law enforcement operations.

I'm ready to answer your questions.

REP. ZELIFF: Thank you. Thank you, Ambassador.

The chair yields to Mr. Clinger.

MORE

It's been two years now since the incident, and we're still trying to come up with an accounting. Do you have any idea how long this will take? MR. HOLMES: We're very close to completing that. We just want to be absolutely certain that it is totally accurate, and we have circulated our reply among various parts of the Defense Department, so that we are able to give you a totally accurate accounting. And we will send it to you.

REP. ZELIFF: Because I think, as we try to do our report, it's vital that we have very definite, specific information on not only assets, but -- not only fixed assets, from tanks to HUMVEEs and everything else, but also personnel itself needs to be diagrammed.

MR. HOLMES: We will do our best to get an accurate accounting of personnel as well.

Let me hasten to add here that it may be extremely difficult to give you an exact accounting of the number of people on any given day, but I think we can come very close to giving you a total picture of the personnel that were there essentially to provide maintenance and training and so forth. REP. ZELIFF: In your advice to Attorney General Reno, can you just describe what the folks there said to her relative to their assurance that CS gas was harmful or not harmful to children, any information relative to the military's experience?

MR. HOLMES: Well, based on the experience of the two military -- the two Army officers concerned, who have used CS gas in training on many occasions, their response to the attorney general's question was that reactions vary according to the individual person concerned. Some people panic and want to leave the vicinity as quickly as they can. And others are able to exercise more control and stay there and use such expedients as might be at hand, such as a wet cloth, to try to overcome the effects of the gas.
MORE

But basically their point was there is no way of knowing exactly how any two people would react to it.
REP. ZELIFF: But specifically -- and I know the red light's on -- my question is -- to little children, people who were very little, less than two years old. Any reference to your concerns --
MR. HOLMES: I'm not aware that they were asked nor did they respond directly to the effects on children, which, obviously, from the point of view of their military training and experience, would not have been relevant. REP. ZELIFF: So, just to make the record clear, you were never asked the question to comment relative to children. You were just asked the use of CS gas?
MR. HOLMES: With respect to people. To the best of my knowledge -- REP. ZELIFF: Assuming adults, and your experience has been with adults, and you would assume that, you know, adults could have gas masks and work them, but you weren't looking at children.
MR. HOLMES: To the best of my knowledge, that was the extent of their exchange.
REP. ZELIFF: Mr. Scott, of Virginia.
REP. SCOTT: Thank you, Mr. Chairman. Ambassador Holmes, as I understand it, you can get military assistance on a number of different ways, and, depending on which category you ask, you have to reimburse or not reimburse. As you do this accounting will that include who is reimbursed, who for what -- so that we can figure out under what category the assistance was obtained? MR. HOLMES: Well, if I understand your question, if you would like a basic division as between the support --
REP. SCOTT: Well, let me ask it another way. Has the military been reimbursed for any expenses at Waco?
MR. HOLMES: I can't answer that. I assume --
REP. SCOTT: Who could answer? MR. HOLMES: Well, I'll have to ask the question at the Department of Defense. But I believe a great deal of the accounting has taken place but I can't give you a definitive answer as to who and what and how much.
REP. SCOTT: Okay. If you could follow up on that I'd appreciate it. Does the military have experience dealing with cults and people who you're engaging with that might have beliefs that are totally different than -- MR. HOLMES: I didn't understand the first word you said. Experience with -- REP. SCOTT: Dealing with people involved in cults.
MR. HOLMES: Oh. Cults. Oh.

REP. SCOTT: So that the reaction may not be what you expect it to be. Is there any expertise in that area?
MR. HOLMES: Not to the best of my knowledge.
REP. SCOTT: You indicated that the military would have gone in all at once and not incrementally. Has anyone evaluated the possibility of that working, as opposed to what was actually done, to your knowledge?

MR. HOLMES: Not in the Department of Defense.
REP. SCOTT: Okay, back to the gas. We were told that -- by a number of different people who had a background in CS gas, that in the annals of history they don't know anybody who has experienced long- term medical problems or death as a result of CS gas and it's the safest thing out there. It is very traumatic while you're under the CS gas, but as soon as it's gone everybody recovers. Did -- was anything told to the attorney general different than that? MR. HOLMES: I don't believe so, but I'm not sure that the question as you posed it was posed to the two Army officers in that way.
REP. SCOTT: Okay. The question I think that you answered was that the psychological reaction is totally unpredictable, that people under gas, you just don't know what they might do.
MR. HOLMES: Well, yeah, I didn't use the word psychological, but I just simply related that the two officers said that any two individuals could react in totally different ways. Some might panic and some might be more controlled and attempt to use expedience for controlling the effects of the gas. REP. SCOTT: And it is your recollection that because of that, there's just no way to predict what people might do?
MR. HOLMES: Yes.
REP. SCOTT: That is your -- that is your recollection?
MR. HOLMES: That is what -- basically what the Army officers were saying to the attorney general.
REP. SCOTT: Okay. You indicated the military were not involved in the law enforcement. Do military officers have expertise in civilian law enforcement? MR. HOLMES: Generally not. Although clearly within the military police function for carrying out the Uniformed Code of Military Justice on military bases, obviously military police and their officers are schooled in those techniques. But --
REP. SCOTT: But that's not appropriate for civilian type use? MR. HOLMES: No, it is not appropriate and it's not used.
REP. SCOTT: Okay. Thank you, Mr. Chairman. I yield back. REP. ZELIFF: Thank you, Mr. Scott.
The chair yields to Mr. McCollum.

REP. MCCOLLUM: Ambassador Holmes, I'd like for you to confirm for us, or corroborate the fact that I believe is correct, that all of the vehicles you provided to the FBI for the Waco siege period, the Combat Engineering Vehicles, the Bradley Fighting Vehicles and the M1- A1 tanks had had their weapon systems disabled or removed before you provided them to the FBI, is that correct? MR. HOLMES: That is correct, Mr. Chairman.

REP. MCCOLLUM: Thank you. I also want to go back to the meeting that the two Army -- senior Army officers had with Attorney General Reno in discussing the CS gas and the plan. Am I not correct that among other things that they said to her with regard to the CS gas plan was a statement that there are risks associated with it and that mothers may leave their children when it's inserted? MR. HOLMES: I do recall that one of the officers concerned -- involved did say -- in the context of explaining the different reactions said something like some mothers might abandon their children.

REP. MCCOLLUM: All right. Also, I am concerned about the question about whether or not they gave any advice to the attorney general regarding taking out the leader at the beginning of the operation. Am I not correct that in a military operation, as opposed to law enforcement operation, these two Army officers advised the attorney general there would be that type of action? MR. HOLMES: The two Army officers concerned did not advise the attorney general in this regard, they simply stated that were it a military mission that they would use speed, surprise, violence of action, and go for the leader. REP. MCCOLLUM: All right, thank you.

Also in that same discussion, am I not correct that these two Army officers advised the attorney general their opinion that the hostage rescue team needed to be pulled off line at some point to restore their perishable skills so that they would not deteriorate further, both mental and physical? MR. HOLMES: Let me rephrase that in replying. They didn't advise the attorney general that they should do that -- that she should do that, they said that, again, if it were a military operation, they would have their soldiers rotated off the site in order to maintain their perishable skills. REP. MCCOLLUM: All right, that's all I wanted. I'm not trying to put your words in your mouth, I just need to get it out somehow or another. MR. HOLMES: No, I just want to get it accurate.

REP. MCCOLLUM: That's -- I want you to, too. And with regard to the meeting itself and its initiation, am I -- let me ask it this way. Do you know who actually asked the two Army officers to come to this meeting with Attorney General Reno, who the contact point was?

MR. HOLMES: The contact point was an FBI official.

REP. MCCOLLUM: Was it Dick Rogers?

REP. MCCOLLUM: And I believe it was -- Rogers was the head of the hostage rescue team; I believe it was Rogers who was the contact point.

REP. MCCOLLUM: Now, with regard to the jamming equipment that was used to prevent the Davidians from receiving television signals, you indicated that the operation of this equipment was by civilians. Did you mean the FBI?

You did not mean civilian military personnel, did you?

MR. HOLMES: No, I -- let me just check something here. (Pause.) The equipment to interfere with the reception of the TV signals was operated by DOD civilians. REP. MCCOLLUM: It was by DOD civilians?

MR. HOLMES: Yes.

REP. MCCOLLUM: Let me ask you another question. Just to express an explanation here on the Hostage Rescue Team perishable skill issue, did at any time, to you knowledge, after the comment was made about how they would be pulled back in the

military operation to -- if -- it was the military's team out there -- to renew their skills, was there a response from the attorney general or from any of the FBI present as to what their position was with respect to their team, that the military officers (remember ?)?
MR. HOLMES: Yes, I recall that the two -- that the Army officers concerned -- that they mentioned that the FBI officials in charge said that in -- that they were confident that their people were prepared, because they had used makeshift training facilities in the vicinity to keep their training up -- something to that effect. I would not try to characterize precisely how the FBI replied, because I work for the Defense Department. (Chuckles.) I think to be absolutely accurate on that, you might want to ask the FBI. But I -- REP. MCCOLLUM: Well, I thank you. I just wanted to get the response -- MR. HOLMES: I recall it pretty much that way.
REP. MCCOLLUM: -- response of how the military officers observed or remembered their conversations --
MR. HOLMES: Yeah.
REP. MCCOLLUM: -- all I was trying to get.
Thank you, Mr. Chairman.
REP. ZELIFF: Time has expired. Thank you.

Mrs. Slaughter, from New York, for five minutes.
REP. LOUISE SLAUGHTER (D-NY): Thank you, Mr. Chairman.
Mr. Ambassador, it's nice to see you again.
MR. HOLMES: (Thank ?) you, ma'am.
REP. SLAUGHTER: I'm not altogether clear why you're back, either to try to prove once again the attorney general didn't understand this issue -- what I hear more and more is that she tried every way in the world to consult everybody that she could find about the gas, and that then, given every kind of -- and frankly, we heard it all here.
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There were a couple of people who said that nobody really knew, but experts who have really worked with it had said, as what we've pointed before and is on the record, that no person has suffered any debilitating conditions or death at the use of CS gas. As a matter of fact, I'm not sure you're aware that this morning it was put into the record that of the autopsy reports from all the people who died on that unfortunate day, that not a single one died from CS gas. Did you know that?
MR. HOLMES: I did not.
REP. SLAUGHTER: No matter how often we say it, we seem to still come back to see what -- did CS gas kill anybody. It's sort of like Alice in Wonderland, we'll believe six impossible things before breakfast, I guess. One of the things that concerns me is the difference in law enforcement and the Defense Department, I think you're trying to make this very clear, and that the chain of events here sometimes gets forgotten, because we talk all the time about whether you need to know all about cults, does law enforcement need to understand all about cults. You were not there because this was a cult. In the first place, the law enforcement was called in by the local sheriff because of illegal weapons. Isn't that correct?

MR. HOLMES: I only know from -- frankly, from publicly-available information.
REP. SLAUGHTER: Is it your understanding that they were called in because they were stockpiling machine guns and hand grenades and other weapons that were illegal to have?
MR. HOLMES: That's what I've heard, but, I mean, I don't have any direct personal knowledge of that.
REP. SLAUGHTER: Well, my concern is if every law enforcement agency decides it has to understand every cult, that's going to be a pretty difficult problem because we've heard from numbers of various experts here who have disagreed completely with each other and who are to this moment still giving me reports on how they differ from what other members have said. But the Defense Department -- I think we need to restate what you had said before -- you feel that you were there on legitimate grounds.

MR. HOLMES: We feel that we were responding, according to our statutory authority, to request from civil authorities, from law enforcement, for help from DOD because of our specialized expertise and resources. REP. SLAUGHTER: And as we keep talking about the two officers who spoke to the attorney general, it was not their position to tell her how to run the operation because the military itself was not in charge of it; isn't that correct?

United States General Accounting Office

GAO

Report to the Secretary of Defense, the Attorney General, and the Secretary of the Treasury

August 1999

DEPARTMENT OF DEFENSE

Military Assistance Provided at Branch Davidian Incident

GAO

Accountability * Integrity * Reliability

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United States General Accounting Office
Washington, D.C. 20548

National Security and
International Affairs Division

B-276428

August 26, 1999

The Honorable William S. Cohen
The Secretary of Defense

The Honorable Janet F. Reno
The Attorney General

The Honorable Lawrence H. Summers
The Secretary of the Treasury

In 1993, the Bureau of Alcohol, Tobacco, and Firearms (ATF) received assistance from the U.S. military, including counterdrug program support, while investigating violations of federal firearms laws by members of an obscure sect, the Branch Davidians, and their leader, Vernon Howell (also known as David Koresh), in Waco, Texas. On February 28, 1993, as the ATF tried to serve warrants on the sect's compound, a gunfight erupted, killing and wounding agents and Davidians. A standoff ensued that soon involved the Federal Bureau of Investigation (FBI). The military provided support to the two federal law enforcement agencies (LEA) throughout the 51-day standoff, which ended April 19, 1993, when the compound was destroyed by fire.

In August 1996, the House Committees on Government Reform and Oversight and on the Judiciary issued a report, "Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians" (Report 104-749).[1] The report recommended that we review certain aspects of the military assistance provided to the LEAs in this incident. We have reviewed the nature and extent of the assistance, including that from counterdrug programs, provided to these operations, as well as the counterdrug aspects of ATF's plans to serve a search warrant at the Davidian compound. We pursued three specific objectives:

- Determine whether the ATF's requests for support from military counterdrug programs met requirements for authorizing that support.

[1] This report was 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.

- Identify the measures ATF took to deal with any drug activity it might find during its warrant service, and determine whether those measures were appropriate for such operations where a methamphetamine laboratory might be encountered.
- Account for the types, costs, and reimbursements of all military support, including that from counterdrug programs, provided to the ATF and the FBI.

Results in Brief

ATF's two requests for military counterdrug support of its Davidian operations met requirements to authorize provision of that support under the relevant statutes.[2] The ATF cited possible drug-related activity at the compound in both its written requests—the first to the Texas National Guard and the second to Operation Alliance, a coordinating center for counterdrug assistance. The military's decision in both cases to provide the counterdrug support was a reasonable exercise of agency discretion and was authorized under the relevant statutes.

ATF's planning for the warrant service addressed the possibility of encountering hazardous drug materials. ATF agents were made aware of the suspected drug laboratory and the appropriate precautions. Moreover, a team from the Drug Enforcement Administration (DEA) was at the command post the day of the operation to handle any drug-related materials that might be found. This planning was consistent with ATF's own policies—and those of other federal LEAs—governing operations to secure armed suspects and facilities, including those where a drug laboratory is present.

Military assistance (both counterdrug and other) to the ATF and the FBI included surveillance, reconnaissance, and transport; equipment and supplies; training and instruction; and maintenance and repairs. The military provided several items of major equipment, including helicopters and unarmed tactical ground vehicles. We estimated the total cost of military assistance to be about $1 million, of which nearly 90 percent was incurred by the Texas National Guard and active Army units and the rest by the Alabama National Guard and active Air Force. Under the Economy Act,

[2] The military is authorized to provide support to LEAs under a number of statutes. Generally, these agencies must reimburse the military for the cost of its assistance. However, the active military can support counterdrug activities on a nonreimbursable basis under section 1004 of the National Defense Authorization Act of 1991, as amended (P.L. 101–510), and the National Guard can do so under 32 U.S.C. §112.

the ATF and the FBI reimbursed the Texas National Guard, the Army, and the Air Force for about three-quarters of the support. Repayment of another 14 percent, which came from counterdrug programs, was waived by the military, which has the authority to do so if the supported agency suspects a drug connection. These nonreimbursable expenses represented less than $140,000. The military also mistakenly undercharged these two agencies by a comparatively small amount (about 10 percent of the total), which should have been reimbursed. The Army does not plan to collect these undercharges, as it would realize no current benefit—it would have to apply any collection to prior-year obligations. Finally, under applicable statutes,[3] the military gave the ATF and the FBI without charge some excess military items, mostly office and camp equipment, clothes, and tools.

Scope and Methodology

The events we examined occurred several years before we performed our work. Moreover, the ATF's investigation of Vernon Howell during 1992–93 focused on firearm violations, not on illegal drugs; neither the ATF nor any other agency, federal or state, performed a comprehensive, in-depth drug investigation of Howell or any other Davidian residing at the compound at the time.

For our first two objectives, we interviewed many current and former employees of the military and of those federal, state, and local LEAs that had dealings with the case. We also reviewed pertinent case files and material provided to the Waco Administrative Review.[4] We did not try to substantiate actual drug activity by Howell or other compound residents. To obtain information concerning the authority under which their components assisted the LEAs, we contacted the Department of Defense (DOD), the National Guard Bureau, Joint Task Force Six, and the Texas National Guard.

For our third objective, we sought to determine the types and costs of military assistance provided to the ATF and the FBI. To this end, we reviewed available records maintained by DOD, the Army, and the Texas National Guard (requests and authorizations for assistance, hand receipts,

[3] P.L. 101–189 § 1208 and P.L. 102–484 § 1044.

[4] A group convened by the Department of the Treasury to review all aspects of ATF's investigation of Howell and the Davidians, including the ATF's effort to serve the arrest and search warrants on Feb. 28, 1993.

flight logs, DOD reports, etc.). We also interviewed officials at Operation Alliance, Joint Task Force Six, the Texas National Guard counterdrug program, and the Army. In addition, we reviewed the military's documentation concerning cost and reimbursement by the LEAs, including the accounting and recovery records. This information we compared with our data on the support rendered by the military.

For all objectives, we visited or contacted various military and law enforcement organizations, reviewed hundreds of pertinent documents, and viewed other relevant media. Appendix I describes our contacts and sources in greater detail.

We conducted our work between January 1997 and February 1999 in accordance with generally accepted government auditing standards.

Background

Throughout the ATF's investigation and the standoff at the compound, the military provided the ATF and the FBI a wide variety of assistance. A detailed discussion of the statutes authorizing the support is provided in appendix II.

LEAs operating in Texas may obtain military assistance for investigations having a counterdrug component from the Texas National Guard counterdrug program. This program can provide a range of investigative support services, from aerial reconnaissance to logistics.[5] In accordance with regulations,[6] requests for support from National Guard counterdrug programs must cite in writing a suspected drug connection. LEAs can also seek military counterdrug assistance via Operation Alliance, a clearinghouse representing the counterdrug interests of many federal, state, and local LEAs.[7] The Alliance only accepts requests that cite in writing a suspected drug connection.

[5]Program personnel will not normally become involved in arrests of suspects, chain-of-custody of evidence, searches, interdiction, or the physical security of law enforcement officers.

[6]National Guard Regulation 500–2.

[7]The Alliance comprises state and local representatives from several states and agents from the DEA, the Customs Service, the Border Patrol, Coast Guard, the FBI and the ATF, the Internal Revenue Service, U.S. Marshal's Service, the Secret Service, and U.S. Attorneys. Representatives from DOD and the National Guard serve on the group as advisors only.

Requests that the Alliance approves can be referred to military organizations, which review the requests to ensure, among other things, that a suspected drug connection is explicitly stated.[8] Each military organization can decline to provide the support despite the referral. In addition to the National Guard program, the Alliance may refer the request to Joint Task Force Six. This task force, an active service organization, identifies military units that can provide the assistance and coordinates with the requester.[9] It also has a rapid support unit to respond to any immediate need.

Finally, LEAs can receive items without charge from DOD's Regional Logistics Support Office; these items come from its excess inventory. The agencies can request this support directly, and their operations need not have a counterdrug component.

According to the ATF, the drug connection in this operation was a possible clandestine methamphetamine laboratory, perhaps active, that it suspected was somewhere on the extensive Davidian compound. Drug laboratories, active or not, are extremely volatile and toxic, and specialized training and equipment are necessary to safely deal with the chemical materials. The DEA, having lead responsibility for counterdrug activities, provides extensive, highly detailed procedures that its agents are supposed to follow when dealing with clandestine laboratories. These procedures, which cover planning, entry, assessment, processing, exit, and follow-up, include such requirements as

- planning with a lab-certified chemist the entry of the suspect premises,
- assigning safety officers for the entry,
- having self-contained breathing apparatus and lab-certified teams on hand,
- giving specific warnings to the entry team, and
- supplying the entry team with full heat- and chemical-resistant clothing.

However, other federal LEAs, including the ATF, which do not have drugs as their primary focus and which lack DEA's extensive training and equipment have less elaborate drug-lab policies. In ATF's case, its instructions in this matter are quite explicit—agents are to call upon DEA

[8]The statutes, however, do not require a full discussion of the possible connection.

[9]Joint Task Force Six neither plans nor coordinates civilian operations, and active Army units can perform only support roles, not law enforcement functions.

to handle any possible drug evidence they encounter during their investigations. ATF entry teams must be made aware of the drug laborato and of standard precautions. There is, however, no requirement that ATF teams making a "dynamic entry"[10] wear fully protective counterdrug suits with self-contained breathing apparatus. This is also true for DEA entry teams. According to officials from both agencies, such equipment would restrict an entry team's vision and mobility and place it at unacceptable risk, as suspects are often armed.

Military Counterdrug Support to ATF's Davidian Operation Was Authorized Under Statutes

The ATF made two requests for military counterdrug support to its Davidian operations. The first was made directly to the Texas National Guard counterdrug program, and the second was later made to Operation Alliance, which approved and forwarded the request to the Texas National Guard counterdrug program and Joint Task Force Six for their consideration. Some counterdrug support to the ATF during its attempt to serve the warrant extended through the ensuing standoff, constituting a continued response to the agency's second request.

For both of its requests, ATF cited a possible drug connection to its Howell investigation. Although ATF conducted a firearms investigation of Howell and other Davidians, it also acquired information on possible drug activity when it decided to seek support from military counterdrug elements. Not all of this information was shared with the military, but it formed the backdrop to and reinforced the data that was shared.

During our review and in the following narrative, we focused on what the ATF knew about a possible drug connection, when the ATF knew it, and what information the ATF provided to the military counterdrug programs. These points are central to determining whether the military was authorized to provide counterdrug assistance under the relevant statutes.

[10]A very rapid, vigorous, sudden, unexpected entry. It is intended to surprise suspects and prevent them from getting to their guns or from destroying evidence and is used to prevent harm to agents and civilians alike.

ATF's First Counterdrug Request: Assistance From the Texas National Guard Counterdrug Program

In 1992, the local sheriff's office discovered that, between March and June of that year, Howell and other Davidians at the Waco compound had received frequent shipments of weapons, explosive components, and related materials.[11] By June 1992 those shipments totaled more than $40,000. Realizing that matters were now beyond its capabilities, the local sheriff's office contacted the ATF and on June 4, 1992, briefed it on (1) the situation at the compound, including armed guards at the site and (2) the group's violent history, including a 1987 gun battle between Howell and the Davidians' former leader. On June 9, 1992, the ATF formally opened an investigation of Howell and his associates.[12] The agency focused on the conversion and manufacture of weapons and explosives, gathering information on Davidian connections and gun related deliveries that continued to arrive at the compound.

In late June, the sheriff's office notified ATF of a recent delivery to the compound of "chemicals, instruments, and glassware." The sheriff's explosives technician did not regard these items as consistent with the manufacture of explosives; an ATF agent thought these items could be used to manufacture drugs, suggesting a current operation. Later, in November 1992, while pursuing its firearms investigation, the ATF acquired information about a possible drug connection when the sheriff's office told the agency about one of Howell's associates. A search of criminal databases showed that this individual had a long history of drug involvement and had been paroled to the Waco area in April 1992 after serving time for his latest drug conviction.

From the first months of the investigation, ATF had kept in touch with the DEA office in Waco, seeking information it might have about the suspects. The DEA agents offered their help on the case, including undercover work, and performed some minor investigative assistance. In the summer or fall of 1992, the ATF and DEA agents speculated on how the Davidians were financing their heavy gun purchases and substantial building projects while supporting 100 or so compound residents. Based on their enforcement

[11] Assault rifles and conversion kits, ammunition, inert grenades, sensors, night-vision devices, chemicals, combat vests, etc. According to the Treasury Department report, some of these items could be used to illegally manufacture and possess machine guns and destructive devices contrary to the National Firearms Act (26 U.S.C. § 5845).

[12] The sheriff's office gave ATF the names of more than 30 current residents of the compound, which ATF checked for criminal histories.

experience, it seemed possible to the agents that a resident might be dealing in illegal drugs.

Having decided that it needed military assistance, on December 4, 1992, ATF discussed with a liaison from DOD[13] how the military might help. The liaison suggested that the military could provide aerial thermal (infrared) photography of the site. He also informed ATF that it would have to reimburse the military unless there was a drug connection to its investigation.

On December 11, 1992, ATF contacted officers of the Texas National Guard counterdrug program to learn what aid it could provide to the Howell investigation. The Texas National Guard discussed the types of assistance available, including surveillance overflights, but explained that, to receive help from this program, the investigation must have a drug connection. The Texas National Guard advised the ATF to determine whether it might have a drug connection and, if so, to send a formal written request citing that connection.

On December 14, 1992, ATF wrote the Texas National Guard counterdrug program, requesting it to support the investigation with aerial photography and surveillance but mentioning no drug connection. The Texas National Guard told ATF it must submit a revised request that contained a possible drug connection.[14]

The ATF decided to inquire of all its contacts in this case whether they had knowledge of any drug activity in connection with the suspects. The first to be asked was a former resident of the compound; on December 16, 1992, this individual responded in writing with the following statements.

- Howell had told him that drug trafficking was a desirable way to raise money.
- Howell had told him about finding a methamphetamine laboratory when he took over the compound.

[13]This position was filled by a military officer under the Office for Drug Enforcement Policy and Support; he was stationed at ATF's Special Operations Division, Washington, D.C.

[14]According to Texas National Guard counterdrug officers, it is not unusual for LEAs to make requests without stating a drug connection. In those cases the Texas National Guard returns the request with an explanation of the need for a written statement of possible drug activity.

- Howell had told him that he turned the laboratory over to the sheriff's office, but another former resident maintained to this individual that Howell had not surrendered any drug materials.
- Another former resident was rumored to have trafficked in drugs while living at the compound.

ATF discussed this information with the sheriff's office, which confirmed that a methamphetamine laboratory was thought to have existed at the compound at one time. The sheriff's office denied ever receiving drug evidence from Howell or any other Davidian.[15] This raised the possibility that the illegal equipment might still be at the compound.

The sheriff's office also confirmed for ATF that the alleged drug trafficker named by the former resident had lived at the compound along with another suspicious person. ATF searched the state's criminal database and found that (1) the first individual had an extensive history of narcotics and firearms violations and was in prison and (2) the second had violated federal firearms laws and was in prison for possessing a firearm during a drug-trafficking crime. It may also be at this time that the ATF learned of a third former resident who had produced methamphetamine at the compound. ATF's computer checks also showed that several current compound residents had prior drug involvement, including possession of marijuana, cocaine, and "tablets of dangerous drugs."

This information suggested to ATF that there were reasonable grounds to suspect a drug connection to its investigation. Consequently, on December 17, 1992,[16] ATF notified DEA to that effect, informing it of the suspected laboratory, and asked DEA to handle all drug evidence when the warrants would be served. ATF also informed the DOD liaison that a methamphetamine laboratory might be at the compound. The next day the ATF sent a revised request for aid to the Texas National Guard counterdrug program, this time citing a drug connection—specifically, that Howell was "suspected of unlawfully being in possession of firearms and possibly narcotics."

Since its requirement for a drug connection was met in this new letter, the Texas National Guard approved the request. In all, six reconnaissance

[15] In our discussions with the sheriff's office, it denied receiving drug material from Howell.

[16] 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 (Sept. 1993).

overflights would be made, with thermal imaging used on at least two flights to search for armed guards and drug-manufacturing facilities.[17]

ATF's Second Counterdrug Request: Assistance From Joint Task Force Six and the Texas National Guard Counterdrug Program

By late January 1993, the ATF had taken statements from other former Davidians and their relatives that suggested a drug connection:

- Information about affidavits and testimony in a 1992 court case that a methamphetamine laboratory was still at the compound after it had supposedly been turned over to the sheriff's office.
- Reports that Howell may have used the laboratory.
- Reports that Howell gave illegal drugs to some of his followers.

At the same time, an ATF undercover agent reported that Howell had told him, in conversation at the compound, that (1) the site would be a good place for making methamphetamine and (2) the sheriff suspected him of manufacturing drugs. Another Davidian resident, according to two undercover ATF agents, told them that he himself had been involved in drugs at one time. In addition, thermal images made by National Guard overflights had shown a "hot spot" inside the compound, possibly indicating a methamphetamine laboratory.

Meanwhile, in preparation for serving warrants at the compound, ATF sought operational and logistical help from other agencies, including the military. It updated the DOD liaison on its case, mentioning that counterdrug support would soon be requested, and it gave information on the drug connection to the head of the Texas National Guard counterdrug program. On January 22, 1993, after some confusion over the appropriate route to take, the ATF's written request for military support of the upcoming warrant service arrived at Operation Alliance. It asked for certain training, as well as a loan of Bradley infantry fighting vehicles and other equipment, for "a continuation of the firearms and drug case."[18] When the ATF filled out the Alliance's request form, it noted that the operation involved a "possible meth lab."

[17]At that time, clandestine manufacture of methamphetamine was thought to produce considerable heat, which infrared imaging could pick up. LEAs, including the DEA, sometimes used aerial thermal imaging to detect the heat produced in illegal narcotics manufacture.

[18]The letter noted that no weapon systems on the Bradleys would be used; it requested floodlights, loudspeakers, smoke generators, gas masks, night-vision goggles, and office and camping gear.

On February 2, 1993, the Alliance and its military advisers met to consider the request for support. The ATF discussed some of the indications of a drug laboratory—statements by former residents; the suspicious delivery of materials possibly intended for use in making drugs (sometimes referred to as "precursor materials");[19] and the hot spot, which was identified on an aerial photograph of the compound. Since its requirement for a possible drug connection was met, the Alliance referred the request to Joint Task Force Six and the Texas National Guard counterdrug program. In its letter forwarding the request, the Alliance cited "a dangerous extremist organization believed to be producing methamphetamine."

On February 4, 1993, representatives of the Texas National Guard counterdrug program and Joint Task Force Six met with the ATF to discuss the request that Operation Alliance had passed on to them. This meeting concentrated on parameters, limits, and training objectives but did discuss the drug connection. The ATF presented indications of a possible methamphetamine laboratory at the Davidian compound: reports by former residents, deliveries of possible precursor materials, and thermal images from reconnaissance overflights that indicated the possible location of the laboratory. The ATF also noted in its presentation that some current residents had recent drug-related arrests. According to one military attendee, the evidence of a possible drug connection was not the strongest they had ever seen, nor was it the weakest.

At this meeting the Texas National Guard agreed to provide the ATF operation with vehicles, office and camp equipment.[20] Approval by Joint Task Force Six took somewhat longer. After its parent organization, the Army Forces Command, had reviewed and modified the support requested, Joint Task Force Six agreed on February 17, 1993, to provide range practice and some limited training. During February 25–27, Joint Task Force Six's rapid-support unit trained ATF agents at Fort Hood, Texas.[21]

[19]The glassware, instruments, and chemicals mentioned earlier (p. 7).

[20]This request to the Texas National Guard was later modified (February 24, 1993) because the ATF now needed support for a dynamic entry rather than a siege, as earlier planned.

[21]They did not receive training on securing or removing drug material. Texas National Guard helicopters and crews also traveled to Fort Hood (February 27) to practice with the ATF their support of the operation.

Continuation of Military Assistance During the Standoff

On the day that the ATF attempted to serve arrest and search warrants a the compound, the Texas National Guard joined several local, state, and federal LEAs to support the operation. ATF had planned a dynamic entry secure the Davidians before they could get to their weapons. However, t Davidians were warned of the ATF's approach and met the agents with gunfire. A 51-day standoff resulted, from February 28 to April 19, 1993, during which the ATF and the FBI (which took control of the operation) requested and received a range of support from the active military and th Texas National Guard.

The bulk of support during the standoff qualified as military assistance tc civilian authorities, which requires no connection to drugs in order to be provided but which generally must be repaid. However, Texas National Guard counterdrug assistance (mainly helicopters and personnel) continued to be provided after the attempted warrant service became a standoff because, upon the Davidians' eventual surrender, this support would be needed to finish the counterdrug mission.[22]

Approval of Military Counterdrug Support Was Reasonable and Authorized

DOD provided support for counterdrug activities of the Davidian operatior under section 1004 of the National Defense Authorization Act of 1991 (P.L. 101–510). The Texas National Guard also provided counterdrug support under 32 U.S.C. § 112. These laws authorize certain types of support of LEAs' counterdrug activities.[23] However, neither law provides a formal standard for determining the level of counterdrug activity that a particular operation must include for authorization of such support. Because there is no formal standard, the military officials involved have considerable discretion in determining the degree of counterdrug activity necessary to approve the support. Based on our review of the relevant statutes, events leading up to the decision by military officials to approve the support, and interviews with key personnel, we found no basis to conclude that the officials involved abused that discretion. We also found no indication that ATF officials misrepresented the information provided to the military in order to obtain the support. Therefore, we conclude that the military's decision to approve the counterdrug support was reasonable and authorized under the relevant statutes.

[22]According to the Texas National Guard, this counterdrug support did not require a new request, as it was provided as a continuation of the ATF's second request approved February 4, 1993.

[23]See app. II for a more detailed discussion of these laws.

ATF Planning for Warrant Service Included Measures for Drug Laboratory

ATF spent several months planning the operation to serve warrants at the Davidian compound. Although the possible drug laboratory was not a major part of this effort, ATF did plan and take certain measures to deal with it.

As recounted earlier, in December 1992 the ATF had already asked the DEA to handle the illegal drug laboratory that it thought might be hidden on the compound.[24] By the end of January 1993, its plans reflected that agreement: A team of DEA agents, including one certified to handle clandestine laboratories, would be on hand the day of the warrant service specifically to deal with drug evidence. If ATF agents should encounter any drug materials while securing people or weapons/explosives evidence, they were to pull back from that particular location, cordon it off, and call in the DEA team. The DEA agents would manage the drug evidence and supervise cleanup. This solution was in keeping with standard practice by ATF and other federal LEAs.

These plans were shared with the military organizations supporting the operation. At the February 4 meeting between ATF and the military, participants discussed the dangers of operating around volatile substances (chemicals for making methamphetamine and explosives are very volatile), especially with gunfire and diversionary devices.[25] The ATF also assured the military representatives that it would have a DEA team ready to "take down the lab." Indeed, some days before the warrant service occurred, the ATF informed DEA of the date, time, and place of the operation and confirmed that DEA would have a certified clandestine-laboratory agent at ATF's command post to handle the drug evidence.

ATF also took certain standard measures to guard against explosives, weapons, and hazardous chemicals:

- During final training for the operation, according to ATF and military sources, ATF leaders discussed with their agents the suspected laboratory and urged caution in the use of weapons. Those few agents

[24]Its location was not known.

[25]These devices, sometimes referred to as "flashbangs," are useful in diverting criminal suspects. Their explosions create a very brilliant flash and a very loud noise to disorient or stun people in the immediate vicinity.

carrying diversionary devices were reminded to look before deploying them.

- Before ATF attempted to serve the warrants, at least one ATF leader went over routine cautions with the agents—do not taste, smell, or touch anything, do not interfere with any chemical reaction, be sure to undergo decontamination if you get drug material on yourself or weapons, etc.
- During the attempted warrant service, ATF teams wore helmets, anti-ballistic vests, protective gloves, sturdy boots, and eye protection. They also had first-aid kits and fire extinguishers on hand.

These measures also conform in large part with DEA's drug-laboratory safety measures for initial-entry teams. They differ only in that the entire clothing of DEA teams (hoods, gloves, pants, and jackets) are made of Nomex,[26] whereas only the gloves of ATF agents are made of this material.

ATF planners acknowledged that their entry teams were not heavily protected against hazardous drug materials. This did not concern them, however, because the laboratory was not a tactical consideration. They believed they could eliminate some parts of the main residence (e.g., bedrooms, dining room, and entrances) as likely sites for a drug laboratory. Moreover, the need to secure the weapons and armed suspects overrode the hazards of a possibly disassembled laboratory.

On the day of the warrant service, DEA agents with special gear were at the command post specifically to handle any drug laboratory ATF might encounter. According to the DEA, it had arranged for a state chemist to be on standby to assist it, and its hazardous-materials van was on standby that day at its Waco office. Moreover, DEA agents, including the laboratory-certified individual, remained part of the law enforcement support during the standoff to handle any drug evidence that might be uncovered once the residence had been secured and vacated.[27] At DEA's request, the state chemist was also at the command post at least 1 day during the siege.

[26]Nomex is a highly fire-resistant commercial material used in protective clothing.

[27]At some point in the standoff, the DEA asked to be part of the final clearing of the site after removal of the Davidians, but that task was later assumed by another LEA in the aftermath of the fire.

Types, Cost, and Reimbursement of Military Support to the Davidian Operation

Military support of the Davidian operation came from both active and National Guard units. The cost of all that support amounted to almost $1 million, of which about 76 percent was reimbursed to the military and another 14 percent ($137,400) waived as counterdrug support. The remaining 10 percent represent the military's billing discrepancies.

Types and Costs of Military Support

Military support for the Davidian operation ranged from aircraft and vehicles to equipment, supplies, and services (training, maintenance, etc). We have estimated the cost of this support to be at least $982,400.[28] The Alabama and Texas National Guard, the Army (including Special Forces units), the Air Force, and other DOD activities—the Uniformed Services University of the Health Sciences, the Regional Logistics Support Office and its Defense Reutilization and Marketing Offices—all provided some form of military assistance.

Table 1 summarizes the types and costs of this support. The FBI incurred the largest single costs—about $230,000 for damages to an Army UH-1 helicopter and $170,000 in operational costs for three Army UH-1s. In these two instances, assistance was provided during the standoff; the helicopter damage was due to pilot error, not Davidian gunfire.

[28]This total does not include a cost for medical support from the Uniformed Services University of the Health Sciences (which provided 133 staff days of services to the FBI during the standoff) because the military no longer has documents available. The total also does not include the value of material provided by the Regional Logistics Support Office and Defense Reutilization and Marketing Offices, since those items, as excess inventory, were provided free of charge.

Table 1: Types and Costs of Military Assistance to the ATF and the FBI in Their Branch Davidian Operations

Types of support	Description	Cost
Aircraft	Reconnaissance and surveillance overflights, aerial diversion, transportation, standby for medical evacuation, and recovery of loaned items (helicopters and fixed-wing aircraft)	$548,400
Vehicles	Surface transportation, protection, and recovery (tanks and other combat vehicles, utility vehicles, and various tracked and wheeled transport and recovery vehicles)	196,600
Equipment and supplies	Flak vests, helmets, masks, night-vision goggles, cameras, binoculars, electronic jammers, cellular telephones, ammunition for grenade launcher, tents, generators, lighting, clothing, fuel for vehicles and generators, and medical dressings	68,200
Personnel	Coordination, liaison, logistics, maintenance, 24-hr. medical and health clinic, operation of classified equipment, driver training, grenade-launcher training, mine-detector training, communications training, medical training, and firing-range support	169,200
Total		**$982,400**

Note: In figuring costs for active-duty military participants, incremental costs alone—per diem and travel, but not pay and benefits—were used.

Source: DOD and the Texas National Guard.

Reimbursement of Support

As required by the Economy Act, the ATF and the FBI reimbursed the military for most of its assistance. Reimbursements covered 76 percent (about $747,300) of the costs, of which the FBI paid about 96 percent (about $718,300) and the ATF the remainder (about $29,000). The FBI also paid directly for the services of the Uniformed Services University of the Health Sciences. Appendix III provides more detail on reimbursements.

Billing Discrepancies

In five instances the active Army failed to properly bill the FBI for services, equipment, and supplies, resulting in undercharges totaling about $100,000. The largest instance was an undercharge of $73,000 in operational expenses for the UH-1 and CH-47 helicopters lent by Fort Hood. According to a Fort Hood official, the Army does not plan to collect these undercharges, since it would realize no current benefit—that is, it would have to apply any collection to prior-year obligations. There were also two minor Texas National Guard overcharges for vehicle parts and helmets. Appendix IV provides more details on these billing discrepancies.

Waivers of Reimbursement for Counterdrug Support

The military waived reimbursement for the costs of support from its counterdrug programs. This assistance represented a small part of the overall military support to the Davidian operation, accounting for only

14 percent of costs (about $137,400) and consisting of aerial overflights, helicopter logistical support, fuel, telephone service, and training. Most of this nonreimbursable assistance was provided by the Texas National Guard counterdrug program at a cost of about $130,600 (about 37 percent of the Texas National Guard's total support). The Alabama National Guard and Joint Task Force Six waived the minor costs of the counterdrug support they provided—$1,200 and $5,600, respectively. Appendix V contains more details on these waivers.

Conclusions

The ATF requests for assistance from military counterdrug programs met the requirements of the relevant statutes for authorizing such support. In these written requests, ATF cited its suspicions of drug activity. In both cases, the military reasonably exercised its discretion in providing that support as authorized under the relevant statutes.

In planning how it would serve warrants at the compound, ATF planned for the possibility of encountering a methamphetamine laboratory or other hazardous drug materials. As required by agency policy, ATF agents in the operation were made aware of the suspected laboratory and of the appropriate precautions. Moreover, DEA agents were at the command post to handle any drug-related materials.

Agency Comments

In oral comments on a draft of this report, the Department of Defense stated it accepted the report as presented and the Department of Justice (including the Drug Enforcement Agency and the Federal Bureau of Investigation) stated it concurred with the substance of the report. In written comments on a draft of this report, the Department of the Treasury (including the Bureau of Alcohol, Tobacco, and Firearms) stated it concurred with the report's conclusions. All three departments provided technical comments that we incorporated as appropriate.

We are sending copies of this report to interested congressional committees. We are also sending copies to the Honorable Louis Caldera, Secretary of the Army; the Honorable Russell C. Davis, Chief of the National Guard Bureau; the Honorable John W. Magaw, Director of the Bureau of Alcohol, Tobacco and Firearms; the Honorable Louis J. Freeh, Director of the Federal Bureau of Investigation; and the Honorable

Thomas A. Constantine, Administrator of the Drug Enforcement Administration. Copies will also be made available to others upon request.

Please contact me at (202) 512-5140 if you have any questions concerning this report.

Mark E. Gebicke

Mark E. Gebicke
Director, National Security and
Preparedness Issues

Contents

Abbreviations

ATF	Bureau of Alcohol, Tobacco, and Firearms
DOD	Department of Defense
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
LEA	law enforcement agencies

Organizations Visited and Documents Reviewed

To obtain the information needed for our review, we visited or contacted the following organizations:

- Military organizations
  - The Office of the Deputy General Counsel, the Department of Defense (DOD); the Office of the Coordinator for Drug Enforcement Policy and Support, Office of the Deputy Assistant Secretary of Defense; and the National Guard Bureau, all in Washington, D.C.
  - Joint Task Force Six, Fort Bliss, Texas.
  - Texas National Guard, Camp Mabry, Texas.
  - U.S. Army Aviation and Troop Command, St. Louis, Missouri.
  - U.S. Army, III Corps, Fort Hood, Texas.
  - Defense Finance and Accounting Service, Fort Monmouth, New Jersey.
- Law enforcement organizations
  - Alcohol, Tobacco, and Firearms (ATF), Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Customs in Washington, D.C.
  - Local offices of federal law enforcement agencies (LEA) (ATF, DEA, and the U.S. Attorney's Office) in Texas.
  - Operation Alliance, Fort Bliss, Texas.
  - State and local LEAs—the McLennan County Sheriff's Department and District Attorney's Office, the Texas Department of Public Safety, and the Texas Department of Protective and Regulatory Services.

We also reviewed hundreds of documents and other media, including the following:

- Investigation into the Activities of Federal Law Enforcement Agencies toward the Branch Davidians, Committee on Government Reform and Oversight in conjunction with the Committee on the Judiciary, House of Representatives Report 104–749 (Aug. 2, 1996), Union Calendar No. 395.
- Activities of Federal Law Enforcement Agencies toward the Branch Davidians, Joint hearings before the Subcommittee on Crime of the Committee on the Judiciary and the Subcommittee on National Security, International Affairs, and Criminal Justice of the Committee on Government Reform and Oversight, Committee on the Judiciary Serial No. 72 (July 19–21, 24–28, 31, and Aug. 1, 1995), in three parts.
- Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas, House Judiciary Committee hearing (Apr. 28, 1993).

- 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 (Sept. 1993).
- Guidelines for the Cleanup of Clandestine Drug Laboratories, Joint Federal Task Force of the Drug Enforcement Administration, Environmental Protection Agency, and Coast Guard (March 1990).
- "ATF Policy Regarding Investigations Involving Clandestine Laboratories," dated April 25, 1990 (subsequently incorporated into ATF Order 3210.7B).
- Excerpts from the DEA agent's manual.
- All Waco Administrative Review documents.
- ATF investigative files.
- Final report by Brigadier General Sagsveen on the Waco/Mt. Carmel incident (July 30, 1996).
- Results of the focal group review of Texas National Guard support to the ATF, known informally as the "Spence Report" (Apr. 28, 1993).
- After-action report of Texas National Guard counterdrug support in Waco, Texas (Apr. 29, 1993).
- Other relevant DOD provisions, policies, and procedures as well as information on the National Guard counterdrug program, other Guard material, and the operational support planning guide for Joint Task Force Six.
- Operation Alliance procedures for reviewing counterdrug requests.
- Videotapes of overflights of the Davidian compound and of selected operational briefings.

Statutes Related to Military Support of Branch Davidian Operations

National Defense Authorization Act of 1991

Section 1004 of the National Defense Authorization Act of 1991 authorized the Secretary of Defense to provide the support of active military units for the counterdrug activities "of any other department or agency of the Federal Government or of any State, local, or foreign law enforcement agency."[1] In 1993, when the Davidian operations occurred, the act limited active military support for counterdrug activities to the following nine categories:[2]

- Maintenance and repair of equipment made available by DOD to a federal department or agency or to a state or local government.
- Maintenance, repair, and upgrading of non-DOD equipment to ensure that it will be compatible with equipment used by DOD.
- Transportation of personnel, equipment, or supplies.
- Establishment and operation of bases of operation or training facilities.
- Training of law enforcement personnel, including associated support expenses for trainees and the provision of materials necessary to carry out such training.
- Detection, monitoring, and communication of movement of air, sea, and surface traffic.
- Construction of roads and fences and installation of lighting to block drug-smuggling across international boundaries of the United States.
- Establishment of command, control, communication, and computer networks to improve integration of law enforcement, active military, and National Guard activities.
- Provision of linguist and intelligence analysis services.

10 U.S.C. §§ 371–382

Sections 371–382 of title 10 of the U.S. Code authorize the Secretary of Defense to provide certain types of support by active military units to federal, state, or local law enforcement officials. LEAs are not required to reimburse DOD for the support if it (1) is provided in the normal course of military training or operations or (2) results in a benefit to DOD that is "substantially equivalent" to that which would otherwise be obtained from

[1] P.L. 101–510, div. A, title X, § 1004, as amended. Congress was extended the authority through 2002. See P.L. 105-261, div. A, title X, § 1021

[2] In 1993, Congress added a tenth purpose for which the Secretary may provide support—aerial and ground reconnaissance. See P.L. 103–160, div. A., title XI, § 1121(b).

military operations or training.[3] Otherwise, DOD must be reimbursed as required by the Economy Act.[4]

Title 10 authorizes the following types of support:

- Any information collected during the normal course of training or operations that may be relevant to a violation of any federal or state law within the jurisdiction of the officials supported.
- Equipment (including associated supplies or parts) and base or research facilities.
- Training in the operation and maintenance of DOD equipment.
- Relevant expert advice.
- Maintenance of equipment.
- The operation of military equipment for (1) monitoring air and sea traffic; (2) monitoring surface traffic outside U.S. borders, as well as 25 miles within U.S. borders if the initial detection occurred outside the United States; (3) aerial surveillance; (4) intercepting vessels or aircraft detected outside the land area of the United States; (5) facilitating communications with federal LEAs; and (6) transporting and staffing an operational base for civilian law enforcement personnel.[5]

32 U.S.C. § 112

Under 32 U.S.C. § 112, the Secretary of Defense may provide funds appropriated for National Guard activities to the governor of a state who submits a drug-interdiction and counterdrug-activities plan that meets certain statutory requirements. To obtain funding, a state's plan must (1) specify how National Guard personnel and equipment will be used in such activities, (2) certify that the use of the National Guard of the state is consistent with state law, and (3) certify that the activities included in the plan serve a state law enforcement purpose. If a state's plan is approved and DOD provides funding, the state may use the funds to pay expenses related to the use of its National Guard personnel (while not in federal

[3] 10 U.S.C. § 377.

[4] The Economy Act, 31 U.S.C. § 1535, generally mandates prompt repayment for goods and services provided by one agency to another.

[5] See 10 U.S.C. § 374. Federal LEAs responsible for enforcing the Controlled Substances Act (21 U.S.C. § 801 et seq.), certain Immigration and Naturalization Act provisions (8 U.S.C. §§ 1324–1328), section 401 of the Tariff Act of 1940, and the Maritime Law Enforcement Act may request such aid.

service) and equipment for drug interdiction and counterdrug activities.[6] DOD considers support requests that are not specifically included in the original plan on a case-by-case basis if accompanied by a certification from the state's attorney general that the operations requested are consistent with state law.[7] LEAs are not required to reimburse the National Guard for this support.

National Defense for Authorization Act for Fiscal Year 1990

Section 1208 of the National Defense Authorization Act[9] allowed DOD to give federal and state agencies equipment—free of charge—that the Secretary of Defense had declared excess to the military's needs. Under this statute, the Secretary of Defense was required to determine that the equipment was suitable for use in counterdrug activities.

[6] The act defines "drug interdiction and counter drug activities" as "the use of National Guard personnel in the drug interdiction and counter-drug law enforcement activities authorized by the law of the State and requested by the Governor of the State."

[7] National Guard (NGR) 500–2.

[8] P.L. 101–189.

[9] In 1996, Congress repealed § 1208. P.L. 104-201, div. A., title X, section 1033(a) contained similar language now codified as 10 U.S.C.§ 2576a.

Reimbursements to the Military From the ATF and the FBI for Assistance to Their Branch Davidian Operations

Support	Recipient	Reimbursement
Aircraft		
Active Army—3 UH-1 utility helicopters and 3 CH-47 helicopters	FBI	$375,179
Active Air Force—C-141 transport of FBI's hostage rescue team (and its equipment) to and from Waco	FBI	73,112
Vehicles		
Texas National Guard—2 M-35A2 2½-ton cargo trucks with transport trailers, 5 M-818 5-ton tractor trucks with trailers, 12 M-1009 high-mobility multi-purpose wheeled vehicles	ATF	6,858
Texas National Guard—10 M-2 Bradleys (infantry fighting vehicles), 3 M-332 tractor trailers, 5 M-728 combat engineer vehicles, 1 M-88A1 tracked recovery vehicle (tank retriever), miscellaneous vehicles	FBI	174,313
Active Army—8 M-998 high-mobility multi-purpose wheeled vehicles, an M35A2 2½-ton cargo truck, 2 5-ton trucks, 14 heavy equipment transports, miscellaneous vehicles	FBI	15,466
Equipment		
Texas National Guard—unrecovered photographic and observation equipment, 100 canteens, 50 first-aid dressings, 130 empty magazines for M-16A1 rifles, assorted field clothing	ATF	5,022
Texas National Guard—16 helmets, 13 helmet covers, 12 M-16A1 rifle slings, 54 empty magazines for M-16A1s, an M-25A1 protective mask, 180 tent pins	FBI	5,190
Active Army—2,488 gallons of generator fuel, fencing, 200 sandbags, 6 boxes of chemical lights, cellular-phone charges	FBI	5,523
Supplies		
Texas National Guard—286 cases of field rations and 2,036 gallons of diesel fuel	ATF	17,015
Texas National Guard—62 cases of field rations, 10,529 gallons of diesel fuel, and transportation costs of tracked vehicles	FBI	19,133
Personnel (per diem, transportation, and travel costs)		
Active Air Force—electronic jammers and travel costs	FBI	34,340
Active Army—liaison to LEAs and HQs; maintenance of aircraft, vehicles, and equipment; operation of equipment; and local transportation costs for DOD personnel	FBI	16,135
Uniformed Services University of the Health Sciences—24-hr. medical control, 24-hr clinic, drafting of Waco medical plan	FBI	Reimbursed 133 staff-days[a]
Total of known amounts reimbursed		**$747,286**

[a]A flat rate plus all travel was used under a Memorandum of Understanding between the two parties. All travel vouchers were sent directly to the FBI for payment; FBI paid for expendable medical supplies.

Discrepancies in Billing the FBI for Military Support to Its Branch Davidian Operations

Undercharges	Amount
Active Army used the wrong flying-hour rates when determining charges for: • flights by UH-1 helicopters for transport, deployment, medical evacuation support, and recovery • flight by CH-47 helicopter on medical standby	$73,073
Active Army did not bill for the loss of two night-vision goggles	9,168
Active Army did not bill for 40-mm grenade-launcher ammunition (200 target-practice rounds, 50 illumination rounds, and 250 high-explosive rounds)	5,066
Active Army did not bill for 9 cases of field rations consumed by Army personnel while supporting the siege	164
Active Army (Special Operations) did not bill for the following services provided during the siege: • observers and technical liaisons to the FBI's hostage rescue team • operation of classified/special equipment • training federal agents in use of classified equipment	10,793
Total undercharges	**$98,264**
Overcharges	
Texas National Guard overcharged for vehicular parts	$41
Texas National Guard overcharged for the loss of 8 Kevlar ground-troop helmets	498
Total overcharges	**$539**
Net undercharges	**$97,725**

Costs Waived by the Military in Support of the Branch Davidian Operations

Support	Recipient	Cost	Authority for waiver
Alabama National Guard			
2 overflights for reconnaissance photography of the compound	ATF	$1,238	32 U.S.C. § 112 (counterdrug)
Subtotal		**$1,238**	
Active Army (Joint Task Force Six)			
Counterdrug training • Communications • Medical evacuation • First aid • Firing-range support • Minor construction	ATF	5,610	10 U.S.C. § 377 (substantial training benefit) P.L. 101–510 § 1004 (b) 4–5 10 U.S.C. § 373
Subtotal		**$5,610**	
Texas National Guard			
UC-26 aircraft • 4 overflights of the compound for reconnaissance photography • 1 flight in support of siege	ATF	8,032[a]	32 U.S.C. § 112 (counterdrug)
Helicopter flights in support of warrant service	ATF	15,388[b]	32 U.S.C. § 112 (counterdrug)
Helicopter flights in support of siege	ATF	2,454	32 U.S.C. § 112 (counterdrug)
Personnel services in siege • Liaison, command and control • Helicopter flight crews, drivers of various vehicles • Vehicle and equipment maintenance	ATF and FBI	102,301[c]	32 U.S.C. § 112 (counterdrug)
Fuel for non-tracked vehicles	ATF and FBI	410	32 U.S.C. § 112 (counterdrug)
Landline and cellular telephone service	ATF and FBI	1,995	32 U.S.C. § 112 (counterdrug)
Subtotal		**$130,580**	
Total amount of expenses waived by the military		**$137,428**	

[a] Includes costs for flying hours, personnel, and special maintenance contract.

[b] Includes repair of gunshot damage sustained in warrant service.

[c] Total pay, per diem, and travel (896 staff-days). All personnel were in title 32 (counterdrug program) status.

Comments From the Department of the Treasury

UNDER SECRETARY

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

August 3, 1999

Mark E. Gebicke, Director
National Security and Preparedness Issues
United States General Accounting Office
Washington, DC 20548

Dear Mr. Gebicke:

This is in response to your request for comments on the General Accounting Office's draft report concerning military assistance provided to the Bureau of Alcohol Tobacco and Firearms (ATF) and to the Federal Bureau of Investigation (FBI) in 1993 in connection with the Federal law enforcement operation at the Branch Davidian compound near Waco, Texas.

With respect to the military counterdrug support provided to ATF during the investigation of David Koresh and during the warrant operation on February 28, 1993, the draft report concludes that ATF's request for assistance from the military met the requirements of the relevant statutes for authorizing such support. The draft report also concludes that ATF's planning for the warrant operation addressed the possibility of encountering a methamphetamine laboratory at the compound and that the planning of the operation was consistent with ATF's policies, and the policies of other Federal law enforcement agencies, when a drug laboratory may be present.

The Department of the Treasury concurs with the conclusions set forth in the draft report with respect to ATF. As you know, in 1993 the Department of the Treasury conducted a review of ATF's law enforcement operation at the Branch Davidian compound. As part of this overall review, the Treasury Department investigated the military assistance provided to ATF and likewise concluded that ATF had conducted a legitimate inquiry into whether a drug nexus existed in the Branch Davidian investigation and that ATF had properly presented this information to the United States military and to the Texas National Guard to obtain counterdrug military support. The

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Department's findings in this regard were set forth in the September 1993 Report on the Bureau of Alcohol, Tobacco and Firearms' Investigation of Vernon Wayne Howell, also known as David Koresh.

Finally, we have enclosed proposed technical corrections to certain information in the draft report.

Thank you for the opportunity to review and comment on the draft report.

Sincerely,

James E. Johnson
Under Secretary
(Enforcement)

Enclosure

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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

September 1993

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-042025-3

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Part One
Section One: The Probable Cause Investigation

Preliminary Information: Initiation of the ATF Investigation of Koresh and his Followers

In late May 1992, Chief Deputy Sheriff Daniel Weyenberg of the McLennan County Sheriff's Department informed the Austin, Texas, ATF office that suspicious United Parcel Service (UPS) deliveries had been received by certain persons residing at the Compound, known as Mount Carmel. The Compound is located a few miles from Waco, which is in McLennan County. Several shipments of firearms worth more than $10,000, inert grenade casings, and a substantial quantity of black powder[5], an explosive, had been delivered to a metal building, known as the Mag Bag, used by Compound residents several miles from the Compound. (See Figure 1.) Because 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 (see Figure 2), and apparently were stockpiling arms and other weapons, Deputy Weyenberg asked ATF to investigate.

Special Agent Davy Aguilera of the Austin ATF office immediately began to make inquiries, with the encouragement of Assistant U.S. Attorney Bill Johnston. On June 4, Aguilera debriefed Lieutenant Gene Barber of the sheriff's department about the Compound, and Barber told Aguilera that the sheriff's department had referred the same matter previously to the Waco office of the Federal Bureau of Investigation (FBI).

[5] Black powder is an explosive under the federal explosive laws in 18 U.S.C. Chapter 40. See 18 U.S.C. §§841(d) and 844(j). Black powder in quantities of fifty pounds or less intended to be used solely for sporting, recreational or cultural purposes in antique firearms is generally exempt from the regulatory provisions of Chapter 40. See 18 U.S.C. §845(a)(5). Black powder, however, is not exempt from the criminal misuse provisions of 18 U.S.C. §844. Black powder can be combined with aluminum or magnesium powder, items that were delivered to the Compound, to create an enhanced explosive effect. In addition, when black powder is confined in a metal case or container, particularly when it is combined with aluminum or magnesium powder, it can explode violently when detonated, bursting or fragmenting the casing and producing high-velocity fragments.

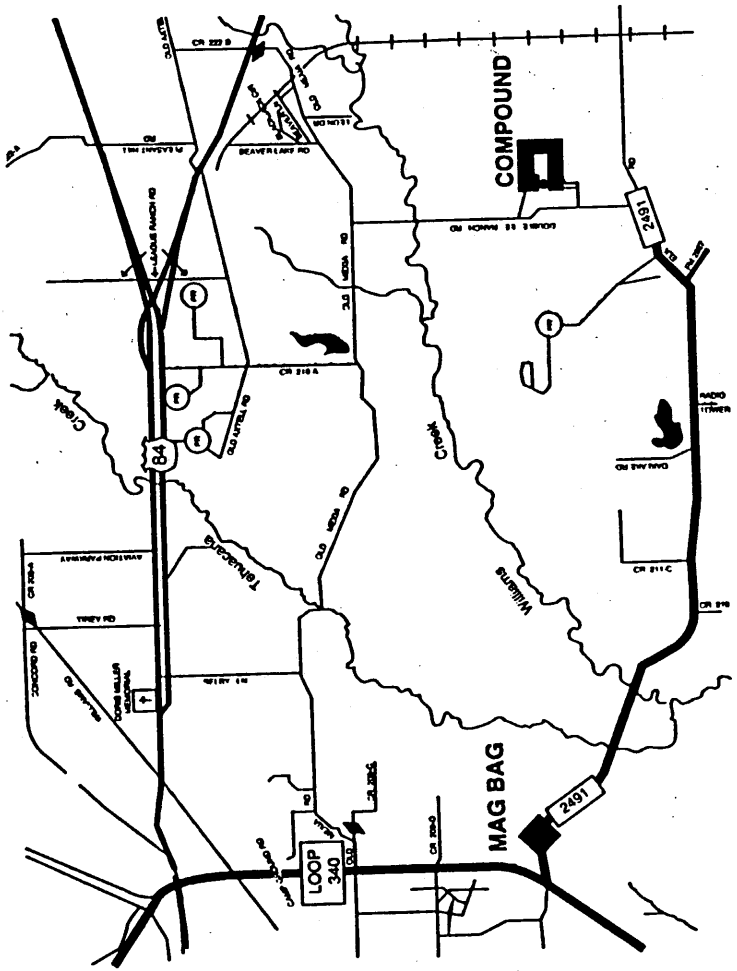


Figure 1: Location of Compound and Mag Bag

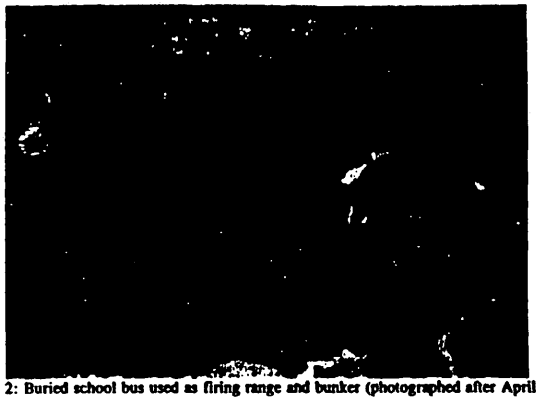


Figure 2: Buried school bus used as firing range and bunker (photographed after April 19, 1993 fire).

Although the FBI had formally opened a case, an agent from that office told Aguilera that the FBI was not actively pursuing any investigation.

Barber provided Aguilera with a detailed account of Koresh's alleged attempt to kill George Roden, the Branch Davidian leader whose parents established the Compound in 1959, and how Koresh seized control of the Compound and the Branch Davidians from Roden in 1987. (See Figure 3.) In support of that account, Barber gave Aguilera an "incident report" that had been prepared by the sheriff's department shortly after the confrontation. When deputy sheriffs arrived and ended the shoot-out, they found Koresh and six followers firing their rifles at Roden, who had already suffered a minor gunshot wound and was pinned down behind a tree at the Compound—which was then called "Rodenville." On the day of the shoot-out, Koresh and all of his followers were dressed in combat fatigues, had camouflaged their faces with black greasepaint before going to the Compound, and were armed with shotguns, .22-caliber rifles, and other weapons, as well as more than 3,000 rounds of unspent ammunition. (See Figure 4.)

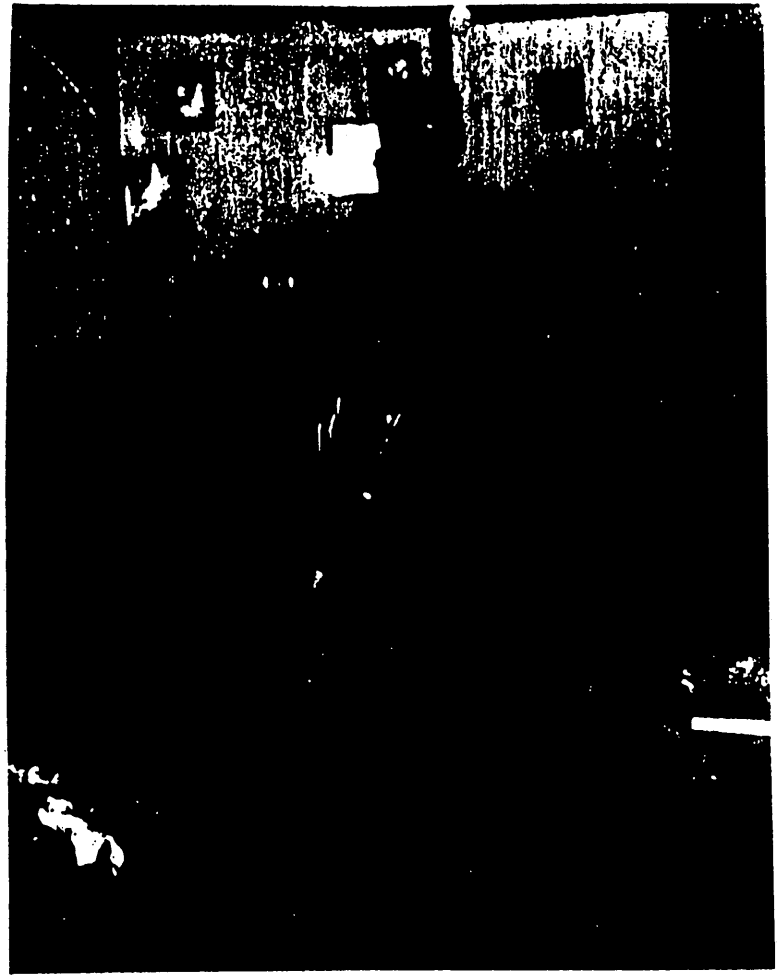


Figure 3: David Koresh, second from left, posing with other Branch Davidians before the November 1987 shoot-out with George Roden.

Barber also told Aguilera more about UPS deliveries made to the Compound during the preceding months, which consisted of firearms components and materials used to make

Figure 4: Ammunition seized from Koresh and his followers after the November 1987 shoot-out with Roden.

explosives. On each delivery, followers of Koresh, including Steve Schneider, met the UPS driver at the Mag Bag (see Figure 5) and directed him to the Compound, where armed guards often kept watch. There, payment was made, usually in cash.

Using the UPS invoices, Aguilera began contacting firearms dealers and checking national registries to track down the specific firearms, firearms components, and explosives materials received by Koresh and his followers during the past year. After his initial conversation with Aguilera, Barber told Aguilera that the UPS driver delivered to Koresh a large quantity of powdered aluminum metal, a common ingredient in explosives, and 60 ammunition magazines for AR-15 rifles. Barber also related a confidential informant's report that Henry McMahon, a federally licensed firearms dealer who had recently moved to the Waco area from Florida, had recently bragged about selling a large number of

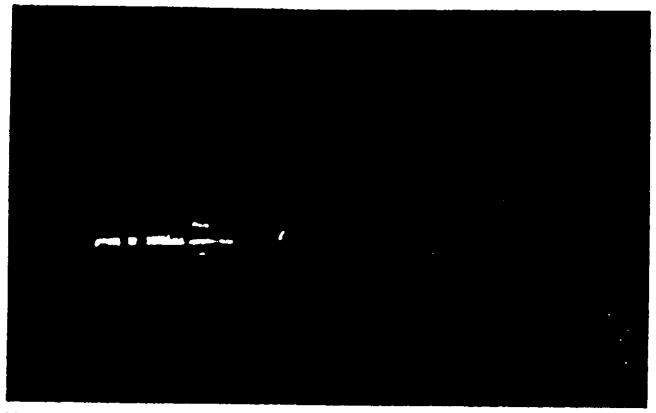


Figure 5: The Mag Bag after execution of search warrant.

weapons, including AK-47s, to Koresh.[6] (See Figure 6.) On June 9, Barber reported that automatic gunfire was heard recently at the Compound.

Aguilera determined that neither Koresh nor any of his followers then known to Aguilera were licensed federal arms dealers or manufacturers or had registered any National

[6] An AK-47 is a Soviet-designed selective fire machinegun that was the standard weapon issued to Eastern Bloc military personnel. Semiautomatic copies of the AK-47 (under a variety of model designations, all commonly referred to as AK-47s) were imported and sold commercially in the United States until their importation was prohibited in 1989. Possession of a semiautomatic copy of an AK-47 is legal and does not require registration pursuant to the National Firearms Act. However, a semiautomatic AK-47 can be converted into an illegal machinegun by making modifications to the receiver of the weapon and replacing certain internal parts with commonly available selective fire AK-47 parts.

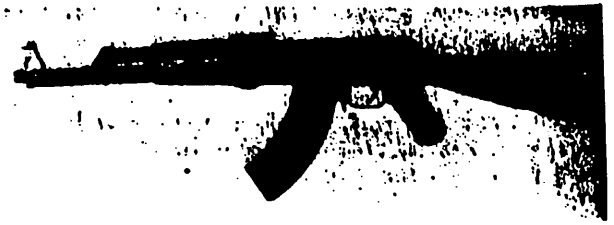


Figure 6: AK-47 assault rifle.

Firearms Act weapons.[7] Using the shipping invoices, Aguilera also learned that Nesard Gun Parts Company had shipped to Koresh several "M-16 machinegun CAR kits" and several "M-16 machinegun E-2 kits," both of which are often called "conversion kits." Each of these conversion kits, when combined with the lower receiver of an AR-15 semiautomatic rifle, generally constitute all the parts from which a machinegun could be assembled.

Figure 7: M-16 assault rifle.

[7] The National Firearms Act, codified in Chapter 53 of Title 26, United States Code, sets out a comprehensive tax and registration system governing the manufacture, transfer and possession of certain firearms. Among other firearms covered by the Act are items classified as "destructive devices," including any explosive, incendiary, bomb, or grenade (26 U.S.C. § 5845(f)), and machineguns (26 U.S.C. §5845(b)). In addition, 18 U.S.C. §922(o) makes it unlawful for any person to transfer or possess a machinegun unless the machinegun was lawfully registered before May 19, 1986, the effective date of the Firearms Owners Protection Act of 1986. Before that Act, it was legal for citizens to make, sell, and possess machineguns as long as they complied with the taxing and registration requirements of the National Firearms Act. Since 1986 no machineguns have been permitted to be manufactured in the United States except those used by government agencies or for export.

An M-16 CAR kit comprises all component parts, with the exception of the lower receiver,[8] for the carbine version of an M-16. (See Figure 7.) The kit includes a complete upper receiver and barrel assembly, buttstock, recoil spring and buffer, M-16 hammer, trigger, disconnector, selector, M-16 automatic sear, pins, springs, trigger guard, magazine release, and bolt hold-open. The parts in the kit can be used with an AR-15 rifle or lower receiver to assemble a machinegun. The M-16 E-2 kit contains a similar set of parts; however, it is geared for use with an M-16 A-2 selective-fire rifle. The parts in the E-2 kit also can be used to convert an AR-15 into a machinegun. Although these kits can be used to maintain M-16 machineguns produced before 1986 and therefore can be sold lawfully, in practice they are commonly used to convert semiautomatic weapons into machineguns. Such kits, of course, only have a lawful, practical utility if the purchaser already owns a registered machinegun. Because neither Koresh nor any of his known followers owned such a registered weapon, Aguilera inferred that the kits Koresh was steadily acquiring were not being used for legal purposes.

On the basis of this information, Aguilera formally initiated a case on June 9, 1992. Within a week, his immediate supervisors and Phillip Chojnacki, the Special Agent in Charge (SAC) of the Houston ATF office, approved this initiation and classified the case as "sensitive," thus ensuring a higher degree of oversight from the SAC and ATF headquarters. ATF regulations classify cases meeting certain criteria as "sensitive" or "significant," and investigating agents are charged with keeping supervising officials informed about those cases. The investigation of Koresh and his followers, which potentially involved a large amount of weapons and explosives in the possession of a potentially volatile group with strong professed religious beliefs, met ATF guidelines for treatment as both sensitive and significant.

The primary violations within ATF's jurisdiction that Aguilera would be pursuing were (1) the illegal manufacture of machineguns from component parts[9] and (2) the illegal

[8] A receiver is a part of a firearm that normally houses the barrel and bolt assembly. Many modern military-style rifles are constructed with a horizontal split in the receiver—hence the terms "upper receiver" and "lower receiver." With respect to the AR-15, which has a split-receiver design, the lower receiver, by legal definition, constitutes a "firearm" for purposes of federal firearms laws. See 18 U.S.C. § 921(a)(3)(B).

[9] 18 U.S.C. § 922(o)(1) provides that, save for certain specified exceptions: "it shall be unlawful for any person to transfer or possess a machinegun." The National Firearms Act makes it unlawful for any person other than a qualified manufacturer to make a machinegun without first filing an application to make and register the item with, and receiving approval from, the Secretary of the Treasury. 26 U.S.C. §5822 and

manufacture and possession of destructive devices, including explosive bombs and explosive grenades and the materials necessary to produce such items.[10]

The ATF Investigation and Development of Probable Cause to Arrest Koresh and Search Premises Under his Control

Additional Weapons and Explosives Shipments

Initially, Aguilera focused on the paper trail generated by the weapons and explosives purchased by Koresh and his followers. Aguilera determined that Olympic Arms had recently shipped a substantial quantity of AR-15 parts to the Mag Bag, and he also learned that Henry McMahon had sold more than a dozen AR-15 lower receivers to Koresh a few months earlier. As Aguilera learned from previous investigations, someone with access to metal milling machines and lathes and with the knowledge to use them, can readily convert AR-15 semiautomatic rifles into fully automatic weapons (machineguns)

5861(f). For purposes of Section 922(o) and the National Firearms Act, 'machinegun' means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically, more than one shot without manual reloading, by a single function of the trigger." The term includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. §5845(b).

A part not yet assembled into a machinegun can still be illegal if it is (1) "designed solely or exclusively for use in converting a weapon into a machinegun"; (2) a "combination of parts designed and intended for use in converting a weapon into a machinegun"; or (3) "any combination of parts from which a machinegun is assembled" if one person has possession or control of all of the parts. See *United States* v. *Bradley*, 892 F.2d 634, 635 (7th Cir. 1990).

[10] The National Firearms Act makes it unlawful for any person other than a qualified manufacturer to make a destructive device without first filing an application to make and register the item with, and receiving approval from, the Secretary of the Treasury. 26 U.S.C. § 5822 and 5861(f). In addition, the National Firearms Act makes it unlawful to possess any unregistered firearm, including, for example, components that readily could be assembled into a hand grenade or any other destructive device. 26 U.S.C. §§ 5845(a)(8) and (f) and 5861(b), (c), (d) and (e). 18 U.S.C. § 922(a)(1)(A) provides that "[i]t shall be unlawful for any person except a licensed importer, licensed manufacturer, or licensed dealer to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce." 18 U.S.C. § 921(a)(3) defines "firearm" to include, among other things, "destructive devices." In turn, "destructive device" is defined to encompass "any explosive, incendiary or poison gas bomb or grenade ... [or] ... any combination of parts either designed or intended for use in converting any device into any [of the above destructive devices]." 18 U.S.C. § 921(a)(4). 18 U.S.C. §§ 842(a) and (j) make it unlawful for any person "to engage in the business of importing, manufacturing, or dealing in explosive materials without a license" or "to store any explosive material in a manner not in conformity with regulations promulgated by the Secretary."

similar to M-16 machineguns by using certain key parts legally available, frequently parts designed for use with an M-16. It is worth noting that there is no practical reason to exchange most AR-15 parts on an intact AR-15 weapon for M-16 parts other than for purposes of converting the weapon into a machinegun. The M-16 parts do not improve the performance of the weapon if used in a semiautomatic mode. For example, the AR-15 bolt assembly performs substantially better in a semiautomatic mode than does the M-16 bolt assembly when installed on an AR-15.

Compliance Inspection of Henry McMahon

On July 30, Aguilera, posing as an ATF compliance officer, joined Jimmy Ray Skinner, an ATF compliance officer, to inspect the premises of Henry McMahon, who was doing business as Hewitt Hand Guns out of his home. Aguilera's review of McMahon's records revealed that he had sold 36 firearms to a "Vernon Howell," who was not identified as "David Koresh," and sold others to persons Aguilera knew to be Koresh's followers. Moreover, approximately 65 AR-15 lower receivers reflected in McMahon's inventory records were not in his physical stock. McMahon claimed that these firearms were being stored at the house of his preacher, whom he identified as David Koresh, apparently suggesting that Koresh and Howell were two different persons.

Although McMahon was out of compliance and was therefore subject to fines, Aguilera and the compliance officer ended the audit without imposing any penalties on McMahon to avoid arousing his suspicion. About a month later, Skinner returned and McMahon presented him with receipts and ATF forms reflecting the sale of the missing 65 lower receivers to "Vernon Howell."

The Sounds of Machinegun Fire and Explosives

Further evidence that Koresh and his followers were manufacturing illegal machineguns came when Aguilera interviewed a neighbor who had served in an Army artillery unit and was familiar with the sound of automatic weapons fire. The neighbor reported that since early 1992, he had frequently heard spurts of weapons fire coming from the Compound at night, including .50-caliber (See Figure 8) and automatic weapons fire, and that residents of the Compound had discharged semiautomatics on July 4. 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 a large cloud of gray smoke. Neither Koresh nor any of his followers had a license or a permit to use explosives at the Compound.

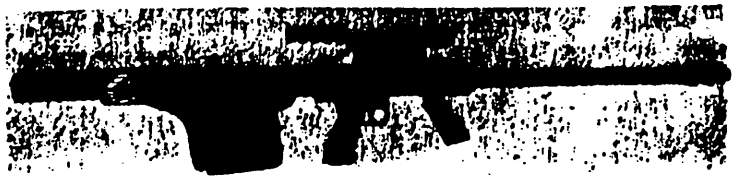


Figure 8: .50-caliber rifle.

Interviews of Former Cult Members

Aguilera also sought information from former cult members, who gave him some insight into the extraordinary degree to which Koresh dominated the lives of Compound residents. Cult members surrendered all their assets to Koresh and permitted him to have sex with all the female members of the cult. While reports that Koresh was permitted to sexually and physically abuse children were not evidence that firearms or explosives violations were occurring, they showed Koresh to have set up a world of his own, where legal prohibitions were disregarded freely.

In early November, Aguilera interviewed Isabel and Guillermo Andrade, then residing in California, whose two daughters were living at the Compound. They told Aguilera that Koresh had sexual relations regularly with all of the women at the Compour including girls younger than 16 years of age. "Annulling" the marriages of couples in the cult, Koresh prohibited the men residing at the Compound from having sexual relations with their "former" wives. The Andrades informed Aguilera that Koresh had fathered a child with their daughter Katherine. The child's birth certificate, like the birth certificates several other children recently born to women residing at the Compound, listed the father unknown.

In early December 1992, Aguilera interviewed Jeannine Bunds and her daughter, Robyn, both of whom had left the Compound within the past two years, and Mrs. Bunds' son, David, who had left earlier. The three were living in California. Both Mrs. Bunds an

her daughter confirmed earlier accounts Aguilera had received about Koresh's sexual domination of female residents of the Compound, including minors. They estimated that Koresh had fathered at least 15 children at the Compound. All three said they had seen Koresh in possession of numerous weapons, including machineguns, and that Koresh had often led cult members in live-fire shooting exercises. The Bundses and other former cult members identified specific weapons they had seen at the Compound from photographs the agents showed them. The Bundses noted that Henry McMahon had participated in some of the shooting exercises.

The Bundses also reported that Koresh frequently directed his followers to maintain an armed guard at the Compound 24 hours a day and that he possessed a loaded firearm at all times. According to Mrs. Bunds, a registered nurse, Koresh on one occasion told her that he was preparing a "hit list" to eliminate former cult members who were complaining to law enforcement authorities and the media about his sexual practices and accumulation of weapons. Mrs. Bunds also mentioned that when she had told Koresh that she was having difficulty with her children, Koresh asked her whether she would kill her children if God asked her to do so. She told him she would not.

Mrs. Bunds told of seeing "pineapple grenades" at the Compound (see Figure 9) and David Bunds remembered seeing Branch Davidians with AK-47s, pump shotguns, revolvers, pistols, and other weapons. David and Robyn related how in June 1992 they had found a machinegun conversion kit at a house in California they had recently taken over from followers of Koresh. Shortly thereafter, several Branch Davidians from the Compound retrieved the kit. David Bunds also related a telephone conversation he had had with his father, Donald, when he called his father at the Compound in spring 1992. Donald Bunds told his son that he was armed and prepared to die for Koresh and that he would resist authorities if they tried to arrest him.

The Bundses' accounts were consistent with information obtained from Poia Vaega, another former resident of the Compound, who had moved to New Zealand. She recalled how Koresh had passed an AK-47 machinegun around to his followers during one of his Bible study sessions and how Koresh regularly had them watch violent war movies that he called "training films" to prepare for "the war to come." Vaega said that both she and her sister, another former cult member, had been subjected on several occasions to physical and

Figure 9: Typical "pineapple" type grenades.

sexual abuse by Koresh and one of his followers before she left the Compound in 1991 a that she had been physically restrained from leaving for more than three months before sl gained her freedom. Her account was corroborated by her sister.

In December 1992, Aguilera also began a dialogue with Marc Breault, a former cu member living in Australia, which continued until the ATF raid on February 28, 1993. Breault had already given information about Koresh and the Branch Davidians to Mark England, a reporter for the *Waco Tribune-Herald*. Breault, who left the Compound in 19: confirmed that Koresh was the undisputed leader of the Branch Davidians and stated that Koresh frequently had sex with minors residing in the Compound and that several minor: had given birth to babies fathered by him. Breault also told Aguilera that from time to ti Koresh had physically abused children who were younger than three years of age when they cried during his Bible study sessions. According to an affidavit Breault filed in an Australian court, which incorporated affidavits by several other former cult members and which Aguilera obtained, Koresh paddled the children with a wooden paddle until their buttocks were "black and blue all over, so that they even bled." Breault's account, which confirmed in conversations with Aguilera, was corroborated by other former cult membe including Poia Vaega and members of her family.

Breault also reported that Koresh had posted armed guards around the Compound and instructed them to "shoot to kill" anyone who attempted to enter the gate of the Compound. Many cult members carried firearms, including AK-47s. In fact, according t Breault and the sheriff's department, on one occasion in 1988, a cult member had taken shot at a newspaper delivery person. Breault also related how Koresh had expressed disl for gun control laws, frequently proclaiming that he wanted to make machineguns,

grenades, and explosive devices at the Compound and bragging how easy it was to convert a semiautomatic weapon into a fully automatic machinegun. In particular, Breault stated that Koresh mocked gun control laws that permitted easy acquisition of all component parts necessary to make a machinegun, yet made possession of either all of those parts or a fully assembled and operable machinegun unlawful. Finally, Breault noted that when Koresh took over the Compound, he told Breault that he had found methamphetamine manufacturing facilities and recipes on the premises. Although Koresh claimed to have turned over these materials to the sheriff's department, according to Breault and the sheriff's department, he never had done so.

Visits from the Texas Department of Protective and Regulatory Services

In light of reports that Koresh might have been engaging in sexual activities with minors, ATF contacted Joyce Sparks, a caseworker with the Texas Department of Protective and Regulatory Services who had been investigating several anonymous reports of the same conduct. Sparks related that, although she had visited the Compound several times in 1992, she had been escorted carefully through the Compound on a staged tour each time. Even though she had not found sufficient reliable evidence to press child or sexual abuse charges against Koresh or any of his followers, she did learn something about Koresh's preparations for an armed struggle.

One child, approximately seven years old, told Sparks that he could not wait to grow up so that he could have a "long gun" as did all the men in the Compound; the boy explained that the men practiced with these weapons regularly. In addition, during one of her guided tours of the Compound, Sparks strayed from the designated path and managed to see the buried school bus. At one end of the bus was a large object riddled with bullet holes, and nearby were at least three "long guns."

In her own dealings with Koresh, Sparks saw a dangerous propensity toward violence. During one of her conversations with him, he proclaimed to her: "My time is coming. When I reveal myself as the messenger and my time comes, what happens will make the riots in L.A. pale in comparison."

Backgrounds of Compound Residents

Aguilera checked the backgrounds of those he identified as current residents of the Compound. He determined that several either had been arrested, convicted, or were under investigation for crimes ranging from fraud to smuggling and narcotics offenses. More than 40 residents were foreign nationals, and many of those were illegal aliens. It is unlawful for either an illegal alien or a person convicted of a crime punishable by more than one year imprisonment to possess any type of firearm.[11]

Reports of ATF Experts

During December 1992 and January 1993, Aguilera obtained technical assistance from several ATF experts. An ATF firearms expert in Washington, D.C., confirmed that the weapons components Koresh had purchased could be used easily to produce illegal machineguns and that the manner in which Koresh had acquired these components was similar to the method used by other manufacturers of unlawful machineguns investigated by ATF. An explosives expert at the ATF lab near San Francisco reported that several of the items Koresh had received, such as the large quantities of black powder and igniter cord (a burning-type fuse), were explosives requiring proper registration and storage. The explosives expert explained that black powder and inert grenade shells, both of which Koresh had received in substantial quantities, are used commonly by illegal arms manufacturers to produce live explosive grenades. These grenades, in turn, are destructive devices, the possession of which without proper registration is illegal. The explosives expert also informed Aguilera that other chemicals Koresh had obtained were common ingredients in homemade explosives.

Before Aguilera received the written report from the explosives expert in San Francisco, who specialized in evaluating the practical utility of various items used to produce explosives, the explosives expert in Washington, who had a different specialty, told Aguilera that he was unable to conclude that Koresh had accumulated sufficient materials to manufacture explosives. This expert had noted, however, that Koresh could make unlawful explosives by acquiring some additional materials.

The experts also gave Aguilera additional information about the arms dealers who were supplying Koresh. The owner of Nesard Gun Parts Company, Barrington, Illinois,

[11] See 18 U.S.C. § 922(g)

who in 1992 had shipped M-16 CAR kits, M-16 E-2 kits, and a grenade launcher to Koresh, had been convicted three years earlier of violations of federal firearms laws. The company had unlawfully supplied one of its customers with AR-15 receivers and certain parts kits that together comprised all the component parts necessary to assemble a "short rifle," a firearm that must be registered pursuant to 26 U.S.C. §§ 5841 and 5845(a)(3). Another of Koresh's suppliers, Shooters Equipment Company, Richland, South Carolina, had been the subject of several ATF investigations, including one that culminated in the seizure of illegal machineguns and silencers in August 1992. At that time, the agents also found large quantities of M-16 and AK-47 machinegun parts and kits to convert AR-15 semiautomatic weapons into unlawful machineguns.

In December, ATF began developing plans for serving the warrants, the "tactical planning" aspect of the investigation. This aspect of the investigation is described in the following section of this report. Aguilera's superiors at the ATF Houston field office directed him to continue developing probable cause for the warrants. Although Assistant U.S. Attorney Johnston was satisfied that probable cause existed in November 1992, it was not until Aguilera and Chojnacki briefed ATF Director Stephen Higgins and ATF Associate Director (Law Enforcement) Daniel Hartnett on February 11 and 12, 1993, in Washington, D.C., that ATF authorized Aguilera to present the information to the U.S. Attorney's Office for the purpose of obtaining the warrants.

The David Block Interview

In late January 1993, Aguilera interviewed David Block, who had been a Branch Davidian from 1981 through June 1992. Block had lived at the Compound for several months before he "escaped." He reported having often seen two Branch Davidians, Donald Bunds, a mechanical engineer, and Jeff Little using a metal milling machine and metal lathe to produce weapons. On several occasions, Bunds also had used an AutoCAD (i.e., computer-aided design) software package—which allows mechanical engineers to design objects by providing a three-dimensional picture and precise measurements of the object being designed—to design a "grease gun." Grease gun is the nickname for the M3 and M3A1 .45-caliber military submachineguns used by American forces during World War II. The parts of this grease gun included a cylindrical tube with a bolt-cocking groove carved into the side and a template to fit around the tube to enable it to be used on the milling machine. Bunds had explained that Koresh wanted him to design a weapon that could be manufactured at the Compound.

Block also recounted that Koresh had asked residents of the Compound how to manufacture grenades and had discussed activating a shipment of inert grenades he had received. Koresh received further technical assistance in spring 1992 when a relative of one of the Branch Davidians, a survivalist with expertise in firearms and explosives, visited the Compound.

Block described the potentially devastating arsenal Koresh was amassing in the Compound. He had seen one high-caliber weapon—either a .50-caliber rifle mounted on a bi-pod or a "British Boys" .52-caliber antitank rifle—and had heard about other .50-caliber weapons stored on the premises. Koresh frequently had expressed interest in converting these high-caliber weapons into unlawful machineguns. Block also had seen approximately 15 AR-15s, 25 AK-47s, several 9mm pistols, and three "streetsweepers." 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. Block reported that Koresh would often fire weapons at the Compound's "range" and that he posted armed guards at the Compound every night.

The Undercover House and Special Agent Rodriguez

Aguilera continued to gather information about Koresh's illegal activities even as ATF's focus began to change from building a case to planning an enforcement operation. After ATF established an "undercover house" near the Compound on January 11, 1993 (see Figure 10) one of the undercover agents posted there, Special Agent Robert Rodriguez, began to seek opportunities to visit the Compound and talk to cult members. On January 28, pretending to be interested in purchasing a horse walker that was on the Compound, Rodriguez spoke for the first time with Koresh. Rodriguez, who had read portions of the Bible in preparation for this encounter, discussed the Book of Revelations with Koresh. Koresh showed Rodriguez his motorcycles and invited him to join the cult's Bible study group. Shortly thereafter, Rodriguez attended his first Bible study session.

After a few more visits to the Compound, Rodriguez attended another Bible study session on February 17 and was invited to return the next day. Between Bible study sessions, Rodriguez practiced shooting cans with his rifle near the undercover house in an effort to further pique Koresh's interest. Rodriguez spent three hours in Bible study the next day and emerged with an invitation to shoot with Koresh on the 19th.

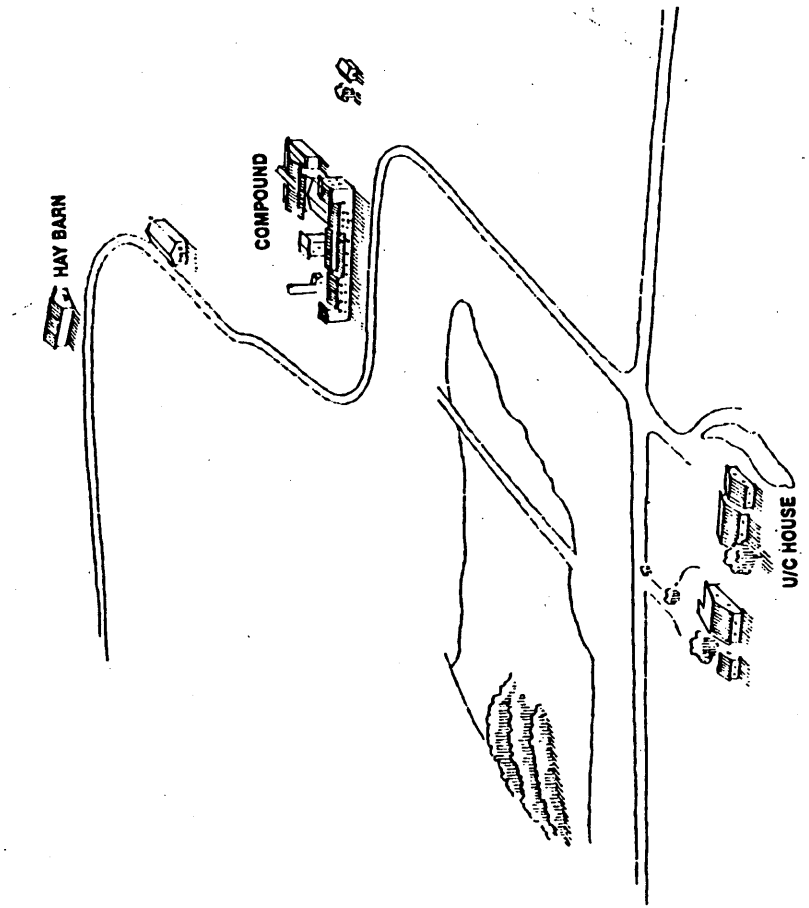


Figure 10: Illustration depicting the undercover house, Compound, and hay barn (not to scale).

Koresh greeted Rodriguez and another agent whom Rodriguez had brought along. Koresh told Rodriguez he had watched him through his binoculars and saw him shooting on the 17th. Koresh brought the agents, both of whom were carrying AR-15 semiautomatic rifles, to the shooting range, and they practiced shooting. Koresh examined in detail and expressed familiarity with Rodriguez's semiautomatic rifle and .38-caliber pistol. Koresh also established himself as an excellent shot and the owner of several weapons, including two Sig-Sauer pistols and a Ruger 10/22-caliber rifle.

Over the next 10 days, Rodriguez visited the Compound several times and often engaged in lengthy conversations with Koresh. During these conversations, Koresh repeatedly confirmed his strong interest in weapons and his disdain for federal laws regulating firearms and explosives. Among other things, Koresh discussed firearms components in great detail, including "hell-fire triggers"[12] and "drop-in sears,"[13] the latter of which are devices used exclusively to convert semiautomatic weapons into machineguns.

Koresh falsely claimed that the possession of an unregistered drop-in sear was lawful as long as the possessor did not also possess an AR-15 rifle. Possession of an unregistered drop-in sear is unlawful regardless of whether the possessor also possesses an AR-15.[14] Nonetheless, he did exhibit profound knowledge of firearms, the nation's gun laws, and methods commonly used to evade those laws. And during a visit Rodriguez made to the Compound on February 23, Koresh showed him a videotape produced by Gun Owners of America, which portrayed ATF as an evil agency that threatened the liberty of U.S. citizens.

[12] A "hell-fire trigger" is an external attachment designed to return the trigger to the forward position more quickly after each firing, thus enabling a semiautomatic weapon to be fired more quickly. The device does not enable a semiautomatic weapon to fire as rapidly as a typical machinegun, and its use does not change the classification of a semiautomatic weapon into an unlawful weapon.

[13] A "drop-in sear" is a part or combination of parts placed inside the weapon to convert a semiautomatic weapon into a machinegun. As a rule, the term refers to the "AR-15 drop-in auto sear," which was designed specifically to convert an AR-15 rifle into a machinegun. Because the sear is designed and intended exclusively for use in converting a weapon into a machinegun, it is considered an unlawful machinegun if it was manufactured after 1981 and not registered properly. 26 U.S.C. §§ 5841 and 5845(b); ATF Ruling 81-4.

[14] 26 U.S.C. §§ 5841 and 5845(b); ATF Ruling 81-4.

Part One
Section Two: The Decisionmaking Process Leading to Forceful Execution of Warrants

In late November 1992, Assistant U.S. Attorney Bill Johnston in Waco reviewed evidence that had been developed by ATF and advised Special Agent Davy Aguilera that, although the investigation should be continued, there already was sufficient evidence to meet the threshold of probable cause for a search warrant. Once Aguilera reported Johnston's opinion to Assistant Special Agent in Charge (ASAC) Chuck Sarabyn (Houston), who had been supervising the investigation, tactical planning for an enforcement operation began in earnest.

Consideration of Tactical Options

The December 4, 1992, Meeting

Directing Aguilera to focus his attention on the probable cause investigation, Sarabyn quickly assumed responsibility for tactical planning. Any enforcement action, Sarabyn decided, would require at least one Special Response Team (SRT). Such teams are specially trained groups of ATF agents with expertise in executing difficult tactical missions—principally high-risk warrants. Sarabyn organized a planning meeting to take place in Houston on December 4.

While Sarabyn could not attend the meeting, his superior Phillip Chojnacki, Special Agent in Charge (SAC) of ATF's Houston Division, did attend, along with Ted Royster, SAC of the Dallas Division; William Buford, Resident Agent in Charge (RAC)[15] of the Little Rock ATF office, a co-team leader of the New Orleans SRT, and an Army Special Forces combat veteran; Jerry Petrilli, RAC of the Albuquerque ATF office, team leader of

[15] A "RAC" is the resident agent in charge of an ATF field office, who acts under supervision of a larger field division, in this case Houston. Buford was a founder of the ATF SRT program.

the Dallas SRT, and a Marine Corps combat veteran; and James Cavanaugh, ASAC of the Dallas ATF office. Two other ATF agents, Kenny King, a group supervisor in the New Orleans ATF office, co-team leader of the New Orleans SRT, and a Marine Corps combat veteran; and Curtis Williams, a group supervisor in the Houston ATF office and team leader of the Houston SRT, who had five years of experience in the tactical division of the Dallas Police Department; both of whom would later assist in tactical planning, did not attend this meeting.

Each of the planners had extensive experience with ATF, collectively having led hundreds of high-risk raids to search for unlawful weapons. As a group, particularly the SRT leaders who formed the core of the tactical planning team, they had other substantial law enforcement and military experience as well. Only Buford, however, had planned or participated in a tactical operation of the magnitude that eventually would be contemplated for Waco—the 1985 siege by ATF and the FBI of the 360-acre Arkansas compound of the white supremacist group The Covenant, the Sword, and the Arm of the Lord (CSA). To execute a warrant at the heavily armed and fortified CSA compound, which had been surrounded by concealed bunkers and land mines, Buford helped devise a plan that established an armed perimeter around the premises. After three days of negotiations, the besieged group members surrendered, but not before they had destroyed many of their illegal firearms, including silencers and automatic weapons. Buford often recalled this siege while the planners were considering various ways to execute warrants at Koresh's Compound.[16]

At the December 4 meeting, Aguilera briefed the planners about his investigation of Koresh. Based on reports from recent visitors to the Compound, he estimated that 75 people lived at the Compound, including large numbers of women and children, all of whom were fiercely loyal to Koresh and devoted to his religious teachings. Aguilera also reviewed the layout of the 77-acre site, particularly its main structure's fortress-like construction and prominent multistory tower. (See Figures 11 and 12.)[17] After hearing Aguilera describe the challenge they had before them, the planners began to consider what they deemed the two

[16] Johnston informed ATF early in the investigation that he would not authorize a search warrant for the Branch Davidian Compound if it was to be executed through a siege-style operation. He, too, feared that a siege strategy would permit Koresh and his followers to destroy evidence and make prosecution more difficult, as happened in the CSA case. Despite Johnston's views, however, ATF's tactical planners seriously considered a siege plan.

[17] The Compound had evolved from a series of free-standing houses. After Koresh took control of the Compound he and his followers dismantled the homes and built the single structure. (See Figures 13 and 14.)

Figure 11: Main Compound building (front side).

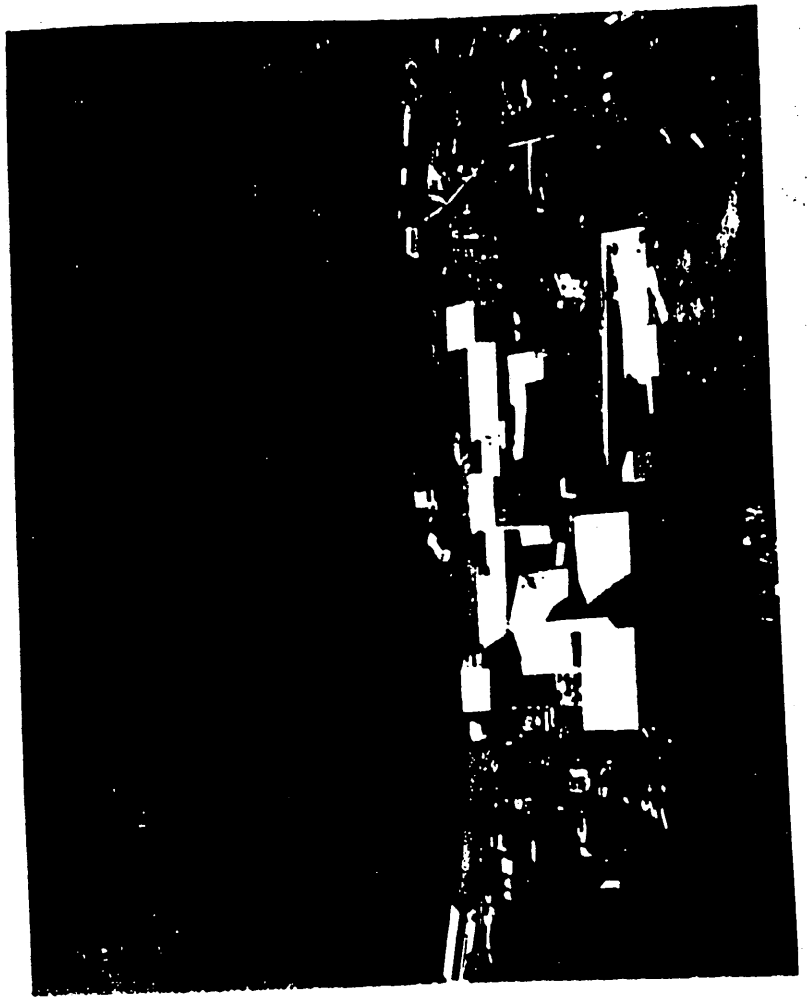


Figure 12: Rear of Compound.

Figure 13: Houses on Mt. Carmel site before construction of Compound.

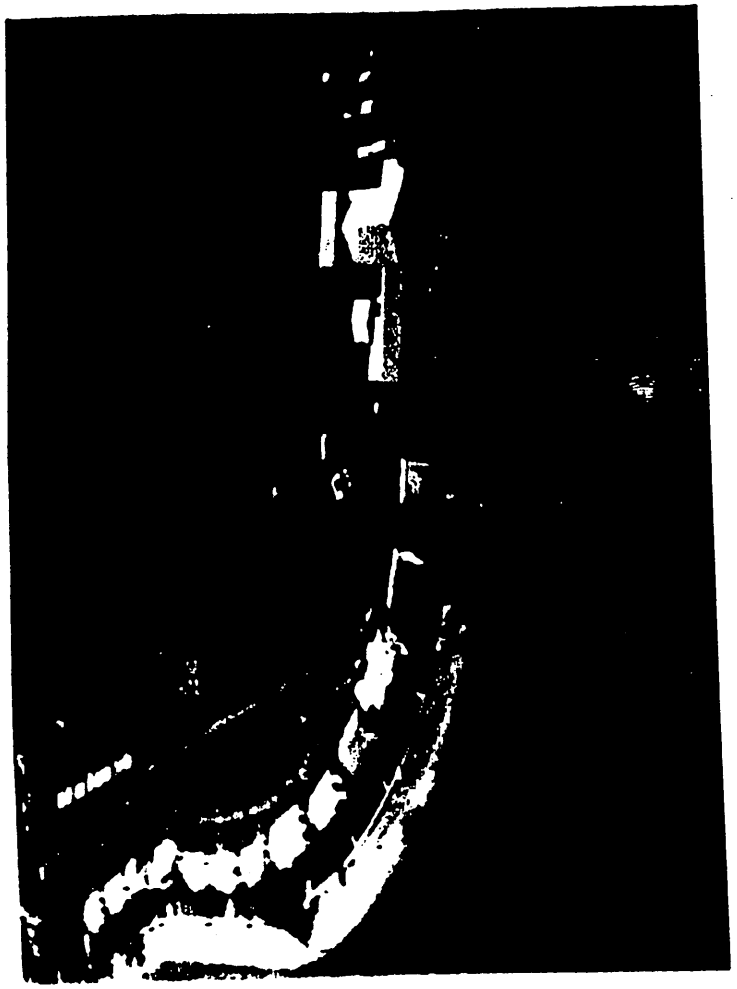


Figure 14: Mt. Carmel site after construction of Compound before houses were dismantled.

principal ways to execute a search warrant: a dynamic entry (raid) or a siege.

Regardless of how the warrant would be executed, ATF's planners decided that execution would be far easier if Koresh were not at the Compound when the agents arrived. Joyce Sparks of the Texas Department of Protective and Regulatory Services had told Aguilera that Koresh rarely, if ever, left the Compound. When they learned this, the planners asked Aguilera to find a way to lure Koresh away from the Compound immediately before the warrant was to be executed. After Aguilera discussed with Sparks her visits to the Compound and Koresh's sexual abuse of minors, the planners suggested that Aguilera inquire whether the Department of Protective and Regulatory Services could schedule a meeting with Koresh on the day of the operation. They also asked whether Koresh could be brought out of the Compound with a grand jury subpoena. Other ways to get Koresh out were also briefly considered, including staging a school bus crash or helicopter crash near the Compound.

Concerned that much of Aguilera's knowledge of the Compound's design and the daily routines of its residents was somewhat dated, Aguilera and Earl Dunagan, acting RAC of the Austin ATF office, recommended that surveillance of the Compound be instituted and that additional information be sought concerning the living arrangements inside, the attitudes of the cult members, the distribution and storage of the cult's weapons and ammunition, and the interior design of the Compound.

At the conclusion of the meeting, Buford, Petrilli, Williams, and King, the leaders of the SRTs that likely would participate in the enforcement action, were assigned to develop a plan for either a siege or a dynamic entry. During tactical planning and on the day of the raid, both Buford and King shared command responsibility for the New Orleans SRT. Sarabyn directed the planning effort, with Buford taking the role of principal tactical contributor. From this point forward, the leaders of the SRTs, who specialized in dynamic entries, would be a driving force in shaping the tactical options and selecting the dynamic entry strategy.

The Late December and Early January Meetings

In late December, the tactical planners met in Austin and reviewed additional information that Aguilera had obtained through his investigation, including reports of interviews of former cult members and new photographs of the Compound. During this

time frame, the SRT leaders—Buford, Williams, Petrilli, and King—as well as Sarabyn drove to Waco to survey the Compound. Until this point, the planners thought that a siege would be the best tactical approach, particularly if Koresh could be arrested at a place other than the Compound. After the planners saw the terrain, however, which offered little cover from the dominating Compound, and after considering the injuries that could be inflicted with the long-range, powerful .50-caliber weapons the planners thought Koresh possessed, they began to reconsider this option. Even if a perimeter could be established, they reasoned, it would have to be quite large and therefore difficult to maintain.

In early January, when the tactical planners next convened, they continued to discuss the practicality of imposing a siege if the Branch Davidians resisted the peaceful execution of a search warrant. With an eye toward a siege plan, Sarabyn soon thereafter arranged for ATF to submit a formal request to the Regional Logistics Support Office—the office through which the Department of Defense provides nonoperational military support to civilian law enforcement agencies—for seven Bradley Fighting Vehicles, which were believed to have sufficient armor to withstand .50-caliber fire. The planners, however, were still uncertain about which tactical option was preferable and sought additional information. To this end, pursuant to Aguilera's and Dunagan's recommendation and to address a recent request from ATF's Associate Director (Law Enforcement) Daniel Hartnett for additional evidence to establish probable cause, the decision was made to establish an undercover operation near the Branch Davidian Compound.[18]

Interviews with Former Cult Members

Meanwhile, at the request of the tactical planners, Buford and Aguilera interviewed several former cult members in California. The interviewees—most of whom Aguilera had already spoken with—included Marc Breault, four members of the Bunds family, and David Block. Aguilera and Buford also interviewed Isabel Andrade, who at the time had two daughters living at the Compound. Also interviewed were Sandra Leake and Jaylene Ojena, close friends of the Andrades who were working with them to gain the return of the

[18] After the planners shifted their focus to a raid, an ATF military liaison submitted to appropriate military authorities in mid-February a superseding request that did not include the Bradleys. ATF did, however, receive other support from the military, including several flights over the Compound and the Mag Bag to produce aerial reconnaissance photographs, interpretation of the photos, and use of the Thermal Imaging System during flights to identify "hot spots" at the Compound. These flights were directed toward the search for armed guards and drug manufacturing facilities. In addition, the military provided ATF with the Military Operation Urban Terrain training facility at Fort Hood for training purposes and helped ATF set up the facility to resemble the Compound.

Andrades' two daughters. Both Andrade and Ojena had visited the Andrade daughters, Katherine and Jennifer, at the Compound in early November 1992.

These interviews confirmed earlier intelligence concerning the level of weaponry at the Compound. Koresh and his followers were known to fire assault weapons and machineguns, and Block had seen what he believed to be a .50- or .52-caliber weapon mounted on a bipod, as well as several dozen rifles, including AK-47s and AR-15s—many of which he believed were fully automatic.

Where these weapons were stored was not clear. According to Block, Koresh usually kept the weapons next to his room, which he decreed off limits to most Compound residents. From time to time, Koresh would issue AK-47s and other rifles to most of the men and some of the women living at the Compound, and would collect them later. Residents who received "long guns" in this fashion usually kept them under their beds. Block did not know whether Koresh also distributed ammunition; however, he did note that several cult members were allowed to keep their own private small-caliber weapons.

Several members of the Bunds family corroborated Block's account of this intermittent weapons distribution. However, when the Bunds family had last resided at the Compound, the weapons distributed had been less sophisticated, consisting mainly of shotguns and handguns, rather than AK-47s and AR-15s. When interviewed by telephone in New Zealand in mid-November, Poia Vaega, a former cult member with several relatives still living at the Compound said that her husband, another former cult member, "has reason to believe that the guns were stored in the quarters that [Koresh] was sleeping in."

These interviews confirmed the dangers of a dynamic entry or a siege, especially if Koresh was in the Compound to provide leadership when a warrant was executed. Indeed, Aguilera reported, "Block left the cult group because [Koresh] would always remind them that if they were to have a confrontation with the local or federal authorities, that the group should be ready to fight and resist." Similarly, Aguilera's report of his January 8 interview with Breault noted that Koresh would make it a point to emphasize the importance of protecting themselves and that if the cult members were attacked, they would have to arm themselves to defend Koresh and their children. Nonetheless, as far as the former cult members knew, Koresh had not specifically trained his followers to repulse law enforcement officers or other visitors perceived to be hostile.

Several former cult members, most forcefully Breault, noted the distinct possibility that Koresh might respond to a siege by leading his followers in a mass suicide; Breault expressed a particular fear for the children at the Compound. One child who had lived at the Compound told a California police officer, who in turn informed Aguilera, that she had been trained by Koresh and his "Mighty Men"—Koresh's closest and most trusted advisers—to commit suicide in several different ways, including placing the barrel of a handgun in her mouth and pulling the trigger.

Block related that Koresh had accumulated at least a three-month supply of military rations, known as Meals Ready to Eat (MREs), and that the Compound had its own source of well water. This was consistent with the report of Joyce Sparks that during one of her visits she had observed large stores of foodstuffs in the Compound's storage area. Breault and Block emphasized that the Branch Davidians were already familiar with a rudimentary, isolated lifestyle and that the Compound had no indoor plumbing, air conditioning, or heating. The room in which Koresh slept, however, was equipped with air conditioning, heating, a stereo, a television, and other amenities. A siege would thus not impose substantial new deprivations on Koresh's followers.

The former cult members discussed the daily routine and physical layout of the Compound. Block reported that only women and children lived on the second floor and in the large tower—in quarters that Koresh barred the men from entering—and that the tower was not used as a watchtower. The men lived on the first floor of the Compound, in a different section from and a floor below Koresh's "arms room." (See Figures 15-17.) According to Breault and other former cult members, worship services were held between 9:00 and 10:00 a.m. each day, roughly three hours after dawn, after which the men began their day's work (except on Saturday, the Branch Davidian Sabbath).

The agents also learned some details about the work the Compound's men performed daily. McLennan County Deputy Sheriff Weyenberg informed Aguilera that daytime reconnaissance flights over the Compound had revealed men working in a construction pit. When visiting the Compound for two days in early November 1992, Isabel Andrade and Jaylene Ojena also had seen men in the pit building a new structure adjacent to the Compound's main building. (See Figure 18.) For the two months before the raid, the construction pit was an excavated area next to the Compound's southwest corner. The pit was connected to the Compound's front wing by an underground passage constructed from the shell of a buried school bus. The pit was rectangular, about 15 feet deep, 100 feet long, and 45 feet wide. Between mid-January, when the undercover house was established, and

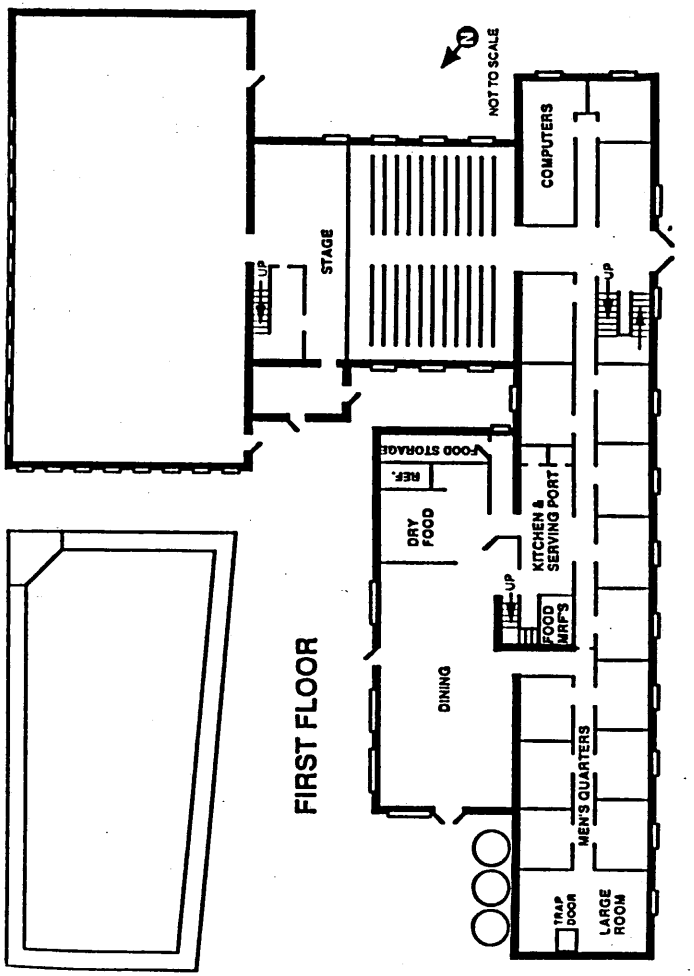


Figure 15: Floor plan of first level based on Block's memory of the Compound's living arrangements.

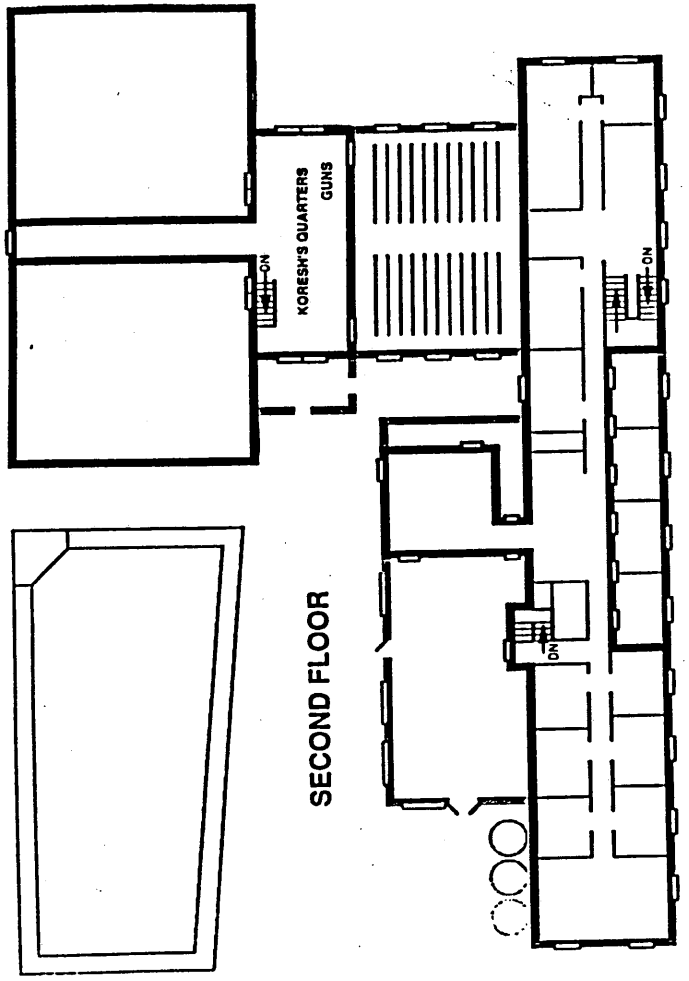


Figure 16: Floor plan of second level based on Block's memory of the Compound's living arrangements.

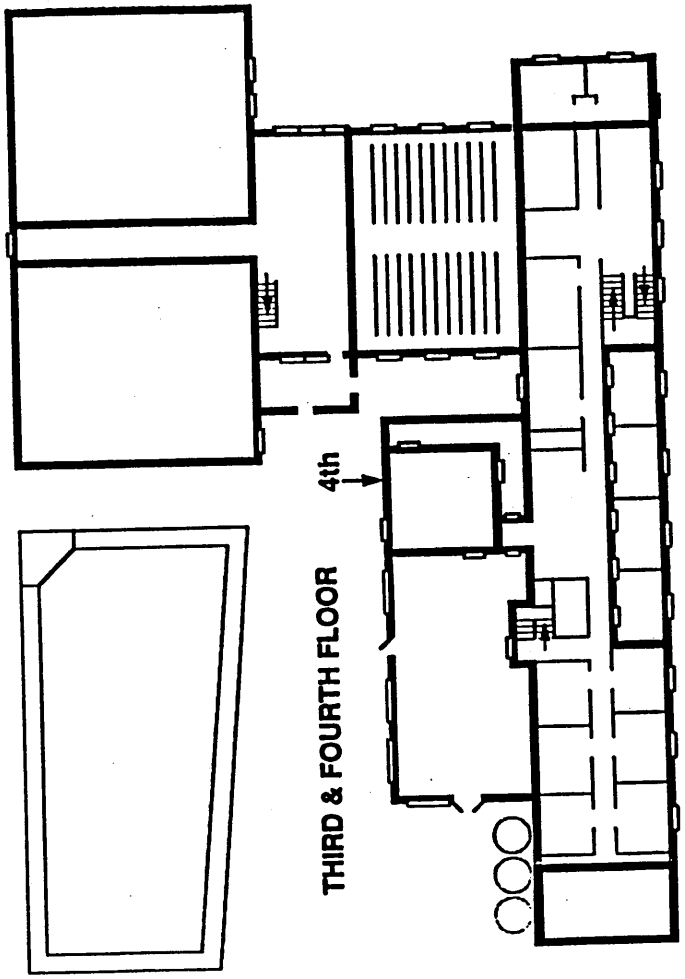


Figure 17: Floor plan of third and fourth level based on Block's memory of the Compound's living arrangements.

Figure 18: Arrow indicates pit (photographed after the raid).

the day of the raid, the men had built a roof covering more than half of the pit.

According to Andrade and Ojena, the men carried no weapons while they worked in the pit. And neither Andrade nor Ojena, outsiders whose only connection to the Branch Davidians was that they were seeking the release of two current cult members, saw any weapons displayed at the Compound. They did report, however, that they were carefully watched and gently ke;t away from certain areas during their visit.

While the men worked in the pit, the women cared for the children and did household chores. Not every man worked in the pit, however. Some were permitted to go into town, while Steve Schneider and Wayne Martin often stayed inside to work on computers. Koresh's schedule was unpredictable—sometimes he slept past noon, and sometimes he awoke early for services. Block also told the agents that Koresh rarely left the Compound because he feared that he might be arrested by the sheriff's department.

Intelligence from the Undercover House

While Aguilera and Buford were conducting their interviews in California, other agents were busy establishing the "undercover house." By January 11, 1993, the operation was up and running in a vacant house across from the Compound. (See Figure 19.) The house offered agents a clear view of the front of the Compound and of the main road to the Compound. The location also provided a limited view of the construction pit. The house was equipped with basic surveillance equipment, including cameras, a radio scanner, and night-vision devices.

The agents' view of the Compound and its residents was limited, however. Koresh's followers had access to the Compound using a road that led to the rear of the Compound not visible from the undercover house. In addition, Koresh and his followers owned numerous motorcycles, which allowed them to gain access to the Compound without using the roads, thereby avoiding detection by agents.

In the beginning, eight ATF agents manned the house, posing as students from a local technical college. Even though Rodriguez was more than 40 years old when his assignment began, all eight agents were chosen, in large part, for their relatively youthful appearances. The agents were instructed, among other things, to determine whether Koresh maintained an armed guard or a watch at the Compound, to identify, count and photograph cult members and their cars, to identify any counter-surveillance, and to gather further

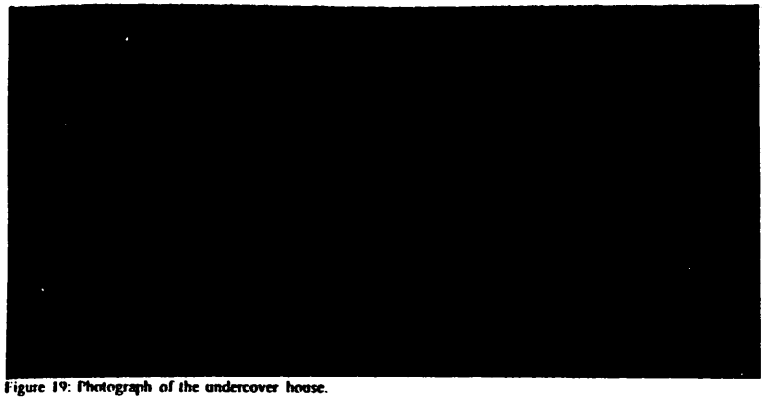


Figure 19: Photograph of the undercover house.

evidence of firearms violations. Other than being told to pay attention to the routines around the Compound and to gain access to the inside if possible, the agents were not given a firm sense of what information the tactical planners were looking for, nor were they kept abreast of the evolving tactical plan.

During the first eight days, the agents in the undercover house maintained surveillance of the Compound around the clock. However, in the absence of any clear direction or supervision, this vigilance soon broke down, as the agents perceived no significant activity at the Compound and began to disagree among themselves about their respective responsibilities. After staying overnight at the house on January 19, Sarabyn told the agents that they could terminate the effort to maintain 24-hour surveillance and should instead concentrate on significant events only and devote more energy toward infiltrating the Compound.

The agents in the undercover house communicated with the tactical planners primarily by providing surveillance logs, photographs, and videocassettes to a contact agent. Although the agents took hundreds of photographs of the Compound and its residents, many photographs were not developed until long after the raid, and few of the photographs that were developed were reviewed by the tactical planners. Although the Review does not know where the videotapes were kept, the tactical planners never looked at any of them. Finally, once the contact agent obtained the logs and other materials from the undercover

agents, no agent was responsible for ensuring that the materials in their original form either were brought to the attention of all tactical planners or analyzed for their benefit.

Using information relayed to them during the first three weeks of the undercover house operation and agents' surveillance logs, the planners concluded that certain routines prevailed among the 75 Branch Davidians who reportedly lived at the Compound. The raid planners concluded that neither armed guards nor sentries were posted at the Compound at any time, that Koresh never left the Compound, and that most of the men worked regularly in the pit, starting at about 10:00 a.m. The planners apparently envisioned that virtually all of the men in the Compound worked in the pit.

The Decision

When the tactical planners met in Houston on January 27-29, Buford reported what he and Aguilera had learned from the former cult members. Sarabyn and the agent who served as the contact with the undercover house related what intelligence was obtained through the undercover agents' surveillance of the Compound. At this time, the tactical planners believed they had sufficient information to choose a tactical option.

Buford, who originally had favored a siege, now rejected this option based on what former cult members told him about Koresh's ability to withstand a siege and the danger of a mass suicide. Buford also noted the tactical difficulty of laying siege to a structure such as the Compound, particularly one with .50-caliber weapons inside. In his view, shared by the other planners, a siege would not succeed quickly, and ATF probably would have to assault the Compound anyway, once public pressure on ATF to resolve the situation grew and the government's patience wore thin. Buford and several other planners warned against any scenario that might result in ATF entering the Compound forcefully, after a prolonged standoff had given Koresh an opportunity to prepare his defenses. Others in the planning group were troubled by the risk of a mass suicide, and based on Buford's experience with the Arkansas siege, they feared that a siege would give Koresh and his followers a chance to destroy evidence of their wrongdoing. All assumed that Koresh would not leave the Compound and would maintain strict discipline over his followers during a siege.

In contrast, Buford and others believed that they could formulate a workable plan for a dynamic entry. If ATF could enter the Compound before weapons could be distributed among cult members, Koresh's arsenal would pose no threat. The critical factor was to separate the men from the weapons. The planners believed this was possible because,

according to some cult members, the weapons were kept under lock and key in a room next to Koresh's and were not generally distributed among Compound residents. Neither at this meeting nor during later planning efforts did the tactical planners question the reliability of this dated information from former cult members. In addition, the men routinely worked in the pit, which was at the far end of the Compound away from the arms room, starting at approximately 10:00 a.m. Moreover, relying on surveillance that indicated there were no sentries, which was consistent with Block's recollection that no sentries were posted in the tower, the planners believed that agents could approach the Compound without alerting residents.

Although former cult members claimed that Koresh maintained armed guards, often on a 24-hour basis—a report corroborated by the UPS delivery person—the planners believed the more recent reports from undercover agents that neither guards nor sentries had been observed at the Compound. When Rodriguez and another undercover agent visited the Compound in mid-February to shoot with Koresh, however, Koresh told the two agents that, through his binoculars, he had seen Rodriguez practicing with the same weapon they were now using at the Compound near the undercover house several hundred yards away. Koresh and perhaps other cult members were, therefore, watching the undercover house and the area around the Compound from a vantage point well above ground level—a matter that would have been of some concern to the raid planners. Rodriguez's exchange with Koresh was never documented or made known to any of the tactical planners. In addition, a representative of the National Guard told Aguilera on January 11 that a January 6 night surveillance flight using the Guard's Thermal Imaging System indicated "hot spots" consistent with the posting of sentries or guards outside the Compound.

By the end of the meeting, the tactical planners had reached a consensus that plans should be formulated for a dynamic entry. Despite ATF's early belief that drawing Koresh away from the Compound was central to the success of any operation, intelligence reports that Koresh did not leave the Compound led the planners to abandon efforts to lure Koresh away.

Development of the Tactical Plan

During the next two weeks, outlines of the ATF raid plan were developed by Sarabyn and the SRT leaders who would be involved in the operation—Petrilli, Williams, Buford, and King. The plan was never committed to paper in any detailed form; however, it reflected a shared basic understanding on the part of its creators.

Figure 20: Aerial photograph of command post at TSTC.

Figure 21: Aerial view of Bellmead Civic Center, utilized by ATF as a staging area.

An agent appointed by Sarabyn selected Texas State Technical College (TSTC) as the site for the command post because of its proximity to an airfield for use by the operation's helicopters and because the sheriff's department previously had received cooperation from the airport manager. (See Figure 20.) At the suggestion of local police, the planners selected Bellmead Civic Center as the staging area because of its proximity to

the Compound, extensive parking facilities, and ability to accommodate more than 100 people. (See Figure 21.) According to the plan, approximately 75 ATF agents would gather at the staging area early on the day of the raid and leave for the Compound in time to arrive at about 10:00 a.m. The agents would travel approximately 10 miles to the Compound on the main road in cattle trailers, hidden beneath canvas tarpaulins and plywood-reinforced sides. (See Figures 22 and 23.) The planners believed that cattle trailers, which are quite common in Texas, could move a large number of people without attracting attention. Agent Dale Littleton, who had suggested using cattle trailers, had used them in October 1992 to surprise a group of heroin dealers operating from a remote 107-acre ranch in Texas. On that occasion, law enforcement personnel who were concealed in the trailers surprised the subjects and were able to make arrests and execute a search warrant without injury or incident.

In addition to the three SRTs, the trailers would carry three arrest support teams that would be responsible for clearing and securing the perimeter and handling any prisoners. All agents would carry semiautomatic handguns, and some would be equipped with semiautomatic AR-15s or 9mm MP-5 submachineguns. Some of the MP-5s carried by the agents could fire two-shot bursts but none of the MP-5s could fire more than two shots with one trigger pull.

If agents in the undercover house, whose raid-day mission included watching the Compound for changing conditions, did not observe any unusual activities, the cattle trailers would pull in front of the Compound, and the agents would deploy. The helicopters would leave the airfield at the command post, which was approximately three miles from the Compound, on a schedule that would make them arrive shortly before the trailers. There they would provide a diversion by hovering a distance from the Compound before the cattle trailers arrived.

The three SRTs were to arrive at the Compound and surprise the men who were working in the pit, separated from the weapons stored next to Koresh's room. The New Orleans SRT would be responsible for gaining control of the arms room and Koresh's bedroom. Initially, the plan called for part of this team to climb an internal staircase, believed to be located near the front door, and proceed directly to the arms room and Koresh's bedroom. However, because the planners were unable to confirm through Rodriguez's visits to the Compound whether a staircase ran from the front door to those two rooms on the second floor, the plan was changed a few days before the raid.

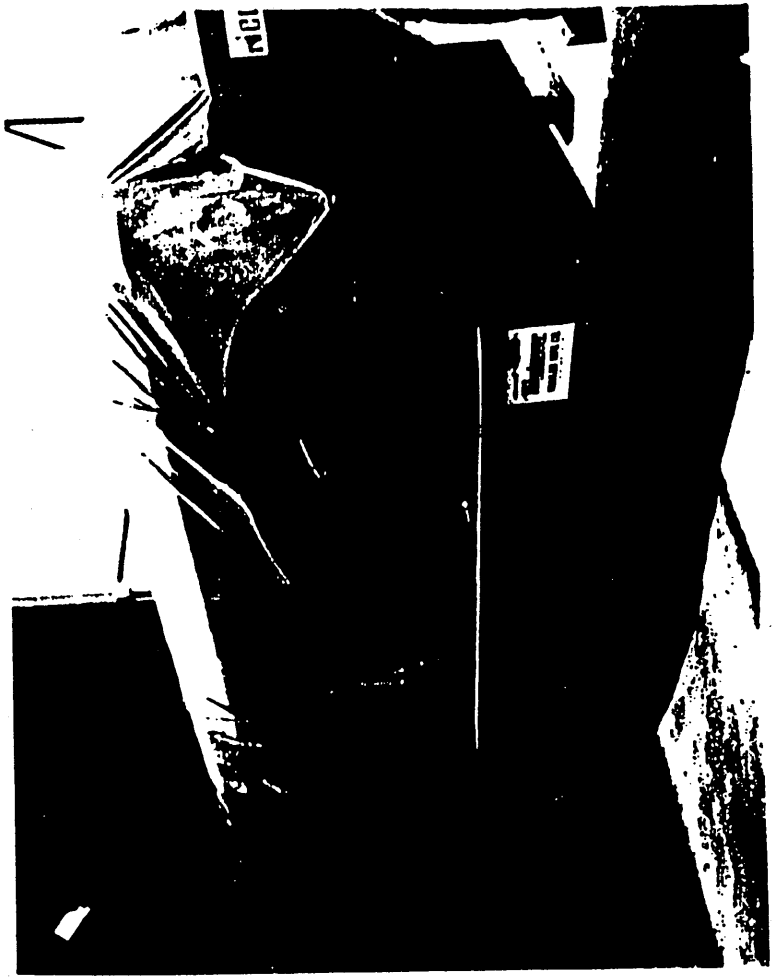


Figure 22: Side view of second cattle trailer.

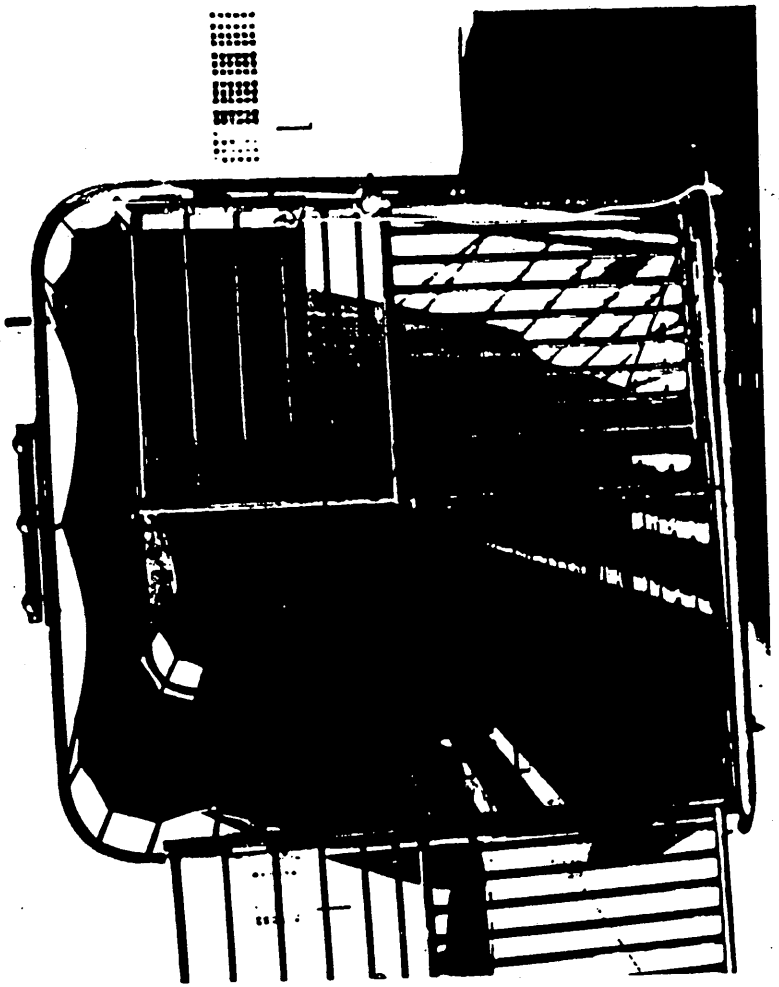
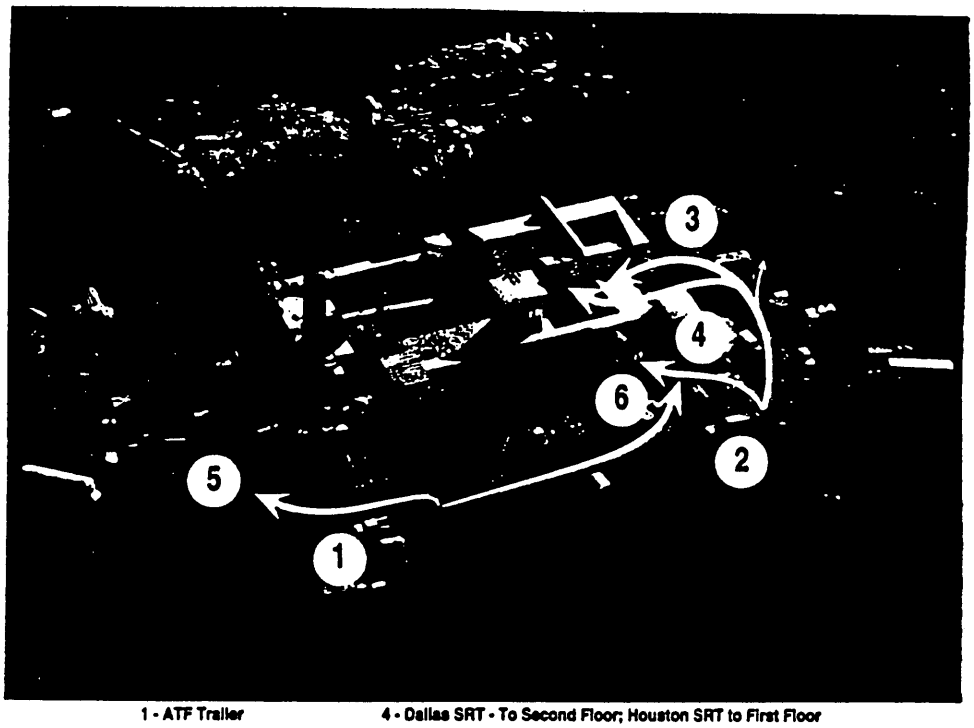


Figure 23: Rear view of second cattle trailer.

The modified plan required that most of the New Orleans agents climb onto the Compound's roof and enter the arms room and Koresh's room through two separate windows, while the balance of the New Orleans team secured the base area. The plan called for the New Orleans team to use "flashbangs"—diversionary devices that produce a flash and a bang but no fragments, and therefore do not cause injury—to enable it to safely enter the windows of rooms believed to be filled with weapons. The Dallas SRT was to enter the front door and secure the second and third floors and the tower—areas believed to contain the women and children's bedrooms. Half of the Houston SRT was to enter the front door and secure the first floor until it reached the trapdoor to the buried school bus; the other half was to circle around to the west edge of the Compound, secure the men in the pit area, and then proceed through the buried bus until it reached the other side of the trapdoor. After the premises had been secured and the residents taken outside, a proper search would be conducted. (See Figure 24.)

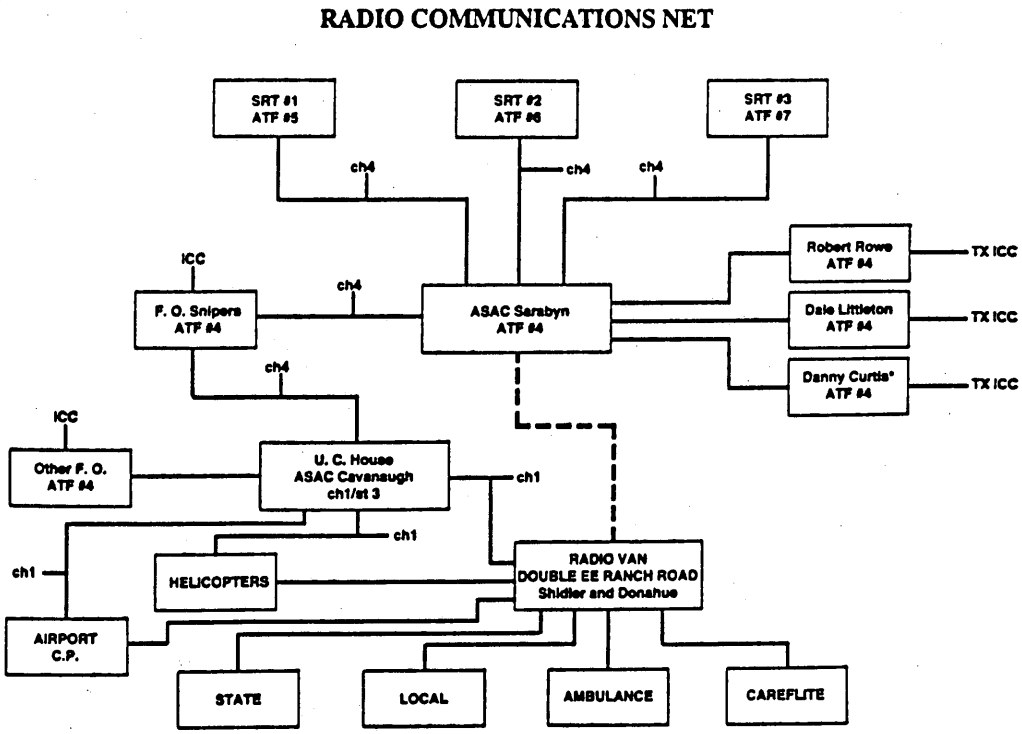
The plan called for deployment of at least two groups of forward observers armed with long-range rifles, who were to provide cover for the agents entering the Compound. In accordance with the ATF forward observer program, the Treasury Department's firearms policy, and the standard rules of engagement for federal law enforcement officers, the cover provided by the forward observers was limited to shooting in defense only (i.e., to protect the lives of agents and innocent third parties in imminent danger). Two forward observers and five other agents who would provide security for them and who would clear and secure vehicles parked nearby were to take positions near the hay barn, which was situated on low ground about a quarter of a mile behind the Compound; four forward observers were to set up in the undercover house. The hay barn team was to arrive at the barn approximately two hours before the raid and move into position as the cattle trailers entered the grounds; the team in the undercover house was to arrive the night before and set up surveillance the next morning.

The planners decided not to place forward observers on the east side of the Compound to provide cover for the New Orleans SRT members because of a concern that the terrain to the east did not provide the necessary cover. Although some planners favored placing such forward observers, the opinion of the planners concerned about the lack of cover to protect and conceal the observers from Compound occupants prevailed. As a result, the New Orleans team was required to achieve its objective without any covering support. A communications network was to link the various components of the raid, which in turn would be connected to the raid's command and control element, which would have its own radio channel. (See Figure 25.) The plan also called for another group of agents to



1 - ATF Trailer
2 - ATF Trailer
3 - New Orleans SRT - To Roof
4 - Dallas SRT - To Second Floor; Houston SRT to First Floor
5 - Portion of Houston SRT/Arrest Team - Secure Pit
6 - Dallas SRT - To Second Floor; Houston SRT to First Floor

Figure 24: Photograph indicating planned deployment for SRTs.



*ATF hand drawn diagram mistakenly lists Curtis Williams

Figure 25: Diagram of communications network used for the raid.

execute a second search warrant at the Mag Bag as soon as the Compound was secured.

The tactical planners developed their plan in accordance with the ATF National Response Plan (NRP). The NRP, which Sarabyn had played a significant role in drafting, sought to define ATF objectives, policies, and procedures to ensure a coordinated response and rapid deployment of ATF resources to situations that exceeded the capabilities of a single field division. The NRP set forth the responsibilities of various ATF headquarters officials and field division leaders. One of its purposes was to permit ATF Washington officials to oversee operations and maintain communication with field commanders. On February 9, pursuant to the NRP, the planners formally requested, and received authority a week later from Hartnett, to activate three SRTs to handle the operation. The attempt to execute the warrants at the Compound was only the fifth time that ATF used more than one SRT in a single operation and the first time since ATF established the NRP.

In accordance with the NRP, the Waco raid plan designated certain field personnel to serve in particular command and control positions for the operation. Chojnacki, as SAC of the field division in which the operation was taking place, was, pursuant to NRP's directive, designated as incident commander. As Incident Commander, Chojnacki was charged with determining the overall strategy for the operation and for coordinating with the National Command Center in Washington.

The tactical plan for entering the Compound, as it evolved toward its final preraid form, called for Chojnacki to be stationed at the command post. Chojnacki then opted to be a passenger in one of the helicopters. Chojnacki designated Sarabyn, an SRT-trained ASAC, as the tactical coordinator in accordance with the NRP. Sarabyn would be responsible for directing and controlling all tactical functions during the operation. Pete Mastin, Deputy Incident Commander, would first be positioned at the staging area and then would ride to the Compound in a cattle trailer. Cavanaugh, an SRT-trained ASAC (Dallas) and Deputy Tactical Coordinator, would be stationed in the undercover house. From there, he could warn Chojnacki and Sarabyn if he or any of the other agents witnessed any changes at the Compound. In addition, once Sarabyn and Chojnacki left for the Compound, Cavanaugh would be in the best position to observe any activities at the Compound, particularly outward signs that residents were preparing for a raid, such as guns in the windows or barricades, and would thereafter have responsibility for aborting the raid if necessary. (See Figure 26.)

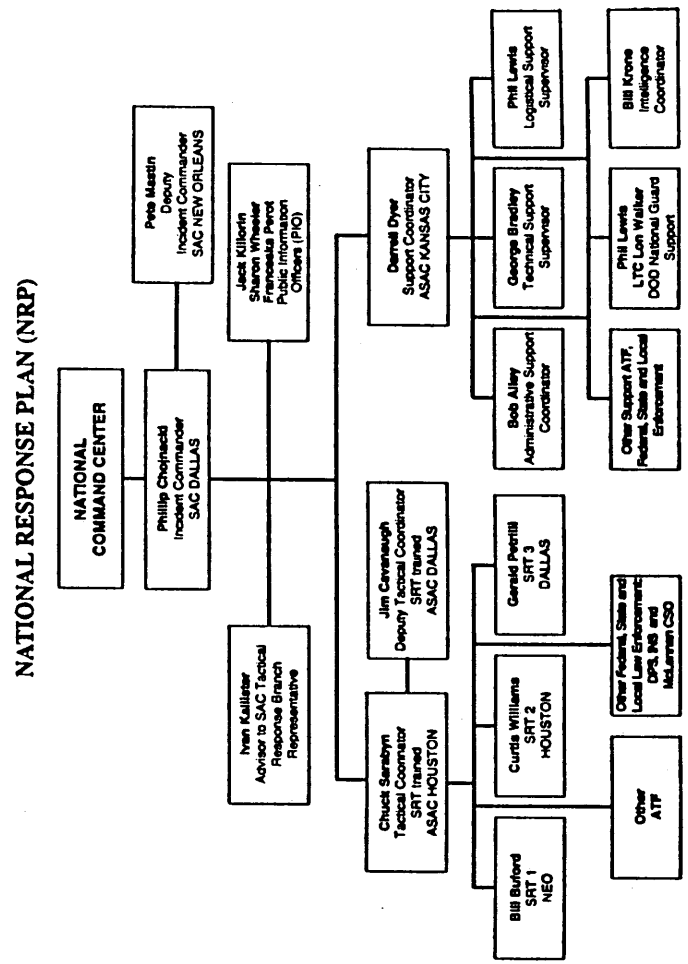


Figure 26: Organizational chart of National Response Plan structure and specific assignments for the Waco operation.

There was also a contingency plan in case the raid had to be aborted. The cattle trailers could easily take a detour at several points before reaching the road to the Compound. Even after turning onto the Compound road, the trailers could, for a short while, stop and allow the agents to disembark and retreat from the Compound. To provide concealment from the Compound's long-range weapons—particularly its .50-caliber guns—in case agents were forced to retreat from the Compound on flat and open terrain, ATF requested smoke canisters from military sources shortly before the raid. Because of the timing of the request, however, no smoke canisters were provided in time for the raid. But the planners determined that once the trailers had arrived near the front of the Compound, the raid could not be aborted because the terrain provided no concealment for the agents, and the driveway would not permit the trailers to turn around. At this point of no return, action would have to be taken, even if the Compound residents were not surprised.

Additional Intelligence Gathering, Training, and the Briefing of ATF Leadership

The formulation of a raid plan that rested on the assumption that the Branch Davidian men could be surprised in the construction pit, when they were away from their weapons, did not lead to any new direction in the intelligence gathering operation at the undercover house. Although the tactical planners recognized by early February that the plan hinged on the men being in the pit at 10:00 a.m., none of the undercover agents was informed that the operation would be based on this assumption. The development of the tactical plan, therefore, brought no change in the nature of the surveillance reports coming from the undercover house; if anything, the reports about the work in the pit became even vaguer and more sporadic until surveillance was officially terminated on February 17.

During the first few weeks in February, any lingering hopes that Koresh would leave the Compound or could be lured away were abandoned. The agents never saw him leave, and ATF's principal effort to draw Koresh away from the Compound failed when Joyce Sparks' supervisor at the Texas Department of Protective and Regulatory Services refused an ATF request that the agency summon Koresh to town for a meeting. A week before the raid, an attempt was made to obtain a state arrest warrant for Koresh's sexual activities with a young girl, which would have gained a basis for either the Texas Department of Protective and Regulatory Services or the District Attorney's Office to schedule a meeting with Koresh in town. The attempt fell short, however, when the girl was unwilling to testify about what had happened.

On February 11, Chojnacki, Sarabyn, and Aguilera flew to Washington and briefed Daniel Hartnett, ATF's Associate Director of Law Enforcement; Daniel Conroy, Deputy Associate Director of Law Enforcement; Andrew Vita, ATF's Chief of Firearms; David Troy, ATF's Chief of Intelligence; Richard Garner, ATF's Chief of Special Operations, and others about the investigation and the planned operation. The next day, the agents gave a similar briefing to ATF Director Stephen Higgins. Chojnacki and Sarabyn explained that Koresh would likely be at the Compound when any operation took place because he apparently rarely left the Compound. After reviewing the reasons for launching a raid rather than a siege—including their concerns about a mass suicide and Koresh's ability to withstand a siege for an extended period of time—Chojnacki and Sarabyn outlined their tactical plan's key aspects, including its focus on separating the men working outside in the pit from the weapons and the women and children.

After hearing the raid plan, ATF management raised several concerns about measures being taken to protect ATF agents and the women and children in the Compound. Higgins, for example, directed that particular care be taken with the diversionary flashbangs. When Hartnett questioned why the raid was scheduled for 10:00 a.m., rather than pre-dawn, when raids are generally begun, Chojnacki and Sarabyn explained how the plan depended on catching the men in the pit, when they were separated from their weapons. They also reviewed the provisions made for aborting the mission if necessary; Chojnacki and Sarabyn, as well as Mastin and Cavanaugh, would have authority to stop the mission at any time. With their concerns thus addressed, Higgins, Hartnett, and the rest of ATF top management approved the plan.

Shortly thereafter, Hartnett telephoned Chojnacki and expressed his concern that the men in the pit might sneak back into the Compound after the agents arrived. He directed that, rather than trying to secure the pit area from above, agents should enter the pit to secure the men inside. Hartnett also questioned the plan's abort options. But after receiving Chojnacki's assurance that the raid would only proceed if conditions were right, Hartnett again expressed his approval of the operation.

Part One
Section Three: ATF and the Media Prepare for the Raid

The *Waco Tribune-Herald*'s Investigation of David Koresh and Preparation of a Series for Publication

Even before ATF began its inquiry into firearms and explosives violations at the Branch Davidian Compound, a local newspaper, the *Waco Tribune-Herald*, had been investigating David Koresh and his followers. In spring 1992, Mark England, a *Tribune-Herald* reporter who had covered Koresh's 1988 trial for attempted murder, became intrigued by reports that Koresh proclaimed he was Jesus Christ and that there might be a mass suicide at the Branch Davidian Compound during Passover. With reporter Darlene McCormick, England gathered information and interviewed Koresh, former cult members, and the families of current cult members. By fall 1992, the reporters had information that children were being physically and sexually abused at the Compound. Having also learned that the Branch Davidians were using a buried school bus as a shooting range and that they were stockpiling large amounts of weapons and munitions, the reporters decided that law enforcement and social service agencies were not taking the situation seriously.

In October 1992, McCormick called Assistant U.S. Attorney Bill Johnston in Waco to ask what constitutes an illegal firearm. According to McCormick, Johnston informed her that the "Treasury guys" could tell her if any Branch Davidians had permits for automatic weapons. While Johnston did not give McCormick any specific information about the ATF investigation, she concluded that federal authorities were in fact investigating the Branch Davidians. After the call, Johnston notified ATF that the newspaper was working on a story.

By January 1993, England and McCormick had drafted a "Sinful Messiah" series of articles and submitted them to their editors. By early February, the galleys (used to detect and correct errors before a newspaper page is composed) went to Randall Preddy, the

Tribune-Herald's publisher, for his review. Because of its startling revelations of Branch Davidian lifestyles and its disclosure of dangerous weapons at the Compound, Preddy sent the galleys to his superiors at Cox Enterprises, the newspaper's parent company in Atlanta, for review. He also asked Cox's Vice President for Security, Charles Rochner, to assess the potential for violence against the *Tribune-Herald*'s plant and personnel and to recommend any necessary security procedures. Preddy and Rochner discussed the situation at the February Cox publishers meeting in Orlando, Florida, and Rochner agreed to visit Waco later in the month.

ATF Discussions About the *Tribune-Herald* Investigation and Contacting the Media

ATF first learned about media interest in the Compound when, in October 1992, Johnston told Aguilera that the *Tribune-Herald* was preparing a major story about Koresh. In December 1992, when Aguilera learned that Marc Breault, a former Branch Davidian, was supplying information to both law enforcement and the *Tribune-Herald*, Aguilera located Breault and asked him to stop dealing with the newspaper. That same month, Aguilera told his supervisor, Earl Dunagan, acting RAC of the Austin office, about the *Tribune-Herald*'s parallel investigation. Dunagan, in turn, suggested to ASAC Sarabyn, his supervisor in Houston, that ATF try to convince the *Tribune-Herald* to delay the story until after the ATF operation took place. At a meeting to discuss the investigation on December 4, SAC Chojnacki suggested meeting with the *Tribune-Herald* to request a delay in publication, but James Cavanaugh (then a Dallas ASAC and later Deputy Tactical Commander for the raid) opposed any such contact. By January 1993, however, an agreement was reached that a delay should be sought to ensure the safety of the undercover agents and the integrity of the investigation.

The February 1, 1993, Meeting With a *Tribune-Herald* Official

In mid-January, Barbara Elmore, the *Tribune-Herald*'s managing editor, contacted Assistant U.S. Attorney Johnston to assess the likelihood that the Branch Davidians would retaliate against the *Tribune-Herald*'s plant or personnel in the wake of the publication of the Koresh series. Johnston advised her of ATF concerns about publication of the articles and suggested a meeting.

On February 1, Sarabyn and Dunagan met with Elmore at the U.S. Attorney's Office and, citing their ongoing investigation, asked her to delay publication of the Davidian series. Johnston introduced the parties but did not participate in the meeting. The

agents offered to give *Tribune-Herald* reporters "front-row seats" during the execution of the contemplated law enforcement action if the newspaper delayed publication of its series until after the raid. Elmore said that her publisher would have to make that decision and mentioned her concerns about the security of the *Tribune-Herald*'s personnel and building. At the conclusion of the meeting, Dunagan told Elmore that ATF planned to execute the search warrant on February 22 and that he would inform her if the date changed. Elmore recalls only that ATF told her that it might take some type of action concerning the cult in two to four weeks.

About two weeks later, Dunagan, with Sarabyn's approval, told Elmore that the raid had been postponed to March 1. According to Elmore, she told Dunagan that the *Tribune-Herald* had made no decisions about publication, but alerted other *Tribune-Herald* personnel of the date change. Dunagan believed the paper was cooperating with ATF's request to hold the story because Elmore had not told him anything to the contrary. Editors at the *Tribune-Herald*, on the other hand, have indicated that they felt no obligation to respond to ATF one way or the other; indeed, they report having been surprised that ATF agents did not contact other members of *Tribune-Herald* management after Elmore had told ATF she could not make the decision to delay publication of the articles.

Continued Discussions Between ATF and the *Tribune-Herald*

After these initial contacts, Chojnacki assumed sole responsibility for ATF communications with the *Tribune-Herald*. On February 9, Rochner informed Chojnacki that he would act as the *Tribune-Herald*'s liaison with ATF and that he was conducting a threat assessment for the *Tribune-Herald* in connection with its "Sinful Messiah" series. *Tribune-Herald* staff members, however, have said that they did not regard Rochner as the paper's liaison with ATF, but only as a security consultant to the paper. Because Rochner planned to be in Waco the week of February 22, Chojnacki agreed to meet with him. In the meantime, Chojnacki invited Rochner to observe raid training at Fort Hood on the 25th, later changing the invitation to the 26th or 27th.

To prepare for the meeting with the *Tribune-Herald*, Chojnacki sought advice from Jack Killorin, Chief of ATF's Public Affairs Branch. ATF's media policy does not require that headquarters personnel be notified of media involvement at the operational stages of an ATF action. It does, however, require such approval for media "ride-along" (ATF Order 1200.2B, January 20, 1988). Noting Koresh's messiah complex and his paranoia, they agreed that taking the press along on a raid could create an inflammatory situation.

Chojnacki said that he would offer *Tribune-Herald* key interviews and would recognize their hard work, but that he would not accept a demand that they be present at the raid or tell them the date or time of the raid. Killorin advised that ATF should not give the *Tribune-Herald* an exclusive story. He did not discuss this conversation with his supervisor, ATF Assistant Director of Congressional and Media Affairs James Pasco.

The *Tribune-Herald* Decision to Publish

By mid-February, reporters and editorial staff at the *Tribune-Herald* were eager to publish the "Sinful Messiah" series. Internal revisions and attorney libel review had been completed, and, at Rochner's direction, new security procedures were in place at the newspaper. Entrances to the building were locked, building passes were issued, and identifying decals had been removed from all *Tribune-Herald* vehicles. England and McCormick would leave Waco when the series appeared, and the homes of the *Tribune-Herald* executives would be protected. Only three hurdles remained before publication: Koresh was to be interviewed a final time so that his reaction could be included in the series; Rochner was to approve security procedures upon his arrival on February 24; and Chojnacki was scheduled to meet with *Tribune-Herald* editors on February 26. Preddy had told his staff that the series would not go forward until he had a face-to-face meeting with ATF officials.

On Friday, February 19, the *Tribune-Herald* editors took the first step toward publication and instructed England to interview Koresh. After contacting Koresh on Monday, February 22, for his reaction to the series, England left for Dallas on Wednesday, February 24, pursuant to the security plan. McCormick was already out of the country on vacation. On Wednesday morning, Rochner arrived in Waco and at Preddy's request, rescheduled the meeting with Chojnacki for that afternoon. Preddy recalls that before the meeting, Rochner mentioned that Chojnacki had invited him to observe ATF training at Fort Hood.

The February 24 Meeting With the *Tribune-Herald*

On February 24, Chojnacki, Rochner, and Preddy met with editor Robert Lott, City Editor Brian Blansett, and Managing Editor Barbara Elmore. Lott recalls that, at the time, he was committed to publication, absent clear and convincing evidence that the publication would cause harm. It is not clear, however, whether Chojnacki understood that this was to be the newspaper's standard for holding publication.

Chojnacki opened the meeting by thanking the *Tribune-Herald* editors for delaying the series, but the editors immediately made it clear that they had not held the series in deference to ATF—they had not been ready to run it for other reasons. Noting that he was concerned with the safety of ATF personnel as well as the safety of *Tribune-Herald* employees and facilities, Chojnacki begged the editors to hold off publication until after ATF had conducted its operation. Koresh appeared to be relaxed, Chojnacki explained, but publication of the series would agitate him and disrupt ATF's planned operation.

Chojnacki did not, however, give the paper any sense of when ATF's operation would take place or what it would entail. He noted that he had not yet obtained warrants and was not sure he would be able to get any; if he were unable to obtain such judicial authorization, he explained, he would have to "go home." While he told the editors that he could not "afford" a siege, Chojnacki refused to answer questions as to "what he had in mind" and "if he had an undercover." The most he would say was that a law enforcement action would likely take place "fairly soon." Asked if ATF planned to act within the next 7 to 14 days, Chojnacki declined to answer.

Chojnacki then asked the *Tribune-Herald* editors if their series would run in one to seven days. He recalls having received an affirmative answer. He asked the editors to give him some advance notice of the publication. He concluded by asking: "So, does that mean that you are willing to run this story even though we are asking you to keep it quiet for a few more days so that we can do what we have to do?" According to Chojnacki, Lott replied "The important thing to us is the public's right to have information that they need to know, and that's our job. We're not concerned about where it falls in or falls out in terms of your law enforcement case." Chojnacki then left the meeting and, as he told the Review, he was "hot."

All participants left the 30-minute meeting with the impression that the *Tribune-Herald* had not agreed to delay publication, and ATF had not revealed any specifics about its impending action. Elmore remembers the tone of the meeting as formal, but not antagonistic. Rochner recalls that Chojnacki appeared to be businesslike and that the meeting ended with an understanding that Preddy and the editors would discuss his request and that Rochner would get back to him. Chojnacki's impression of the meeting was that it was tense and did not end cordially. He had not expected to meet with all the *Tribune-Herald* editors and he was upset with the outcome of the meeting.

ATF and the Media Prepare for the Raid February 24-27

After the meeting with Chojnacki, the *Tribune-Herald* editors agreed that they had heard nothing to persuade them to delay publication. According to the those at the meeting, their chief concern was to inform the public about the Branch Davidians as soon as the security of the paper and its employees allowed. Preddy tentatively decided that the series would begin on Saturday, February 27. This day was chosen, according to *Tribune-Herald* management, to allow the newspaper to gauge Branch Davidian reaction during the two weekend days, when activity at the newspaper's office and plant was reduced. Preddy decided not to notify ATF of the decision to publish until after Rochner had answered all security questions.

Tribune-Herald officials have asserted that the March 1 ATF raid date was not a factor when they chose the publication date on Wednesday afternoon. Chojnacki's discussion of his difficulty securing warrants and his problems funding his operation made the March 1 date appear unlikely to the editors and publisher. In their view, his presentation was consistent with the *Tribune-Herald* editors' belief that local law enforcement had failed to take action for two years.

After the meeting on Wednesday, Tommy Witherspoon, the *Tribune-Herald* reporter who covered the courts, told City Editor Blansett that he had received a tip from a confidential informant that something "big" might happen at the Branch Davidian Compound between 9:00 and 10:00 a.m. next Monday, that the roads might be blocked, and that Witherspoon might want to be there when it happened. (The *Tribune-Herald* has told the Review that this confidential informant was not an ATF employee.) Without asking Witherspoon to verify the tip or making assignments, Blansett decided he would send a few reporters to the Compound area that Monday.

In the wake of his meeting with the newspaper, Chojnacki realized that it was unlikely that the newspaper would accommodate his request to delay its series. At the ATF command post, he and other ATF leaders concluded that the Koresh series would begin on Sunday, February 28, and Chojnacki told as much to the SRT leaders at Fort Hood. Chojnacki then asked Sarabyn whether it would be possible to move the raid date up two days to Saturday. Sarabyn said that such a change was impossible, but that the raid could be done a day earlier, on Sunday. Chojnacki set the raid for Sunday, alerted Hartnett and Conroy of the change in plans, and they concurred.

ATF Raid Preparations: February 24-26

Even as Chojnacki met with the *Tribune-Herald*, ATF's preparations were in full swing. On February 24, ATF's forward observers and SRTs began arriving at Fort Hood for three days of rigorous training. On Thursday, the first day of training, Sarabyn briefed the SRT leaders on the overall plan and set out each team's assignment. The team leaders then briefed their respective teams. In addition, Rodriguez told the assembled agents about the Compound. On Friday, the agents, coordinating with a Fort Bragg Army Special Forces unit, were able to use the Military Operations Urban Terrain (MOUT) site at Fort Hood, a mock setting for urban military exercises, and the firing ranges.

Each team trained on structures similar to areas of the Compound that it was assigned to secure. Some members of the Houston and the Dallas teams practiced entering the front door of a structure and securing the rooms and hallways inside. The New Orleans team practiced transporting ladders to the base of the structure and climbing up to secure the roof. In addition, the Special Forces personnel had constructed stand-alone window structures that permitted the New Orleans personnel to practice "break and rake" procedures, breaking a window and clearing the glass shards. Team members with prior emergency medical training also received trauma medical training, including the administration of intravenous transfusions, from the Special Forces medics. Meanwhile, the forward observers and agents who had been assigned AR-15s were given access to range facilities, where they qualified and zeroed their weapons to distances that would conform to their positions around the Compound.

Securing Search and Arrest Warrants

After Aguilera and Chojnacki briefed ATF officials, including Director Higgins and ADLE Hartnett, in Washington, D.C., on February 11 and 12, Chojnacki received approval to seek both an arrest warrant for Koresh and search warrants for the Compound and the Mag Bag. On February 25, Aguilera signed a sworn affidavit he had prepared with the assistance of Assistant U.S. Attorneys Bill Johnston and John Phinizy. On the same day, after reviewing the affidavit, Dennis Green, U.S. Magistrate-Judge for the U.S. District Court for the Western District of Texas, issued an arrest warrant for Koresh for violating federal firearms laws and a warrant to search both the Mag Bag and the Compound for evidence of that crime. Even though, to avoid disclosing the progress of the investigation, Aguilera had intentionally curtailed his contacts with firearms dealers who had sold weapons and components to Koresh, his affidavit's account of the documented flow of

materials into the Compound gave some sense of the arsenal that Koresh had amassed in 1992. Listed in the affidavit were:

104 AR-15/M-16 upper-receiver groups with barrels
8,000 rounds of 9mm and .22-caliber ammunition
20 100-round-capacity drum magazines for AK-47 rifles
260 M-16/AR-15 magazines
30 M-14 magazines
2 M-16 E-2 kits
2 M-16 car kits
1 M-76 grenade launcher
200 M-31 practice rifle grenades
4 M-16 parts sets—Kits "A"
2 flare launchers
2 cases (approximately 50) inert practice grenades
40 to 50 pounds of black gunpowder
30 pounds of potassium nitrate
5 pounds of magnesium metal powder
1 pound of igniter cord
91 AR-15 receiver units
26 various calibers and brands of handguns and long guns
90 pounds of aluminum metal powder
30 to 40 cardboard tubes

Other Waco Media Learn About the Raid

While ATF agents were training at Fort Hood, reports of the impending raid were beginning to circulate among the Waco media. On Thursday, February 25, *Tribune-Herald* reporter Witherspoon told his friend Dan Mullony, who was a cameraman for television station KWTX, that something was going to happen at the Branch Davidian Compound on Monday. Mullony, in turn, alerted KWTX reporter John McLemore about the impending raid. Mullony attempted to confirm the tip. Darlene Helmstetter, his friend who was a dispatcher for American Medical Transport (AMT) ambulance service, told him that three ambulances had been put on standby for Monday at the request of law enforcement. On Friday, ATF advised AMT that the operation had been moved up and that ambulances should be at the Bellmead Civic Center rather than the airport. On Friday afternoon, at a

wreck site, an AMT paramedic also told Mullony that something "big" was going to happen on Monday.

The Tribune-Herald Notifies ATF of its Decision to Publish on Saturday, and ATF Reacts

On Friday, February 26, publisher Preddy gave his final approval for the series to be published the next day. At about 3:30 p.m., Rochner gave this information to Chojnacki, advising him that a copy would be available at the *Tribune-Herald* loading dock at 12:15 a.m. on Saturday. Rochner says that he told Chojnacki that he would try to talk again with the newspaper editors and publisher if ATF had strong objections to publication. Chojnacki does not recall this offer. At Chojnacki's request, Rochner and Preddy reviewed the first story, and Rochner assured Chojnacki that it did not mention ATF.

That evening, Chojnacki advised other ATF supervisors, now gathered at Fort Hood, that the story would run the next morning. As a precaution, Chojnacki and Sarabyn decided they would send Rodriguez into the Compound on Saturday to gauge the effect of the article on conditions in the Compound.[19] Saturday was the Branch Davidian Sabbath, which usually entailed an all-day service in which Koresh preached to his followers. According to the revised plan, Rodriguez would enter the Compound at about 8:00 a.m. before the service began and look for signs that the article had caused Koresh to be on the alert for action by law enforcement or had otherwise caused a change in Compound routine.

ATF Notifies the Treasury Department's Office of Enforcement About the Raid

On Friday afternoon in Washington, ATF officials notified the Treasury Department's Office of Enforcement—which oversees ATF—of the impending raid. A one-page memorandum from ATF's liaison to that office went to Acting Deputy Assistant Secretary for Law Enforcement Michael D. Langan. The memo was later shared with John P. Simpson, who was acting as Assistant Secretary of the Treasury, and Ronald K. Noble, who had been designated to be the Assistant Secretary of the Treasury for Enforcement, but who, pending nomination and confirmation, was working as a part-time consultant to the office. After Langan, Stanley Morris, who had been detailed to the Office of Enforcement, Noble and others expressed grave reservations about the operation outlined in the memorandum, Simpson contacted ATF Director Higgins and, noting these

[19] The original raid plan had not provided for this undercover visit, or for the one on the day of the raid.

concerns, directed that the operation not go forward. Higgins spoke with Associate Director Hartnett, who was able to obtain additional information from Chojnacki that appeared to answer the Office of Enforcement's concerns. Higgins was thus able to assure Simpson and Noble that the raid plan recognized the dangers posed by Koresh's weaponry, and to assure them that though children were present at the Compound, the raid could be executed safely. Higgins noted that an undercover agent would be sent into the Compound before the raid to ensure that there had been no change in routine; he also assured them that the raid would be aborted if things did not look right. After these assurances were given, Simpson said he would permit the raid to go forward. (A fuller narrative of the Office of Enforcement's role in the operation appears at Part Two, Section Five of this Report.)

Sarabyn advised team leaders at a Friday afternoon meeting that Treasury officials had placed a "hold" on the raid. He suggested that this information be withheld from the agents until training was completed. After Simpson told Higgins that Treasury would not prevent the raid from proceeding, Higgins notified Hartnett, who gave Chojnacki the authority to make the decision to proceed. On Saturday, Chojnacki called Sarabyn to announce that Treasury had removed its "hold."

Saturday, February 27: Media Preparations

On Saturday, February 27, the first installment of the "Sinful Messiah" series appeared in the *Tribune-Herald*. The article described child abuse at the Compound, saying that Koresh encouraged the whipping of children as young as eight months and alleged that Koresh had fathered children with 15 women, many underage, living at the Compound. The article traced the 50-year history of the Branch Davidians and explained the importance of the Seven Seals from the *Book of Revelations* to Koresh and his followers. The newspaper also featured a sidebar entitled, "The Law Watches, But Has Done Little," and an editorial asking when the McLennan County sheriff and the district attorney would take action.[20]

The *Tribune-Herald* then shifted its focus away from its investigative series and prepared to cover the developing story of law enforcement activity at the Branch Davidian Compound. Tommy Witherspoon's confidential informant told Witherspoon on Saturday that the raid had been moved up 24 hours. As a result, early Saturday afternoon, Preddy, Lott, Blansett, and Rochner met and decided to send reporters to the Compound area on

[20] On Monday, March 1, the day after the ATF raid was repulsed, the *Tribune-Herald* published the remaining five parts of its "Sinful Messiah" series.

Sunday morning. Preddy encouraged them to consider the safety of the reporters, but left before specific plans for coverage were discussed. After the meeting, while returning to Waco from a drive to see the Branch Davidian Compound, Lott, Blansett, and Rochner saw a military helicopter headed toward the airport at Texas State Technical College (TSTC). Blansett, familiar with landing patterns at TSTC, believed that the helicopter was landing in an area not usually used by military aircraft. When the three drove to TSTC to investigate, they saw approximately 10 people, some in uniforms, greeting the helicopter pilot. Rochner thought that these individuals must be with ATF and that TSTC could be the staging area for the raid.

Blansett returned to his office about 4:30 p.m., developed story assignments, and directed reporters to meet at the *Tribune-Herald* office at 8:00 a.m. on Sunday. Because most reporters did not have Sunday assignments and he believed the updated tip about the raid to be reliable, Blansett assigned nine reporters to the story, triple the number he had contemplated on Wednesday. Blansett was interrupted by a call from Steve Schneider, one of Koresh's senior deputies. Schneider told Blansett that Koresh was upset by the first "Sinful Messiah" article and wanted an opportunity to tell the *Tribune-Herald* the "real story," the story of the Seven Seals and not, as Schneider put it, "seven days of lies." Promising to call Schneider back, Blansett called Mark England in Dallas and told him about the raid tip and Koresh's request for an interview. England left Dallas for Waco. Blansett next called Rochner, who suggested that England interview Koresh in a restaurant, so that Rochner and an off-duty police officer could be nearby. Rochner also asked if reporters wanted flak jackets for the raid, noting that he might be able to locate some. When England arrived in Waco, he told Blansett that he did not want to interview Koresh. Blansett never called Schneider back.

Rochner talked with Chojnacki twice that Saturday. First, he sought, unsuccessfully, to get Chojnacki's reaction to the story. That evening he also sought Chojnacki's counsel on Schneider's request that someone from the newspaper interview Koresh. They discussed sending reporters into the Compound on Saturday, which Chojnacki discouraged, explaining that he did not think it would be safe to enter the Compound.[21]

[21] Rochner recalls that he next proposed sending a reporter into the Compound on Sunday. According to Rochner, Chojnacki said, "Good luck, you will not be in our way if you go on Sunday." Rochner contends that this reinforced his view that no raid was planned for Sunday. Chojnacki does not recall making such a statement. In any event, the *Tribune-Herald* did not send reporters to the Compound on February 28 to interview Koresh; it sent reporters to cover a raid.

KWTX's preparations to cover the raid also moved forward. On Saturday morning, Mullony learned from Helmstetter, the AMT ambulance service dispatcher, that the ATF operation had been moved up a day. Helmstetter also told him that he should plan to be in town on Sunday. On Saturday afternoon, Mullony and Witherspoon acknowledged to each other that they knew the ATF operation was set to occur the next day. By Saturday evening, Mullony concluded that the raid would occur at about 9:00 a.m. Sunday based on standby times Helmstetter had given him. Helmstetter had also told Mullony that ATF had placed CareFlite, a Fort Worth helicopter medical transport service, on standby for Sunday. This fact led KWTX to believe the operation would be a major one.

That night, at the direction of KWTX News Director Rick Bradfield, Mullony asked Jim Peeler, another KWTX cameraman, and reporter McLemore to meet him and Bradfield early Sunday morning. Mullony was so concerned about what might happen the next day that he drafted his will. In contrast, McLemore, unconcerned, took his wife out to a local club. According to one witness, in a conversation at the bar, McLemore said ATF was going to conduct a big raid the following day. McLemore admits that he alluded to a big event but denies saying anything about ATF.

Saturday, February 27: ATF Preparations

Saturday was a hectic day for ATF as raid preparations continued. At the morning briefing, Sarabyn discussed the first installment of the "Sinful Messiah" series. He pointed to Koresh's picture, noting that the article did not mention an ongoing investigation, and explained to the agents that Rodriguez would be sent in Saturday and Sunday to gauge Koresh's reaction to the series.

The SRTs were joined by arrest team personnel for a rehearsal of the deployment from the cattle trailers into the Compound. The agents focused on exiting the trailers and getting to the Compound as quickly as possible. In an open field, Special Forces personnel had outlined the dimensions of the Compound on the ground with engineer tape and set up a front-door facade, thus allowing raid personnel to practice in a confined area similar to the Compound. In addition, the New Orleans and Houston SRTs practiced using "flashbangs"—distraction devices that, when detonated, produce a loud bang and a emit a bright flash—in one of the MOUT structures. The teams also simulated the arrival of the cattle trailers and the helicopter diversion.

Meanwhile, ancillary and support elements converged on Waco. Two marked ATF bomb-disposal trucks and National Guard support trucks, including a two-and-a-half ton military transport truck and a water truck, arrived at TSTC. After Fort Hood training, three National Guard helicopters also proceeded to TSTC. The Texas Department of Public Safety was prepared to set up roadblocks and the sheriff's department was prepared to provide other support functions. ATF reserved 153 rooms at three Waco hotels for the evening of the 28th. At 8:00 that evening Chojnacki and Sarabyn conducted a briefing at the Best Western Hotel for arrest and support teams, including National Guard members, explosives specialists, dog handlers, and laboratory technicians. Phillip Lewis, Support Coordinator, had arranged with local suppliers for such diverse items as the ambulance services, portable toilets, and the Bellmead Civic Center. On Saturday, he ordered doughnuts at a Waco grocery store, arranging to pick them up the next morning. He also arranged with the sheriff's department for coffee at the Bellmead Civic Center site the next morning.

Special Agent Sharon Wheeler, the ATF public information officer (PIO) assigned to the operation, prepared for the raid. Several weeks earlier, Chojnacki had asked that public information be handled by Killorin, but his request was denied because Pasco and Killorin determined that Killorin was needed in Washington on other matters. Wheeler was chosen because the Houston PIO was less experienced and New Orleans did not have a PIO.

Responding to direction from her SAC, Ted Royster, Wheeler contacted one Dallas television station for a weekend contact number. Then, following her press plan, she called two other Dallas television stations to obtain similar telephone numbers. While she indicated to all the stations that ATF might have something going on during the weekend, she did not describe the action or provide its timing, location, or any other information specific to the raid. She did not contact Waco television stations or newspapers, out of a concern that the raid's security might be threatened.[22]

Rodriguez entered the Branch Davidian Compound at 8:00 a.m. Saturday to join Koresh's worship service. Koresh preached about the "Sinful Messiah" article and told his followers that "they" were coming for him. He cautioned that, when this happened, his

[22] Despite earlier accounts to the contrary, Wheeler did not divulge any information about the raid in these contacts. The reporters she contacted were not able to determine what law enforcement action she was referring to, based on their conversation. Indeed, none of the stations she contacted were at the Compound until well after the firefight began.

followers should not get hysterical and should remember what he had told them to do; he did not specify at the time what those instructions were. Between noon and 5:00 p.m., Rodriguez met with Chojnacki at the TSTC command post. Chojnacki asked Rodriguez whether he had seen any guns or preparations to resist law enforcement. Rodriguez said he had not.

Rodriguez went back to the Compound for more services at 5:00 p.m., and stayed until about midnight. Upon his return to the undercover house, Cavanaugh and the forward observers who had arrived earlier that evening noted that Rodriguez was showing the strain of his assignment. Rodriguez called Sarabyn and reported that no changes inside the Compound were evident. Sarabyn instructed Rodriguez to return to the Compound Sunday morning for a final check on conditions and leave by 9:15. Rodriguez explained to Sarabyn that he was upset about this assignment because he was concerned that an unexpected return might arouse Koresh's suspicions. Rodriguez was also concerned about his ability to leave the Compound by 9:15 because Koresh exerted such control over the Compound and could be so intense in his personal interactions. Rodriguez was not confident that he would be able to leave by 9:15 without alarming Koresh. Nonetheless, he reluctantly agreed to return the next morning.

Part One
Section Four: The Assault On The Compound.

ATF Agents Assemble

On the morning of February 28, Cavanaugh and the forward observers watched the Compound from the undercover house for signs of unusual activity. They saw nothing out of the ordinary. A few men were walking about the grounds and some women were emptying waste buckets. The weather was overcast with traces of precipitation. The forward observer teams in the undercover house who, if necessary, were to provide cover fire for the raid teams, checked and prepared their equipment. Rodriguez was to enter the Compound at 8:00 a.m. Two undercover agents were available to support him. In addition, one of the undercover agents was assigned the task of taking forward observer and arrest support teams to a hay barn behind the Compound. Once the raid teams had left the staging area, the undercover agents also were to ensure that the residents of the neighboring house remained safely inside during the raid.

Meanwhile, at Fort Hood, the 76 agents assigned to the cattle trailers assembled at 5:00 a.m.[21] They traveled to the staging area, the Bellmead Civic Center, in an approximately 80-vehicle convoy with a cattle trailer at each end. Many of the vehicles bore the telltale signs of government vehicles—four-door, late-model, American-made vehicles with extra antennas. All the vehicles had their headlights on. Agents report that, once underway, the convoy stretched at least a mile.

The convoy arrived at the Bellmead Civic Center between 7:30 and 8:00 a.m. The civic center is adjacent to a residential neighborhood and is visible from the nearby intersection of Interstate 84 and Loop 340, 9.4 miles from the Compound. (See Figure 27.)

[21] With few exceptions, no definitive record exists of times for the events on February 28. Accordingly, except where otherwise noted, all times are approximations derived from witness recollections, logs, and other records.

An ATF agent wearing an ATF raid jacket and local police were in the street in front of the civic center directing the convoy into the parking lot. While waiting to be briefed, some of the agents went inside the center to have coffee and doughnuts; others milled about outside. A supervisor became concerned about the visibility of the agents, many of whom wore ATF insignia or were otherwise unmistakably law enforcement personnel. He ordered everyone to go inside and to remain in the civic center.

At 8:00 a.m., Sarabyn gave a short briefing at the civic center. He reviewed assignments with the various groups, discussed the recent *Tribune-Herald* article, and related the substance of Rodriguez's Saturday assessment of conditions in the Compound. He also distributed the most recent photographs of the Compound and took questions from team leaders. He told the assembled agents that Rodriguez was in the Compound and that there would be a final briefing after Rodriguez reported on conditions in the Compound. Sarabyn left the staging area for the command post to await Rodriguez's report. The agents gathered in small groups, talked, checked their equipment, and reviewed plans while awaiting Sarabyn's final briefing.

Activity at the command post at TSTC also began at dawn. Special Agent Lewis, in charge of logistics support, checked the telephone lines. The three National Guard helicopters, one UH-60 Blackhawk and two OH-58 Jet Rangers that had flown in the night before were parked on the tarmac.

Andy Vita, Chief of the Firearms Division, opened ATF's National Command Center in Washington, D.C., at 9:00 a.m. (EST). Richard Garner, Chief of the Special Operations Division; John Jensen, in charge of the National Communications Branch, and others designated by the National Response Plan, also were present. Director Stephen Higgins, Associate Director Daniel Hartnett, and Deputy Assistant Director Daniel Conroy were available by telephone.

The Media Sets Out To Cover The Raid

Even as ATF agents were gathering to embark on the raid, local reporters were deploying to cover the operation. At 7:00 a.m. at KWTX, Jim Peeler, John McLemore, and Dan Mullony received maps of the area and reviewed assignments with the station's news director, Rick Bradfield. Bradfield anticipated a major law enforcement operation because he had learned from Mullony's AMT Ambulance Service informant, Darlene Helmstetter, that CareFlight, a Fort Worth-based trauma flight company, was involved. Bradfield told the

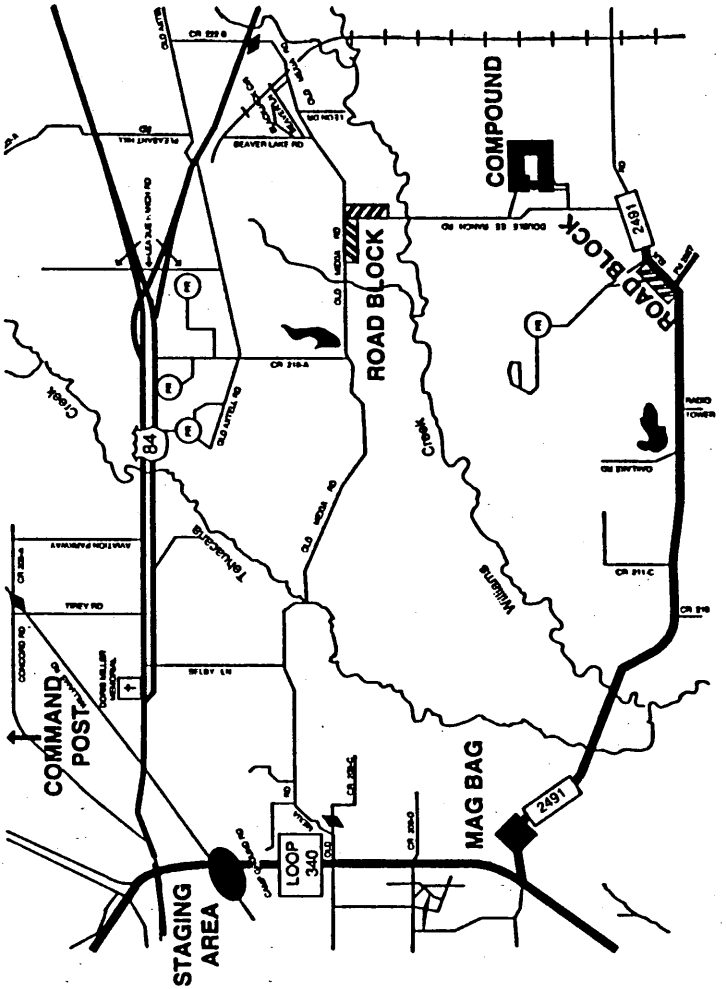


Figure 27: Map depicting staging area, Mag Bag, Compound, and road blocks.

Review that KWTX did not call ATF to confirm the raid because asking for information or permission is generally unproductive. (According to Bradfield, the policy of KWTX when covering law enforcement operations is to go to the news site, obey law enforcement orders, and respect private property.)

Peeler was sent to the intersection of Double E Ranch and Old Mexia roads where, according to Mullony, Peeler was to watch for and film raid helicopters. Peeler denies receiving any information concerning helicopters. Peeler thought his job was to film any prisoners brought out during the raid. Mullony and McLemore were sent to Farm Road 2491 (FR 2491) on the other side of the Compound's grounds. Bradfield, from the newsroom, communicated with his employees by cellular telephone. Radios were not used so that competitors could not overhear their conversation.

Prior to the raid, nine *Tribune-Herald* reporters were assigned to the developing story. The morning of the raid, some of them gathered at the newspaper's office before departing for the Compound in four cars, three heading for the Compound and the fourth to TSTC to watch for helicopter activity. The newspaper, concerned about the enormous cache of weapons at the Compound and Koresh's potential for violence, had gone to extraordinary lengths to ensure the safety of its plant and personnel. In contrast, the reporters were not given any safety instructions about covering the raid, nor were they instructed about possible affects their presence or actions might have on the raid.

As the reporters drove to the Compound they mistakenly expected to encounter roadblocks. In law enforcement operations however, a roadblock is usually not established until the action begins. In this case, establishing a roadblock more than two hours before the raid was to begin likely would have compromised the secrecy of the operation.

At about 7:30, after driving up and down the Double E Ranch Road in front of the Compound twice, Mullony parked on FR 2491 about one mile north of its intersection with Double E Ranch Road. By 8:30, other *Tribune-Herald* vehicles were patrolling the two roads bordering the Compound. At 9:30, Mark England asked a DPS officer parked on the side of the road if he could go by what he believed to be a roadblock. The officer told England that he could pass but that the road would later be closed. In the hour before the raid, five media vehicles could be seen driving or parked on roads near the Compound. The agents in the undercover house reported the increased traffic to Cavanaugh. The Review has been unable to verify whether Cavanaugh forwarded the information to the command post. (See Figure 28 and legend.)

But while other reporters were waiting for the raid to begin, KWTX cameraman Peeler became lost. At about 8:30, he used his cellular telephone to ask Bradfield and Mullony for directions. Despite getting directions, Peeler remained lost somewhere near the intersection of Old Mexia and Double E Ranch roads. There he encountered David Jones, a local letter carrier who was driving a yellow Buick with "U.S. Mail" painted on the door. Jones pulled up behind Peeler and asked him whether he was lost. Peeler, who was wearing a KWTX jacket, introduced himself as a cameraman with the station and asked for directions to "Rodenville," the name by which many Waco residents had referred to the Compound ever since it had been owned by the Roden family. Peeler did not know that Jones was one of Koresh's followers. Jones pointed to the Compound, which was in sight, and commented that he had read about the cult in the paper and thought they were weird. Peeler, deceived into believing that Jones was not affiliated with Koresh, warned Jones that some type of law enforcement action was about to take place at the Compound. He indicated that the action was likely to be a raid of some type and that there might be shooting.[24]

After the chance encounter with Peeler, Jones returned to his car and as he sped away toward the Compound, Peeler began to wonder whether Jones was affiliated with the cult. After this conversation, Peeler drove to a nearby store and called Bradfield, who told him to return to the intersection of Old Mexia and Double E Ranch roads, wait 30 minutes, and if nothing happened, go home. When Peeler returned to the intersection, DPS officers and ATF agents had set up a roadblock. Peeler was not allowed to pass, but he was told where he could set up his camera.

[24] There are conflicting reports about what Peeler actually told Jones. In a statement to the Texas Rangers, Koresh's attorneys stated that in one of their visits to the Compound during the standoff between the cult and the FBI, David Jones (now deceased) told them that Peeler warned him not to go near the Compound as there were going to be "60 to 70 TABC (Texas Alcohol Beverage Commission) guys in helicopters and a shoot-out would occur." Peeler has denied giving this much detail to Jones. However, he has admitted that on the morning of the 28th he believed that TABC was involved and had tuned his scanner to the TABC frequency. TABC was not involved in the action on the 28th and Peeler is the only witness interviewed by the Review who believed that TABC was involved. Peeler's admission lends credibility to the account provided by Koresh's attorneys.

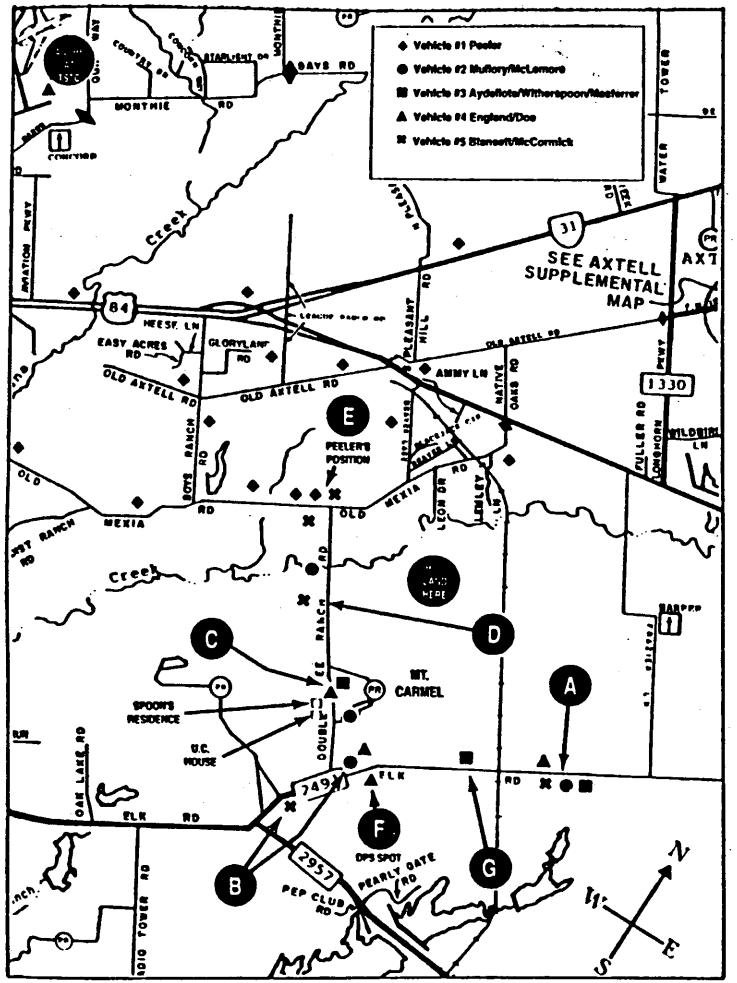


Figure 28: Location of Media Vehicles.

VEHICLE #1 — **WHITE BLAZER** — **PEELER**

8:30 AM Arrives the vicinity of Old Mexia Road and Hwy 84. Was lost, cellular telephone calls to Mullony or directions. Found way to Old Mexia Road and Double EE Road, parked on Old Mexia Road (Spot E), had conversation with Jones. Left area, returned following Trooper, parked at Spot E and videos the raid.

VEHICLE #2 — **WHITE BRONCO II** — **MULLONY, McLEMORE**

7:30 AM Arrive 1.8 miles past Double EE Road on FR 2491 (Spot A). Received and made calls to Peeler giving directions and admonishing him not to talk to anyone. Talked to England, Doe, Aydelotte, Witherspoon, Masferrer and Blansett at various times while at Spot A.

9:15 - 9:30 AM Received call from Peeler, said he saw helicopters, moved from Spot A and drove by DPS Trooper talking to England at Spot F. Turned down Double EE past Compound, on way to Old Mexia Road saw helicopters, turned around and proceeded past Compound to intersection of Double EE and FR 2491 (Spot B). Set up camera, saw cattle trailers, followed them down driveway to back of bus, videos raid

VEHICLE #3 — **SILVER HONDA ACCORD** — **AYDELOTTE, WITHERSPOON, MASFERRER**

9:30 AM Arrive on FR 2491, drove past Double EE Road to a location in sight of the compound roof (Spot G). Remained for while, then moved further down FR 2491, met Mullony and McLemore at Spot A. Received cellular call from Sanchez, helicopters moving. Drove down Double EE Road past Compound driveway, parked. Witherspoon to Spoon House, Witherspoon returned to car, then drove down Double EE Road a short distance, stopped, backed up, saw cattle trailers turn down Compound driveway and remained at Spot C.

VEHICLE #4 — **WHITE CAVALIER STN WGN** — **ENGLAND, DOE**

9:45 AM Arrive on FR 2491, drove past Blansett/McCormick parked near the intersection of Double E Road and FR 2491 (Spot B), continued to Spot A and are joined by Blansett, told to go to TSTC, to check on Sanchez, drove to TSTC. Met Sanchez, told helicopters are not moving. Returned to FR 2491, followed DPS Trooper to a small depression in road on FR 2491 (Spot F), left car to speak with Trooper. Trooper said road block not in force yet. Saw vehicles 2 and 3 drive by to Double EE Road. Followed to Spot B met Mullony/McLemore, remained there until they saw three helicopters, minutes later saw cattle trailers, followed Mullony/McLemore down Double EE Road to Compound driveway, parked beside Aydelotte's car at Spot C.

VEHICLE #5 — **WHITE CAVALIER STN WGN** — **BLANSETT, McCORMICK**

8:30 - 8:50 AM Arrive Double EE Road, took Double EE Road past Compound to Old Mexia Road, turned around just before intersection Old Mexia and Double EE (Spot E). Return to intersection of FR 2491 and Double EE Road (Spot B), England/Doe pass (9:10 AM), followed England/Doe down 2491 to Spot A, told England to check Sanchez. Went back toward Double EE Road, turned down Double EE Road past Compound to Old Mexia, turned around before reaching intersection, and stopped at a ridge and depression (Spot D) and remained there until after shooting started, then moved to Spot E.

VEHICLE #6 — **WHITE BRONCO II** — **SANCHEZ**

8:30 - 8:45 AM Called by Blansett, while in route to Compound told to go to TSTC to check on helicopters. Parked 6 blocks from TSTC tower.

9:13 AM Called Blansett, advised saw activity . . .

9:29 AM Called Blansett, advised saw helicopters moving . . . decided to go to Compound, led DPS/ATF caravan (Mag Bag Search Team), used Loop 340 to FR 2491.

9:41 AM Pulled over briefly, cattle trailers passed him, he tried to pass cattle trailers and called Blansett and told him ATF is coming in cattle trailers.
Sachez is pulled over by ATF on FR2491 . . .

Legend for Figure 28

Peeler's encounter with Jones was witnessed by one of the ATF undercover agents who was taking the forward observers and their arrest support teams to a hay barn behind the Compound. The undercover agent was dressed in casual clothes; the forward observers wore ATF battle dress utilities. When the undercover agent saw the two vehicles parked together on the road, he recognized Jones' postal vehicle. Jones was talking to the occupant of the second car, whom the agent did not recognize but suspected was a reporter. The agent, fearing that Jones might spot the uniformed agents in his car, told them to crouch down. Jones did not appear to look in the agents' direction and the undercover agent was satisfied that his group had not been seen. He drove to the hay barn, deposited the forward observers and arrest support team, and returned to the undercover house where he told Cavanaugh what he had seen. Cavanaugh claims to have relayed the information to the command post although no one there recalls receiving it.

Rodriguez Enters The Compound

At 8:00 a.m., not long before Peeler had his conversation with David Jones, Rodriguez went to the Compound one final time for the most critical phase of his undercover assignment, assessing whether the *Herald-Tribune* articles had incited Koresh and his followers to take up arms or otherwise increase their security measures. Koresh greeted the undercover agent and invited him to join a "Bible study" session with two of his followers. There were no signs of unusual activity.

While Koresh and Rodriguez were engaged in this Bible session, David Jones arrived at the Compound, fresh from his encounter with Peeler. He told his father, Perry Jones, what had happened. Perry Jones devised a pretext to draw Koresh away from Rodriguez.[25] He called to Koresh that he had a phone call. When Koresh ignored the request, Jones added that it was long distance from England.

Early interpretations of Jones' reference to England speculated that Jones was referring to Mark England, the co-author of the *Tribune-Herald* series whom Koresh had been trying to contact. This interpretation led to speculation that Mark England alerted Koresh to the impending raid. However, Koresh's attorneys have said that Jones told them that he was referring to the country. In any event, contrary to early accounts, there is no

[25] Cult members released from the Compound after the raid have stated that prior to the 28th, Koresh had suspected that Rodriguez was an undercover agent. One cult member stated that despite his suspicions, Koresh continued to meet with Rodriguez believing that he could nonetheless successfully recruit him.

evidence that Mark England placed a call to the Compound on the morning of February 28. Records provided by the *Tribune-Herald* of their telephone calls contain no record of a call to the Compound on the morning of February 28.

When Koresh left the room to take the fictitious call, David Jones described his conversation with Peeler. Upon Koresh's return, Rodriguez could see that he was extremely agitated, and although 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."

Rodriguez was shocked. As Koresh repeatedly looked out the window and said, "They're coming," Rodriguez wondered whether the raid was beginning even though he was still in the Compound. Needing an excuse to leave, Rodriguez told Koresh he had to meet someone for breakfast but Koresh did not respond. Other male cult members entered the room, effectively if not intentionally coming between Rodriguez and the door. Fearing that if he did not leave he would be trapped in the Compound, Rodriguez contemplated jumping through the window. He repeated that he had to leave for a breakfast appointment. Koresh approached him, and in a manner Rodriguez believed highly uncharacteristic, shook Rodriguez's hand and said, "Good luck, Robert." Rodriguez left the Compound, got into his truck and drove to the undercover house.

Rodriguez Reports

Agents in the undercover house recall that Rodriguez was visibly upset when he returned from the Compound. He complained that the windows of the undercover house were raised and that he could see a camera in one of them. Cavanaugh asked Rodriguez what had happened in the Compound. Rodriguez announced that Koresh was agitated and had said ATF and the National Guard were coming. 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 Sarabyn.

Rodriguez called Sarabyn at the command post and told him that Koresh was upset, that Koresh had said ATF and the National Guard were coming, and that as Rodriguez left Koresh was shaking and reading the Bible. Sarabyn asked Rodriguez a series of questions from a prepared list provided by the tactical planners: Did you see any weapons? Was there a call to arms? Did you see them make any preparations? Robert responded in the negative to each question. Then, Sarabyn asked what the people in the Compound were doing when Rodriguez left. Rodriguez answered that they were praying. Next, Sarabyn called Cavanaugh who reported that there was no observable activity in the Compound.

A special agent in the command post witnessed Sarabyn's part of the conversation with Rodriguez. After Sarabyn had hung up the phone, the agent stopped Sarabyn and asked what Rodriguez had said. Sarabyn responded that Rodriguez had been with Koresh when Koresh was called from the room to take an emergency telephone call. When Koresh returned to the room he said that ATF and the National Guard were in Waco and were coming. Sarabyn also stated that Rodriguez reported Koresh was nervous and dropped the Bible from which he was reading. The agent asked Sarabyn, "What are you going to do?" Sarabyn responded that Rodriguez had seen no firearms and that Koresh was reading the Bible when Rodriguez left. Sarabyn said he thought they could still execute the plan if they moved quickly.

Initial accounts by the participants in and witnesses to Rodriguez's conversations with Cavanaugh and Sarabyn differed significantly with respect to whether Rodriguez clearly communicated that Koresh knew the raid was imminent. Although there remains some variance with respect to Rodriguez's actual words, all key participants now agree that Rodriguez communicated, and they understood, that Koresh had said the ATF and National Guard were coming.

Now Sarabyn hurried out of the command post to the tarmac to confer with Royster and Chojnacki. The helicopters had already begun warming up. In order to hear over the noise of the rotors, the three supervisors moved to a fence bordering the tarmac, approximately 50 feet away. Although the noise still made conversation difficult, the three men huddled together so Sarabyn could pass on what he had learned. Sarabyn related that he had just spoken with Rodriguez who had said that Koresh knew ATF and the National Guard were coming but that, when Rodriguez had left, Koresh was reading the Bible and shaking. Sarabyn also stated, based on what Rodriguez had said, that Koresh was not ordering anyone in the Compound to do anything. Chojnacki asked Sarabyn whether Rodriguez had seen any guns. When Sarabyn responded that Rodriguez had not, Chojnacki

asked Sarabyn what he thought should be done. Sarabyn expressed his belief that the raid could still be executed successfully if they hurried. Chojnacki responded, "Let's go." The conference lasted no more than three minutes. Sarabyn left immediately for the staging area.

Events began to reflect Sarabyn's perceived need for speed. News of Rodriguez's report spread rapidly among the ATF agents at the command post, creating an atmosphere of great urgency and commotion. Various agents were heard yelling that Koresh knew of the raid and that they needed to depart immediately. Royster hastened to the helicopters and told the agents there that Koresh knew of the raid and therefore it was beginning immediately. Royster then ran back to the command post, joined by Chojnacki who called the National Command Center and reported to Special Agent Jensen, responsible for the Center's communications, that the undercover agent was out of the Compound and that the raid was commencing. Chojnacki did not relate the substance of Rodriguez's report. Chojnacki then ran to and boarded his helicopter. A few minutes later, the helicopters departed. Shortly thereafter, Rodriguez arrived at the command post only to find that Sarabyn, Chojnacki and Royster had departed. Witnesses recount that Rodriguez became distraught, repeatedly asking how the raid could have gone forward when he had told them that Koresh knew they were coming.

The Raid Goes Forward

Sarabyn arrived at the staging area at 9:10 a.m. Witnesses report that he was excited and obviously in a hurry. Agents in the parking lot when Sarabyn arrived recall that he ran to them and told them that they had to hurry, making statements such as, "Get ready to go, they know we are coming," and "They know ATF and the National Guard are coming. We're going to hit them now."

Similarly, agents inside the civic center recall Sarabyn running in and calling for their attention. He announced, "Robert has just come out. Koresh knows that ATF and the National Guard are coming." Sarabyn told the agents they would proceed immediately. Sarabyn exhorted the agents to move quickly, repeatedly telling them to hurry, to get their gear because Koresh knew they were coming. There was no formal briefing, discussion or evaluation of Rodriguez's information. Several agents report having had qualms about going forward, especially since Koresh had mentioned the National Guard, yet they also felt questioning the decision would be inappropriate.

Within 15 minutes of Sarabyn's arrival at the staging area, the special response and the arrest teams boarded the trailers and left. According to agents in the trailers, although there was some lighthearted banter, the overall mood in the trailers was uncharacteristically somber. While some felt confident, others began to wonder why they were proceeding if Koresh knew they were on their way.

Sarabyn rode in the truck pulling the first cattle trailer. He maintained an open cellular phone contact with Cavanaugh throughout the trip to the Compound, keeping Cavanaugh posted as to the team's location and asking for reports on the level of activity at the Compound. Cavanaugh reported that he could not see any signs of activity in the Compound or on its grounds.

Activity In The Compound

According to some of the former cult members in the Compound at the time, preparations were being made in the Compound, although not detectable by Cavanaugh and the forward observers. Even as Rodriguez was departing, Perry Jones and the female members of the Compound had gathered in the chapel, thinking that they had been called for a church service. They had been waiting almost an hour when Koresh came in and ordered them back to their rooms. The older women and children went to the second floor and began to lay on the floor in the hallway, away from the outer walls of the Compound. Many of the cult members began to arm themselves, some with 9mm pistols, some with automatic and semiautomatic assault rifles, and others with both pistols and rifles. (See Figure 29.) Some donned bulletproof vests, others put on ammunition vests. (See Figure 30.) Ammunition was distributed. The Compound members assumed stations at the windows, waiting for the ATF agents to arrive.

The Media Covers The Approach Of The Raid Teams

According to *Tribune-Herald* cellular phone records, at 9:26 a.m., photojournalist Robert Sanchez called Blansett to advise him that several helicopters were leaving TSTC. Sanchez had earlier reported to his colleagues waiting near the Compound that he had seen agents at TSTC in camouflage fatigues loading duffle bags and gear into vehicles, and lining up to go. As Sanchez drove to the Compound he caught up to the two cattle trailers filled with uniformed agents. He relayed this information to his colleagues near the Compound. Agents in the second trailer reported that a vehicle was following them and two ATF agents in a chase car following the trailers stopped Sanchez. Sanchez again called his

Figure 29: Kalashnikov assault rifle, recovered from Schroeder's van which was parked in front of main Compound building (photograph taken after April 19, 1993).

Figure 30: (From left) Load-bearing ammunition vests containing two 9mm magazines, four loaded AK-47 magazines, and a military helmet recovered from Schroeder's van after the 4/19/93 fire.

colleagues and advised them that he had been turned back and was unable to continue to the Compound.

Media personnel used radio and cellular telephones to communicate with one another and used scanners to monitor law enforcement frequencies during the hour before the raid. Several members of the press heard on scanners "no guns in the windows," and "it's a go" moments before ATF raid trucks entered the Compound's driveway.

Once Blansett relayed Sanchez's information, the reporters in the area moved closer to the Compound. *Tribune-Herald* reporters, Witherspoon, Aydelotte, and Masferrer drove to the house beside the undercover house to observe the raid from its front yard. Witherspoon knocked on the door to ask permission, but the agent safeguarding the residents inside declined to answer. As Witherspoon was knocking another agent approached. Believing the approaching agent to be a resident, Witherspoon said there was about to be a raid and asked whether he and his colleagues could observe it from the front yard. Without identifying himself, the agent ordered the reporters to leave the property. As the reporters were backing their car onto Double E Ranch Road, the trailers were turning into the Compound's driveway. The reporters parked their car on the road in front of the house next to the undercover house. Aydelotte was retrieving his camera from the trunk of his car, when a second car containing two more *Tribune-Herald* reporters pulled alongside. Aydelotte managed to shoot several frames before gunfire began striking the car, forcing all five reporters into a ditch alongside the road.

Meanwhile, KWTX's Mullony and McLemore turned onto Double E Ranch Road and followed the ATF cattle trailers up the Compound's driveway. McLemore pulled up behind a parked bus. As the trailers continued the short distance to the front of the Compound, Mullony set up his tripod. Seconds later gunfire erupted from the Compound.

The Helicopter Diversion

As the trailers approached the Compound from the Double E Ranch road, the helicopters had not yet arrived at their designated point, even though Cavanaugh repeatedly radioed for them to come in "low and fast." The helicopters approached the rear of the Compound at approximately the same time the trucks pulled along the front, which failed to create the intended diversion. When they were approximately 350 meters from the rear of the Compound, the helicopters were fired upon, forcing them to pull back. It was too late at this point for them to warn the trailers to abort.

Two of the helicopters were forced to land in a field to inspect for damage. Agents discovered that bullets had pierced the skins of each of the helicopters. The third helicopter, although also struck by gunfire, was able to remain airborne. It circled overhead to watch for additional attackers. Due to the damage, the two helicopter pilots initially decided not to attempt to fly them back to the command post. Chojnacki requested the third helicopter to land and take him back to the command post. While the pilots inspected the helicopters, agents climbed a small hill to determine how far they were from the Compound. From the hill they concluded that the group was still within range of hostile fire. They recommended to the helicopter pilots that if the helicopters could be flown, they should leave the area. The pilots decided that the helicopters were flightworthy and they returned to the command post without further incident.

The Raid Team Arrives

As the cattle trailers entered the driveway there was no sign of activity inside or outside the Compound. The approaching agents realized the absence of activity was a bad omen. When one agent noted over the radio, "There's no one outside," a second agent responded, "That's not good."

The trucks stopped in front of the Compound's main building as planned. Figure 31 shows their position. Agents with fire extinguishers for holding the Compound's dogs at bay were the first to exit the trailer. One agent opened the gate in the wall in front of the Compound, and another discharged a fire extinguisher at the dogs. Simultaneously, agents began exiting the second trailer. Koresh appeared at the front door and yelled, "What's going on?" The agents identified themselves, stated they had a warrant and yelled "freeze" and "get down." But Koresh slammed the door before the agents could reach it. Gunfire from inside the Compound burst through the door. The force of the gunfire was so great that the door bowed outward. The agent closest to the door was shot in the thumb before he could dive for cover into a pit near the door. Then gunfire erupted from virtually every window in the front of the Compound. The Dallas and Houston SRTs, which were approaching the front of the Compound and the pit area to the left, took the brunt of the initial barrage. Agents scrambled for cover. One of the first shots fired hit the engine block of the lead pickup truck. Consequently, neither the first, nor the second vehicle were able to leave.

As the Dallas and Houston teams attempted to get to the front of the Compound, the New Orleans team, which had been concealed in the second trailer, approached the east side

Figure 31: Photograph of Compound after 2/28/93 raid, which includes the ATF cattle trailers in the foreground.

of the Compound. As they left the trailer, the agents heard gunfire. At first, the agents thought it came from the dog teams. During training the agents had been told that they might hear the dog teams firing at the dogs if they were not able to subdue them with fire extinguishers. However, they quickly realized that the gunfire was coming from the Compound. While one agent provided cover from the ground, seven others approached the wall and climbed to the roof. Conway LeBleu, Todd McKeehan, Kenny King, and David Millen were to enter Koresh's bedroom on the west pitch of the roof, while Bill Buford, Keith Constantino and Glen Jordan were to enter the window on the east pitch of the roof. That window led to the room that ATF intelligence indicated contained the weapons. But soon after the agents reached the roof, they came under heavy gunfire. Special Agent Millen was able to retreat back to the east pitch of the roof where he stood guard outside the armory. Special Agent LeBleu and Special Agent McKeehan were killed.

Special Agent King was shot six times before managing to roll himself off the roof and into the courtyard behind the Compound. (See Figure 32.) As he lay trapped in the courtyard, too injured to move, King repeatedly called over his radio that he had been shot several times and was bleeding badly. Agents hearing King's pleas, tried to rescue him. New Orleans Field Division SAC, Pete Mastin, contacted Cavanaugh and asked whether the forward observers could suppress fire from the tower while agents on the ground attempted to rescue King. The forward observers directed rifle fire at the area of the tower from which shots had been directed at the agents. However, as the agents attempted to move toward the rear of the Compound, gunfire from other areas stopped them. Despite the agents' best efforts, the intensity of the gunfire made it impossible to rescue King until the final cease-fire, approximately an hour and a half later.

At the arms room, Agent Jordan managed to "break and rake" the window and Agent Buford threw a distraction device into the room. Buford, Constantino and Jordan entered. Inside, Agent Buford saw a person armed with an assault rifle backing out of a doorway in the far left corner of the room. That individual began firing into the room from the other side of the thin walls. The agents returned fire, but without automatic weapons, which are used to deliver a defensive spray of gunfire, they could not suppress the attacker's fire. The shots fired at the agents inside the room passed through the wall to where Special Agent Millen was positioned on the roof. Shots were also fired at Millen from the first floor up through the roof. He escaped the attacks by sliding down the ladder to the ground.

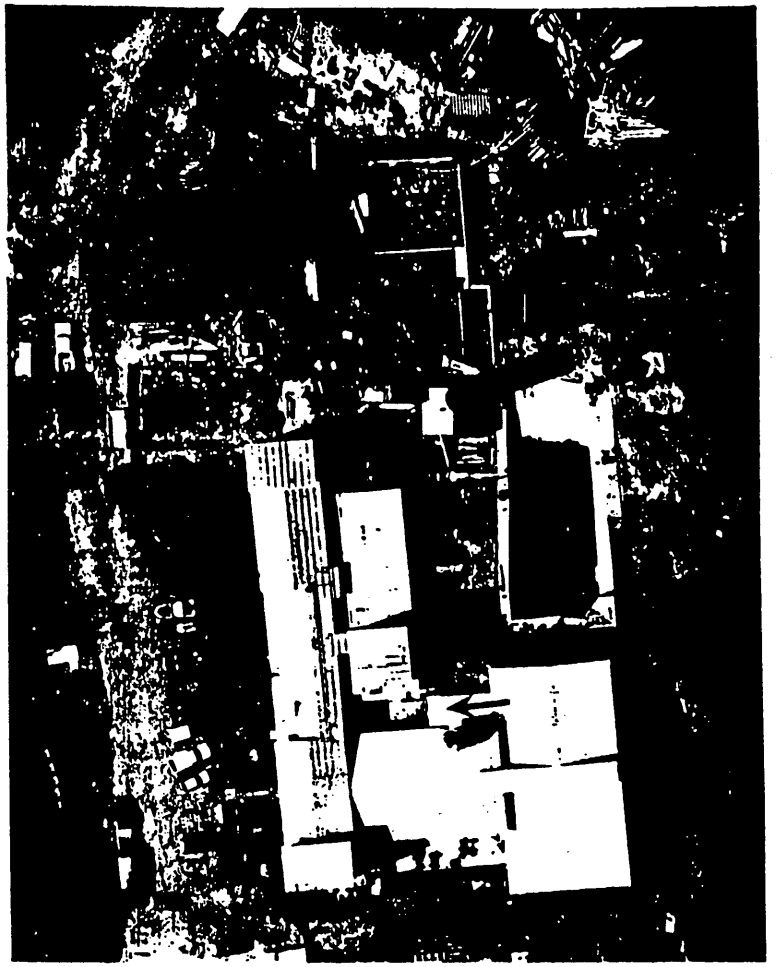


Figure 32: Arrow shows location of seriously wounded Kenny King after he rolled from the roof into the courtyard.

Inside the room, Buford was shot twice in the upper thigh. Agent Constantino provided cover for Buford and Jordan while they ran back for the window, dove out onto the pitched roof and then dropped to the ground. As Agents Chisolm and Bonaventure dragged Buford out of the line of fire, they were fired upon. A bullet creased Buford's nose. Agent Chisolm threw his body over Buford to protect him[76]. When the shooting stopped, Chisolm and Bonaventure pulled Buford to a safe position. Chisolm, the medic for his team, observed Buford's wounds and began administering an IV to him.

Immediately after Buford and Jordan were out of the arms room, the firing stopped. As Constantino was deciding whether to hold his position or make a run for the window, a cult member entered the room aiming an assault rifle at him. He fired two or three shots at Constantino. Constantino returned fire and the man fell. Constantino ran for the window, but as he was going through it, he struck his head, knocked off his helmet and dropped his weapon. Dazed, he rolled off the roof and fell to the ground, severely fracturing his hip and leg and causing extensive injury to both knees. As he lay on the ground, vulnerable to the cult's guns, he saw two agents who had taken cover near the wall of the Compound. Constantino put his hand out and Special Agents David Millen and Charles Smith dragged him out of the line of fire. (Contrary to some publicly disseminated accounts, none of the agents that entered the armory were killed.)

Special Agents Steven D. Willis and Robert J. Williams were killed during the ambush. Agent Willis, a member of the Houston raid support team, had taken cover behind a van parked near the right front corner of the Compound. Special Agent Williams, New Orleans SRT, was providing cover for his teammates mounting the roof. Intense gunfire forced him to seek cover behind a large metal object on the ground to the east side of the Compound.

Throughout the vicious firefight, ATF agents demonstrated extraordinary discipline and courage. Special Agents Bernadette Griffin, Jonathan Zimmer and Martin Roy were pinned down behind a shed when Special Agent Jordan, who had been wounded in the arms room, staggered over to where they were and collapsed on them. Special Agent Griffin discovered that Jordan's arm was bleeding profusely. She elevated his arm and compressed the wound with her hand until the cease-fire, 90 minutes later. Special Agent Chisolm, relinquishing his own protected location, came to their location and rendered

[76] There were many acts of sacrifice and heroism during the attack on the agents, only some of which can be recounted here.

medical aid. Special Agent Tim Gabourie, a medic with the Dallas SRT, who also repeatedly exposed himself to gunfire to treat several wounded agents, had one of his medical bags shot out of his hand by .50-caliber gunfire. He braved gunfire in an unsuccessful effort to reach Special Agent Willis who died during the battle.

In the face of insurmountable, unrelenting automatic and semiautomatic weapons fire from virtually every area of the Compound, the agents had no choice but to remain in their covered positions. The openness of the terrain made retreat impossible. They returned fire when possible, but conserved their ammunition. They also fired only when they saw an individual engage in a threatening action, such as pointing a weapon. Neither of these constraints applied to those in the Branch Davidian Compound who had a virtually limitless supply of ammunition (Several hundred thousand rounds of ammunition were later found in the Compound) and could fire at will. They even fired at the undercover house and at the reporters parked on the road in front of the Compound.

In addition to the agent fatalities, the cult's weapons inflicted vicious wounds on other agents. For example, one agent was shot in both legs by a shotgun. Another agent was shot in the left leg by one bullet while a second passed through his left leg and lodged in his right leg. There were many other serious wounds and related injuries which are listed in Figures 33 and 34.

In contrast to the extensive casualties inflicted upon the agents, there were few casualties among the cult members. (See Figure 35.) Autopsies revealed that two cult members were killed by agents in the entry teams returning fire. Autopsies of two other cult fatalities reveal that they were shot at close range: Perry Jones was killed by a shot in his mouth, a manner of death consistent with suicide; Peter Hipsman was wounded but was later killed by a cult member who shot him at close range in the back of his skull—an apparent mercy killing, although the autopsy revealed that his initial wound would not have been fatal. Koresh was wounded both in the pelvic area and in his wrist.

The Cease-Fire

According to McLennan County 911 records, Branch Davidian Wayne Martin called the Waco 911 emergency service at 9:48. His call was handled by Deputy Larry Lynch. Martin sounded very frightened and Lynch heard gunfire in the background. Deputy Lynch attempted to speak with Martin, but Martin did not respond and at 10:02, Martin hung up.

GUNSHOT RELATED DEATHS SUSTAINED BY ATF ON FEBRUARY 28, 1993

(according to CA-6 Forms submitted by ATF)

	Name	Team	Injury	Cause	Hospital where treated
1	Conway Lebleu	NO	Death	Gunshot	N/A*
2	Todd McKeehan	NO	Death	Gunshot	N/A*
3	Robert Williams	NO	Death	Gunshot	N/A*
4	Steven Willis	HOU	Death	Gunshot	N/A*

GUNSHOT AND SHRAPNEL RELATED INJURIES SUSTAINED BY ATF ON FEBRUARY 28, 1993

(according to CA-1 Forms submitted by ATF)

1	Clayton Alexander	NO	Two gunshot wounds - thigh in left leg; thigh in right leg	Gunshot	Providence
2	Roland Ballesteros	HOU	Gunshot wounds to the hand	Gunshot	Hillcrest
3	Bill Buford	NO	Gunshot wounds to both legs	Gunshot	Hillcrest
4	Samuel Cohen	DAL	Shrapnel fragments to lower right thigh	Shrapnel	Hillcrest
5	Eric Evers	HOU	Gunshot and shrapnel wounds to chest and shoulder area	Gunshot/ Shrapnel	Hillcrest
6	Mark Handley	HOU	Shrapnel wounds in right leg	Shrapnel	Hillcrest
7	Walter Glen Jordan	NO	Gunshot wounds to both legs	Gunshot	Hillcrest
8	Kenneth King	NO	Gunshot wounds to arms, chest and legs	Gunshot	Providence
9	Mark Murray	DAL	Buck shot wounds to left shoulder	Gunshot	N/A*
10	Gary Orchowski	HOU	Shrapnel wound to the right hand	Shrapnel	Hillcrest
11	Joseph Patterson	DAL	Shrapnel wounds to right cheek	Shrapnel	N/A*
12	Gerald Petrilli	DAL	Shrapnel wounds to right hand, wrist, forearms and left upper arm	Shrapnel	Hillcrest
13	Clair Rayburn	HOU	Gunshot wound to the hand	Gunshot	Hillcrest
14	John Risenhoover	HOU	Gunshot wounds to both legs	Gunshot	Hillcrest
15	Robert Rowe	HOU	Shrapnel wounds to right hand; large abrasion on face	Shrapnel	N/A*
16	Michael Russell	DAL	Wound to back of left shoulder	Gunshot	N/A*
17	Larry Shiver	HOU	Multiple shrapnel wounds to left lower extremity, tissue loss to left medial calf, soft tissue injury to left thigh	Shrapnel	Hillcrest
18	Steven Steele	DAL	Shot in lower lip and left hand; injured lower back and left leg	Gunshot	Hillcrest
19	Robert White	DAL	Bullet wound to left shoulder, neck and bruise to right shin	Gunshot	N/A*
20	Curtis Williams	HOU	Bullet fragments and puncture wound to upper thigh of left leg	Gunshot	N/A*

*N/A means Not Applicable, treated by EMT at scene, or by private physician.

Figure 33

SERIOUS NON-GUNSHOT RELATED INJURIES SUSTAINED BY ATF ON FEBRUARY 28, 1993

(according to CA-1 Forms submitted by ATF)

	Name	Team	Injury	Cause	Hospital where treated
1	Keith Constantino	NO	Broken hip, extensive injuries to both knees and legs	Falling from roof	Hillcrest
2	Terry Lee Hicks	NO	Torn ligament between 3rd & 4th vertebra in neck; possible ruptured disk between 7th and 8th vertebra in neck; bruised or crushed nerve between 7th and 8th vertebra	Moving for cover	N/A*

OTHER NON-GUNSHOT RELATED INJURIES SUSTAINED BY ATF ON FEBRUARY 28, 1993

(according to CA-1 Forms submitted by ATF)

1	Wendel Frost	N/A	Ears subject to extreme noise levels causing possible hearing loss	Noise of two .308 highpowered rifles	N/A*
2	Felix Garcia	N/A	Severe irritation to left heel	ATF boots	N/A*
3	Steven Jensen	HOU	Severe back pain - lower back and right leg, muscle spasms	Carrying dead & wounded from scene	N/A*
4	Kenneth Latimer	HOU	Sprain/pull to right shoulder	Warrant execution	N/A*
5	Charles Meyer	N/A	Rib and back injury on left side	Diving for cover	N/A*
6	John Henry Williams	HOU	Two top front teeth chipped	Moving for cover	N/A

*N/A means Not Applicable, treated by EMT at scene, or by private physician.

Figure 34

BRANCH DAVIDIAN DEATHS ON FEBRUARY 28, 1993

CULT MEMBERS KILLED BY CULT MEMBERS

NAME	NUMBER OF WOUNDS	WEAPON DISTANCE TO WOUND (RANGE)	WEAPON CALIBER/ TYPE OF AMMUNITION	LOCATION OF WOUNDS/ CAUSE OF DEATH
WINSTON BLAKE	1	TWO TO THREE FT.	.223	CRANIOCEREBRAL TRAUMA
PETER HIPSMAN	4 (a)	ONE TO TWO FT.	9 MM. WINCHESTER SILVERTIP JACKETED HOLLOW POINT	(a) UPPER POSTERIOR NECK
	(b)	LESS THAN 1 INCH	9 MM. COPPER JACKETED SOFT POINT	(b) RT. PARIETAL SCALP
	(c)	MORE THAN 4 FT.	9 MM. COPPER JACKETED HOLLOW POINT	(c) LOWER LEFT ANTERIOR CHEST
	(d)	MORE THAN 4 FT.	UNKNOWN (NOT RECOVERED) PROBABLY BULLET (a)	(d) ENTRY TO POST-LATERAL ARM W/ EXIT OF ANTEROLATERAL ARM DEATH DUE TO (a) & (b) CRANIOCEREBRAL TRAUMA
PERRY JONES	1	WEAPON IN MOUTH	UNKNOWN (NOT RECOVERED)	CRANIOCEREBRAL TRAUMA-GUNSHOT WOUND TO MOUTH

CULT MEMBERS KILLED BY ATF

NAME	NUMBER OF WOUNDS	WEAPON DISTANCE TO WOUND (RANGE)	WEAPON CALIBER/ TYPE OF AMMUNITION	LOCATION OF WOUNDS/ CAUSE OF DEATH
PETER GENT	1	DISTANT	9 MM. HYDROSHOCK	PERFORATION OF AORTA GUNSHOT TO UPPER LF. CHEST
MICHAEL SCHROEDER	6 (a)	DISTANT	9 MM. HYDROSHOCK	(a) RT. ANTERIOR SHOULDER
	(b)	DISTANT	9 MM. HYDROSHOCK	(b) RT. LOWER FLANK
	(c)	DISTANT	9 MM. HYDROSHOCK	(c) LEFT THIGH
	(d)	DISTANT	9 MM. HYDROSHOCK	(d) RT. TEMPORAL SCALP
	(e)	DISTANT	UNKNOWN (NOT RECOVERED)	(e) RT. SUPRA-AURICULAR REGION - EXIT RT. POSTIOR AURICULAR SURFACE
	(f)	DISTANT	UNKNOWN (NOT RECOVERED)	(f) GRAZING GUNSHOT WOUND OF THE LEFT CHEST. DEATH DUE TO MULTIPLE GUNSHOT WOUNDS
JAYDEAN WENDELL	1	DISTANT	9 MM. HYDROSHOCK	CRANIOCEREBRAL TRAUMA-GUNSHOT WOUND TO HEAD

BRANCH DAVIDIAN INJURIES SUSTAINED ON FEBRUARY 28, 1993

NAME	NATURE OF INJURY
DAVID JONES	*GUNSHOT WOUND TO GLUTEUS MAXIMUS
DAVID KORESH	GUNSHOT WOUND TO PELVIC RIM AND LEFT WRIST
JUDY SCHNEIDER	*GUNSHOT WOUND TO INDEX FINGER
SCOTT SONOBE	*GUNSHOT WOUND TO LEG

*ALLEGED WOUNDS

Figure 35

Using the telephone number that appears on a screen when a call is placed to 911, Lynch called back to the Compound. An answering machine responded. Hoping that Martin, or someone in the Compound, could hear, Lynch yelled for Martin to pick up the phone. Martin responded and Lynch began attempting to arrange a cease-fire. Simultaneously, Lynch tried to contact ATF through Lieutenant Barber, who as the liaison between ATF and the sheriff's department, was at the command post. However, Barber had turned off his radio because he was planning to assist the bomb technicians in recovering and processing any explosives. Although Lynch was unable to raise ATF on his radio, a TSTC officer, Jim Stone, responded and said that he was able to contact ATF. Stone drove to the command post and reached SAC Chojnacki. Chojnacki used Stone's radio to speak with Deputy Lynch.

Afraid that if Martin was told to hang up the telephone to allow ATF to contact him directly, contact might not be restored, ATF worked through Lynch. Thus, Martin was in contact with Deputy Lynch, who had to relay what Martin said to Chojnacki by way of Stone's radio. Lynch told Martin to cease firing while simultaneously arranging for ATF agents at the Compound to do the same and pull back.

At 10:34, Martin advised Deputy Lynch that someone else in the Compound wanted to speak to Lynch. At 10:35 Koresh called Lynch. Lynch was then in contact with Martin on one telephone line, David Koresh on another, and ATF by radio, as he attempted to arrange a cease-fire. The negotiations were unproductive, stymied by the unwieldy communications and confusion in the Compound.

In the undercover house, Cavanaugh eventually decided that the sheriff's department was not making sufficient progress toward achieving a cease-fire, but he did not have the telephone number for any phone in the Compound. He yelled across to the agents in the neighboring house, who yelled back that the number was on the refrigerator. Cavanaugh found the number and dialed the Compound. The phone rang repeatedly but no one answered. Cavanaugh radioed to the agents on the Compound grounds to yell into the Compound for someone to answer the phone. Then, Branch Davidian Steve Schneider answered the telephone. Cavanaugh identified himself and told Schneider that he wanted to discuss the situation. Through the telephone Cavanaugh could hear yelling, screaming and crying in the Compound. Intermittent gunfire between agents and those in the Compound punctuated the tense standoff. Schneider was frantic and hostile. It took Cavanaugh several minutes to calm him. When Cavanaugh began to discuss arranging a cease-fire, Schneider was receptive because individuals in the Compound had also been wounded. But even 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 Compound 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.

The cease-fire agreement did not address how the agents would leave. Cavanaugh told Schneider that ATF wanted to retrieve its dead and wounded agents. Schneider demanded that the agents withdraw unconditionally. Cavanaugh insisted that the agents would leave only if they could retrieve their wounded and dead. Schneider who remained excitable and irrational insisted that the agents leave immediately. Cavanaugh assured Schneider that the agents would retreat, but vowed not without their fallen comrades. Retrieval of King, who had fallen in the rear courtyard, was a particularly difficult point of negotiation. Initially, Schneider would not allow agents to go to the courtyard for King. Cavanaugh was able to discuss with Schneider King's precise location, even arranging for Schneider to have someone in the Compound look in the Courtyard to verify that an agent was there. Eventually, Schneider agreed to let agents retrieve King.

Cavanaugh instructed the agents to raise their hands, not to make any sudden movements and begin leaving the grounds. At approximately 11:34, SAC Mastin approached Agents Griffin, Bonaventure and Chisolm to assist them in retrieving King from the rear courtyard. The four of them proceeded slowly, with their hands raised, around the east wall of the Compound to reach the rear courtyard. When they reached the courtyard area, they began searching for King. Suddenly, one of the Branch Davidians aimed a rifle at Griffin and yelled racial slurs at her. Griffin decided that if she was going to be shot, she would rather it be while attempting to assist one of her fellow agents. She turned and walked toward King. The cult member did not shoot.

King was too seriously injured to be carried without a stretcher, so the agents placed him on a ladder. They brought him out to the front of the Compound and put him in an ambulance that Special Agents Aguilera and Dunagan had driven to the Compound with Special Agents Rodriguez and Salas riding in the back to provide assistance: The AMT driver was not present because ATF could not guarantee his safety.

By this time, most of the agents able to walk had gathered near a large bus to the right of the Compound. At 11:46 Cavanaugh was able to persuade Schneider to allow ATF

to retrieve the remaining dead and wounded agents. The cease-fire left the agents at a significant tactical disadvantage. The agents were not covered, while the cult members were shielded inside the Compound's main building with vantage points on floors above the ground. While many agents were almost out of ammunition, the Branch Davidians were well supplied, which became clear when the Compound was searched after the April 19 fire. Under the threat of Branch Davidian gunfire the agents withdrew, some with holstered weapons, some with their shields raised, some with their hands in the air, and some with their backs to the Compound. The dead agents and those unable to walk were placed in any available vehicle: the ambulance; a pickup truck that had been parked in front of the undercover house; and a KWTX reporter's Ford Bronco. The six agents in the undercover house, rearranged the furniture into a defensive configuration and the forward observers monitored the retreat, prepared to return fire if necessary. The agents stayed in the undercover house until later that afternoon, when they received support from the Texas Department of Public Safety SWAT team who took positions at the nearby roadblock. At roughly the same time, ATF agents who had taken positions in a building near the undercover house were also able to withdraw safely. During the ceasefire, some agents had moved from the hay barn closer to the Compound. From this relatively safe, high ground, they had an excellent view of the Compound. But soon they were ordered back to the hay barn, where they had no such vantage point.

Because no one had designated a rallying point at which agents would take defensive positions or had ordered a sequential withdrawal that might have permitted some agents to cover the movements of others, the retreat continued until the agents reached the roadblock at the intersection of Double E Road and FM 2491. There, arrangements were made for bus transportation, first to a nearby social club, the Pep Club, and then back to the staging area. It was approximately 1:00 when the withdrawal negotiations were completed. Once the agents had left the Compound grounds, Cavanaugh agreed with Schneider that no agents would come on the property and no one inside would attempt to leave. Cavanaugh told Schneider that he would call again at 2:00 p.m. Cavanaugh then arranged for the residents of the neighboring house to be taken to a hotel, and he went to the command post.

Aftermath of the Shoot-Out on February 28

Once Cavanaugh and Schneider had negotiated the cease-fire, ATF was confronted with a number of demanding and urgent tasks. First, and foremost, ATF needed to give prompt medical attention to the agents who had been wounded in the gunfight. Second, as described in the preceding section, ATF agents needed to withdraw safely from their vulnerable positions around the Compound. Third, ATF had to establish and maintain a secure perimeter around the Compound to prevent the escape of any adult cult members—all of whom were suspects in the murder of four ATF agents and the attempted murder of federal agents—and to prevent cult members outside the Compound from rendering assistance. Fourth, residents of the Compound who had not resisted, especially the children, needed to be evacuated. Finally, ATF had to provide the public with a prompt and accurate outline of the events at the Compound, while making clear to both the general public and those inside the Compound that ATF was in control of a difficult and challenging situation.

Events in the aftermath of the cease-fire demonstrated that ATF lacked the planning, training, and resources to accomplish all of these tasks satisfactorily. Nonetheless, through the courage and tenacity of its agents and local law enforcement personnel, ATF managed to make substantial progress toward achieving several critical post-raid objectives.

The Evacuation of Wounded Agents

Before the raid on the Branch Davidian Compound, planners arranged for a private ambulance to stand by at a roadblock near the Compound during the operation and for a CareFlite helicopter to be available at the command post, which was five minutes' flying time away from the Compound, for medical evacuations. Soon after the operation began, it became clear that these resources were not enough to help all of the wounded agents. Even

before the shooting was over, ATF agents called for more ambulances and an additional CareFlite helicopter. The additional evacuation vehicles soon reached the roadblock where the retreating agents had gathered. First, three additional ambulances and an additional CareFlite helicopter arrived. During the next fifteen minutes, emergency medical care was administered to the ATF agents most seriously wounded. Those who needed immediate additional attention were then taken by either ambulance or helicopter to one of the two hospitals in Waco equipped to treat persons with gunshot wounds. By 12:25 p.m., the helicopters were airborne, and by 12:35, they had landed at Providence Hospital in Waco. After one of the hospitals received death threats against the wounded agents, ATF sent agents to the Providence and Hillcrest hospitals to provide security for the wounded agents and to obtain accurate information about the extent of ATF losses.

The Media and the Shoot-Out

Tensions ran high between ATF and the media during the shoot-out and cease-fire. Many agents were angry with media personnel who had been in the midst of the shoot-out, distracting agents while they were under fire and whom agents had almost shot accidentally, fearing they were cult members. When the cease-fire was established, the five *Tribune-Herald* reporters who had been pinned in the ditch on Double E Road retreated quickly toward FM 2491. An ambulance driver, concerned that three of the media representatives might be Branch Davidians, ducked behind his ambulance and pointed the suspects out to an ATF agent.

Mullony, who had filmed portions of the shoot-out from the front of the Compound, walked along the Compound driveway after the cease-fire and filmed the agents as they walked to the roadblock. Once he reached the roadblock at FM 2491, ATF agents and local law enforcement authorities verbally and physically assaulted Mullony as he filmed the agents' dead colleagues lying on the ground. Witherspoon, who had spent the shoot-out huddled in the ditch, was scolded by a sheriff's department employee for being at the scene.

The Failure to Maintain the Perimeter

During the course of the afternoon, ATF withdrew from its positions, and aside from the roadblocks it maintained, relinquished much of its control over the perimeter of the Compound. At one of these roadblocks, an alert ATF agent and local law enforcement officer prevented cult member Donald Bunds from returning to the Compound within an

hour after the firefight. Because Bunds was driving a car with an expired registration, he was arrested and taken to McLennan County jail.

The failure to maintain the perimeter other than the roadblocks was due in part to a communication failure. After learning that Koresh had threatened to use women and children as shields in order to bring wounded cult members to the hospital, Hartnett ordered that Koresh be permitted to leave the Compound if he made good on this threat. In Waco, however, this order was either received erroneously or transformed by command post supervisors as a directive to abandon perimeter positions and to permit Koresh and his followers to leave. Numerous agents in the field, receiving these instructions, were greatly demoralized because these instructions would permit people who had murdered other agents to escape.

The withdrawal of the agents from the hay barn, combined with ATF's failure to guard the rear of the barn from attack by cult members outside the Compound, resulted in a sequence of events that almost produced additional ATF casualties. While most of the agents had been deployed to execute the warrants at the Compound, a smaller group was sent to execute a search warrant at the Mag Bag. The plan called for the group to arrive at the Mag Bag shortly after the Compound had been secured. However, while en route to the Mag Bag, the group was told of the firefight and ordered to return to the command post. This left the Mag Bag unsecured, even though Aguilera's investigation had revealed regular communication between cult members in the Mag Bag and those in the Compound. Shortly thereafter, three armed cult members who had been inside the Mag Bag drove to a house near the Compound and walked from there toward the rear of the Compound.

Meanwhile, during the afternoon, one of the agents stationed near the hay barn spotted a Branch Davidian moving away from the Compound toward an adjacent property. Because the agents had been instructed to avoid confrontations and to permit persons who did not pose an immediate threat to leave the Compound, the agents allowed him to leave. Shortly thereafter, agents withdrawing from positions around the hay barn, led by ASAC Darrell Dyer, encountered in the woods the three Branch Davidians who had left the Mag Bag. When the agents identified themselves as federal agents, the cult members opened fire. After a prolonged exchange of gunfire, one of the three cult members surrendered. He was carrying a .22-caliber weapon and 100 rounds of ammunition. A second cult member, Michael Dean Schroeder, was killed by the agents; he had a loaded Glock 9mm semiautomatic pistol and two ammunition magazines—one empty and one full. The third Branch Davidian, Woodrow Kendrick, escaped, but was captured later.

When ASAC Dyer first saw the Branch Davidians in the woods, he informed the command post that he and the other agents were in contact with suspected cult members. By that time, a National Guard Armored Personnel Carrier (APC) had arrived at the forward command post, that ATF had established near one of the roadblocks after the cease-fire. Sarabyn asked the National Guard commander to send the APC to the rear of the Compound to support Dyer and his fellow agents. Cavanaugh, however, who was still engaged in negotiations with the Branch Davidians, feared that the appearance of an APC near the Compound might disrupt negotiations. In addition, the supervisors were concerned that the APC could be pierced by long-range .50-caliber fire. As a result, the APC was kept near the forward command post for the duration of the conflict. The agents made their way back to the roadblock where they were taken by car to the command post. Throughout this exchange of gunfire in the woods, Cavanaugh continued his negotiations with Koresh and other cult members.

With the withdrawal of these agents, ATF temporarily stopped efforts to prevent cult members from leaving the Compound. To the limited extent the perimeter around the Compound was controlled, that was accomplished principally through the efforts of local law enforcement personnel and SWAT teams, including the Austin Police Department, Texas Department of Public Safety, Waco Police Department, Killeen Police Department, McLennan County Sheriff's Department, and the U.S. Marshals Service. These officers refused to follow ATF directives to abandon the perimeter that would have allowed cult members to leave the Compound. However, local law enforcement were able to control only the roads to the Compound; other routes went unguarded. Colonel Charlie A. Beckwith, U.S.A., Ret., on assignment for *Soldier of Fortune* magazine, claims that he managed to advance on foot to within less than a mile of the Compound without being challenged.

A Siege Develops and ATF Obtains Assistance from the FBI

Chaos at the Command Post

After the shoot-out, the situation at the command post became chaotic. Nonetheless, throughout the afternoon, individual agents identified urgent tasks both at the command post and elsewhere and completed them. Cavanaugh negotiated with the Compound; Dyer provided support to agents at the rear of the Compound; Robert White, an assistant SRT leader (Dallas), began organizing agents to establish a perimeter; Phillip Lewis regularly updated the National Command Center in Washington, D.C., and various agents handled

tasks related to the wounded, including providing security, contacting relatives, and insuring all received proper medical attention. With no one coordinating these diverse individual efforts, however, the logistical situation in Waco deteriorated rapidly. Many ATF agents, after returning from the shoot-out at the Compound, milled around the command post during the late afternoon and evening hours, awaiting orders. Others were told by supervisors not to return until early the next morning. In contrast, many of the agents who stood guard at the roadblocks and provided security at the hospitals for the wounded agents remained at their posts for lengthy shifts, some exceeding 24 hours. Many of the agents in the field were not adequately supplied with food, warm clothing, and other necessities.

Initial Relief

Based on conversations with agents at the command post, ATF management at the National Command Center determined that additional SRTs should be brought to Waco immediately to provide relief. Within a few hours of the firefight, three additional SRTs from Miami, St. Louis, and Detroit were requested by Washington ATF officials to report to Waco. They arrived over the course of the next 24 hours and, after being briefed by the tactical commanders, were rapidly pressed into service around the Compound. They relieved their fellow ATF agents as well as those local law enforcement personnel who had stood vigilant through the night.

The Decision to Bring in the FBI HRT

Shortly after the shoot-out, Chojnacki spoke with Hartnett, who was in Washington, D.C., and recommended that the FBI Hostage Rescue Team (HRT), which had experience with both prolonged standoffs and hostage negotiations, 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 Director of Investigations, and formally requested FBI assistance. Gow, in turn, contacted FBI SAC Jeffrey Jamar (San Antonio) and briefed him on the situation. At roughly the same time, FBI Special Agent James Fossum (Waco) was informed of the crisis by both AUSA Phinizy and another local FBI agent. After speaking with Jamar, Fossum drove to

the ATF command post. Shortly after he arrived, Chojnacki told him the ATF would welcome whatever assistance the FBI could provide.

Meanwhile, the Office of the Assistant Secretary for Enforcement at the Treasury Department, particularly Ronald Noble, had contacts with both high-ranking FBI officials and ATF leadership. Noble, who had been informed of the firefight and the losses incurred by ATF while en route by train from Washington, D.C. to New York, sought advice and assistance from FBI Assistant Director Larry Potts and Deputy Director Floyd Clark.[27] Shortly after Hartnett requested the HRT, Noble and Clark discussed the possibility of dispatching the HRT to Waco in one of their conversations. Clark informed him that a request for the HRT had already been made by ATF and that the HRT was on its way to the Compound 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 the long term, the FBI should have operational command to resolve the standoff. There were several reasons for this advice. First, the FBI HRT traditionally has control over operations in which it participates, and ATF was not in a position to assert such control. Second, the FBI was in a better position to stabilize the situation than ATF. The ATF had already absorbed heavy losses and if further hostilities occurred might be accused of seeking revenge. Noble also wanted to preclude any turf battles that might arise if the effort were jointly managed. At the FBI, Potts and Clark, as well as Gerson from Justice, agreed that were the HRT fully deployed, its leaders must have command and control of the operation.

[27] Due to the World Trade Center bombing, Potts, Clark, and Acting Attorney General Stuart Gerson were at the FBI command center in Washington, D.C., on the day of the raid.

Hartnett and Conroy Arrive at the Command Post

Hartnett, who had arrived in the National Command Center shortly after noon (EST) on the day of the raid, ordered Dan Conroy to leave immediately for Waco. Hartnett remained at the National Command Center until Director Higgins arrived at roughly 3:00 p.m. After Hartnett had briefed him, Higgins directed Hartnett to proceed to Waco. Hartnett, accompanied by several members of the FBI HRT advance team, including Dick Rogers, the HRT supervisor, traveled to Waco on an FBI airplane.

At approximately 6:30 p.m., Dyer returned to the command post and informed Assistant U.S. Attorney Johnston and the supervisors about the shoot-out near the hay barn. By that time, after hours of negotiation with cult members, Cavanaugh had managed to reach an agreement with Koresh who allowed the release of several children in exchange for ATF arranging to have a particular passage of scripture broadcast repeatedly on a local radio station. Cavanaugh was assisted by two negotiators from the Texas Department of Public Safety. Cavanaugh continued to play a leading role in these negotiations for several days, although the FBI took charge of them during the afternoon of March 1.

When Dyer returned, Cavanaugh directed him to assemble a group of agents to receive the children that would soon be released from the Compound. Dyer, Rodriguez and several others went to the Compound and received six children over the course of the evening. The children were immediately placed in the custody of the Texas Department of Protective and Regulatory Services.

Conroy arrived in Waco at approximately 8:30 p.m. and found the command post still in a state of disarray. Several of the commanding officers were trying to restore order and were striving to deal with the most pressing tasks. Cavanaugh was continuing to negotiate with the cult members; Sarabyn was coordinating the recovery of the children through contacts with Dyer and others, and Royster was trying to handle the large influx of ATF agents and the state and local law enforcement officers who were volunteering for service. Royster was also seeking night-vision equipment, lenses, Light Armored Vehicles, and Bradley Fighting Vehicles from the National Guard. Other agents were trying to deal with the media. In fact, the raid became an international story within hours after the shooting ended. According to the *Tribune-Herald*, by mid-afternoon the day of the raid, 60 newspaper reporters and camera crews from at least 17 television stations and the Cable News Network had deluged the police barricades near the Compound. More than 50 reporters attended the ATF press conference at the Waco Convention Center Sunday

afternoon where SAC Royster read a statement from Director Higgins. A similar crowd attended Sharon Wheeler's short briefing and announcement that a press conference would be held at 10:30 the following morning. Despite ATF and FBI attempts to provide daily news briefings, the media complained that they were not getting enough information. Neither ATF, the local media, nor the town of Waco was prepared for the intense media coverage following the raid.

A few hours later, when Hartnett arrived at the command post at about 11:00 p.m., he found over 100 local law enforcement personnel and ATF agents, many still wearing bloodstained clothes from the raid. After Conroy briefed him, Hartnett took control of the operation, requiring the original operation commanders to report directly to him and Conroy. He then cleared the main area of all non-ATF people and told most of the ATF agents to report back the next morning.

Together with Conroy and Chojnacki, Hartnett established a new ATF command structure. Ivan Kalister, Program Manager for Tactical Response Branch, Washington, D.C., and Sarabyn were made responsible for establishing the SRT people on the perimeter of the Compound and for providing security for the hospitalized agents. Cavanaugh and the FBI were to conduct the negotiations with the Compound. Royster was given responsibility for the overall criminal investigation of Koresh and the other cult members. Once the Texas Rangers opened a formal homicide investigation, he became the liaison with the Texas Rangers. David Troy, Chief, Intelligence Division, Washington, D.C.; Dave Benton, Chief, Planning and Analysis Division, Washington, D.C., and Bill Wood, SAC, Cleveland Division, were the shooting review team, charged with interviewing all participants in the shoot-out. RAC Phillip Lewis, San Antonio, and Program Manager, Firearms Division, Dick Curd, Washington, D.C., were put in charge of managing all logistics, including lodging and vehicles. ATF Public Information Officers Wheeler and Perot were told to continue functioning as the public information officers.

These agents reported to Conroy and Hartnett until the FBI HRT took control of their respective aspects of the operation. Many supervisory and field agents believed the Hartnett and Conroy takeover exacerbated the problem of poor communication between the operation's leadership and the field agents. In addition, because Hartnett and Conroy often met privately, most agents, including the raid leaders, felt they were inappropriately being denied access to the decisionmaking process.

Hartnett instructed the ATF agents to take control of the roadblocks by midnight and to establish a full perimeter around the Compound at dawn. By early morning on March 1, with the assistance of both local law enforcement and the relieving SRTs, ATF had resumed its watch on most of the roads leading into and out of the Compound. From their posts, law enforcement officials could observe much of the Compound. In the days immediately following the raid, aside from the person seen near the hay barn escaping from the Compound, law enforcement officials did not see any other cult members leave the Compound.

Starting soon after the shooting ended ATF also attempted to provide support and counseling for the raid participants. Members of ATF peer support groups, which provide confidential support for agents who have experienced traumatic incidents, met with numerous raid participants. These support groups consist of agents who have been through earlier traumatic incidents and who are trained to provide peer support. In addition, professional counseling from experts in handling participants in violent incidents was available for those agents who elected to avail themselves of those services. Although many agents did use those services, other agents who could have benefitted from such services chose not to. Some of those who did not seek counseling apparently feared that if they did, they would be stigmatized as weak or troubled. Numerous agents also provided support and care for their hospitalized colleagues.

At approximately 10:00 a.m. on March 1, Hartnett and Jamar conducted a meeting with those ATF agents who were not posted around the Compound. This was the first post-raid meeting attended by most of the ATF agents who had participated in the raid. Hartnett announced that the FBI HRT was going to take over the operation because of its special expertise in hostage and siege negotiations. Hartnett expressed his concern that further ATF involvement in violence at the Compound might lead to accusations that ATF was seeking revenge. The agents were angered by Hartnett's remarks. He did not comment upon the four agent fatalities or the bravery exhibited the day of the raid. The agents resented the implication that they were not capable of handling the current situation. Next, Hartnett introduced Jamar who also failed to mention the slain agents and the valiant actions of ATF agents. Moreover, as Jamar explained the rationale for the FBI takeover, the agents felt he overemphasized FBI capabilities and, by inference, ATF shortcomings. Many of the agents, including several of ATF's top management team, were disappointed and angered by Jamar's remarks.

The next day, March 2, the HRT took control of the inner perimeter from ATF agents, who by then had supplanted local law enforcement officials. In turn, the ATF agent took the positions on the outer perimeter previously held by local law enforcement. Many ATF agents resented the way some of the HRT agents acted when taking over the perimeter, and they were especially troubled by what they perceived as the FBI's lack of interest in debriefing them. Although a few verbal exchanges took place between certain agents, the transition between ATF commanders and HRT supervisors was reasonably smooth, with ATF briefing the HRT leaders about Koresh and the situation at the Compound. A few days after the takeover, Hartnett sent the Dallas, Houston, and New Orleans ATF agents home. The remaining ATF agents assumed positions in an outer perimeter outside the HRT and provided support for the operation. Transfer to the FBI of control of the inner perimeter effectively ended ATF's authority over and responsibility for the standoff.

Part Two
Section Seven: ATF Post-raid Dissemination of Misleading Information About the Raid and the Raid Plan

Following a tragedy of this magnitude, it was inevitable that the law enforcement community, the Executive Branch, Congress and concerned private citizens would demand an accounting of these events.

In the wake of the tragedy on February 28, the raid commanders, who made the decision to proceed with the raid despite the clear evidence that Koresh had been forewarned, and their superiors in the ATF hierarchy endeavored to answer the call for explanations. But critical aspects of the information that they provided—to superiors, to investigators, and to the public—were misleading or plain wrong. It was not that they lacked access to the relevant facts. Rather, raid commanders Chojnacki and Sarabyn appear to have engaged in a concerted effort to conceal their errors in judgment. And ATF's management, perhaps out of a misplaced desire to protect the agency from criticism, offered accounts based on Chojnacki and Sarabyn's statements, disregarding clear evidence that those statements were false.

ATF Management's Misleading Post-raid Statements

In the aftermath of the Waco raid, perhaps the most frequently asked questions were: Had Koresh been tipped off that ATF was coming? And, if Koresh indeed was forewarned, did ATF commanders know this before they launched the raid? Certainly the news media representatives pouring into Waco sought answers for these questions from official and unofficial ATF spokespeople. The answers would also be significant for those looking toward a criminal prosecution of Koresh and his followers, since evidence that the Compound's residents had deliberately planned an ambush after getting tipped off would blunt any claims that they had merely acted in self-defense against unknown assailants. And ATF's leadership sought answers, that they might respond to media and official inquiries, and that they could work to prevent future tragedies.

in fact, that representatives of both the Texas Rangers and the local United States Attorney's Office asked Hartnett, Conroy and Troy to refrain from commenting in specific terms about the loss of the element of surprise because of concern about how such statements might affect ongoing investigations and likely future prosecutions. Similar requests came from the Treasury Department. Over time, as ATF kept mischaracterizing the raid commanders' knowledge, these requests were sharpened and put more forcefully—and indeed, by early April, particularly with respect to Treasury's concerns, ripened into an effort to convince ATF to make no further statements on the subject. Still, since ATF officials obviously ignored these requests, and spoke regularly about this subject to the media, the requests offer no justification for making statements known to be misleading or false.

In addition to misleading the public, the statements by Conroy, Hartnett and Troy also had the effect of wrongfully pointing the finger at Rodriguez as being responsible for the failed raid. If the raid commanders were not informed that Koresh had been tipped, then the necessary corollary was that Rodriguez likely had failed to tell them what they needed to know. He was to blame. Moreover, despite the consistency of Rodriguez's recollection of what happened immediately before the raid, persistent rumors circulated that he was changing his story. As Rodriguez appropriately protested:

> They're saying that [I've changed my story about what I saw in the compound and what I told raid commanders.] That's not true. Every time I told my story, I said it the same way—every time. The Rangers know that too. There's no reason for me to go and make up stories.

"ATF Agent Says He Saw Disaster Loom," *Dallas Morning News*, May 13, 1993 at 8A. ATF's top managers should have acted swiftly to quash those rumors; they did not.

Sarabyn and Chojnacki lied to their superiors and investigators about what Rodriguez had reported. Their consistent attempts to place blame on a junior agent were one of the most disturbing aspects of the conduct of senior ATF officials. The recollections of Sarabyn and Chojnacki have diverged considerably since the immediate aftermath of the raid. After being confronted with the collective contrary recollections of dozens of line agents, Sarabyn finally admitted the accuracy of Rodriguez's account. In contrast, despite

When advised by the Review that Chojnacki and Sarabyn had denied making any changes except the handwritten marginal comments Chojnacki had affixed to one of the already altered versions of the plan and Sarabyn's change of the raid date, Dyer seemed shocked. Obviously, as Dyer realized, when taken together, Chojnacki's and Sarabyn's denials amounted to a joint accusation that Dyer had directed or made all of the other changes.

The Review credits Dyer's account of events and believes that both Sarabyn and Chojnacki falsely denied participating in the alteration of the original raid plan. The assessments are reinforced by Dyer's relative lack of knowledge about the facts that were changed in the raid plan. Certain changes that were made went beyond Dyer's knowledge of the raid plan and the factual assumptions upon which it was built. Everything he knew came from someone else; he created nothing; he decided nothing. And, of course, as the only one of the three who was not intimately involved in planning the failed raid, he lacked motivation to lie about making changes to the plan. Sarabyn and Chojnacki's false statements with regard to altering the raid plan document is consistent with their failure to tell the truth about raid day events. And their readiness to blame Dyer indirectly is equally consistent with their efforts to do the same to Robert Rodriguez.

Part Two
Section Eight: National Guard Support

Introduction

During the investigation of the Branch Davidians and the subsequent raid on the Compound, ATF obtained assistance from the military, including the Texas National Guard. This support included the provision of training facilities and equipment, aerial reconnaissance missions, the use of helicopters during the raid, and advice concerning ATF's medical and communications plans. In the wake of the raid's outcome, specific questions were raised about the representations made by ATF in its effort to obtain the use of the helicopters which had been provided by the National Guard. This section responds to those questions.

ATF's Initial Contact with the Military

While investigating Koresh for violations of federal firearms laws in November 1992, ATF believed it required military assistance. ATF, therefore, approached the U.S. military and Texas National Guard for support. In early December, at ATF's request, the Department of Defense liaison to ATF briefed ATF officials about military support available for the Branch Davidian operation. During this briefing, the Department of Defense representative told ATF officials that ATF could obtain military assistance without having to reimburse the Department of Defense if the investigation was related to narcotics enforcement, i.e. had a "drug nexus." An ATF agent then met with officials of the Texas National Guard Counterdrug Support Program to determine what assistance the Texas National Guard could provide. During the meeting, the Guard and individuals representing

the state of Texas reiterated the fact that nonreimbursable military support could be made available to ATF if the case had a drug nexus."

After these meetings, ATF officials investigated whether there was any drug activity at the Compound. The ATF case agent learned from an informant that parts of an illegal methamphetamine laboratory had been at the Compound when Koresh took control of the premises, and that the McLennan County Sheriff's Department had planned to collect this equipment. The informant, however, did not know whether such parts were ever collected. Upon inquiring at the sheriff's department, the agent found no records indicating that these parts had been collected by or turned over to the sheriff, raising the possibility that the illegal equipment might still have been at the Compound.

ATF acquired additional information that suggested there was drug activity at the Compound. An ATF agent who was acting in an undercover capacity during the investigation reported that Koresh had told him that the Compound would be a great place for a methamphetamine laboratory because of its location. Furthermore, information obtained from informants and a search of the criminal records of the Branch Davidians revealed that one cult member living at the Compound had a prior conviction for possession of amphetamines and a controlled substance, and that 10 other individuals associated with the Compound had previously been identified as having some involvement in illegal narcotics activity. The drug involvement of the 10 individuals varied; some had been arrested for alleged drug violations while others had been investigated for suspected drug activity.

After ATF had gathered this information, ATF officials informed representatives of the U.S. military and the Texas National Guard on numerous occasions about possible drug activity at the Compound. On February 4, 1993, ATF officials met with representatives of both groups to discuss the Branch Davidian operation. At this meeting, the military representatives were accurately informed of the results of ATF's investigation into the existence of a drug nexus. This briefing satisfied the representatives that a sufficient drug nexus existed to justify military assistance on a nonreimbursable basis.

[33] Under 10 U.S.C. § 371 et seq. and 32 U.S.C. § 112, the Secretary of Defense is authorized to provide military support to law enforcement agencies engaged in counterdrug 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.

ATF's Specific Requests for National Guard Support

On December 14 and 18, 1992, an ATF official wrote to the Texas National Guard Counterdrug Support Program requesting that the Guard take and interpret aerial reconnaissance photographs of the Compound. The National Guard subsequently conducted a total of six flights over the Compound and Mag Bag from January 6 through February 25, 1993. During the flights, the Guard used infrared scanning devices, which identified "hot spots"—heat sources—inside and outside the Compound. A Texas National Guard airman then provided ATF with an unofficial interpretation of the reconnaissance videotapes that suggested a hot spot inside the Compound was consistent with characteristics of a methamphetamine lab. ATF, however, never obtained an official interpretation of the videotapes.

In addition to the reconnaissance flights, the Texas National Guard supplied three helicopters and pilots for training exercises on February 27, and for the raid the following day. Prior to February 27, ATF officials told representatives of the Guard that the helicopters would be used as an airborne command platform and to transport ATF personnel and evidence on the day of the raid. During the training exercises, however, ATF officials informed the National Guard pilots that on the day of the raid, the helicopters were to arrive at the rear of the Compound shortly before the raid teams to draw the attention of the Branch Davidians away from the agents arriving in the cattle trailers. On raid day, however, the helicopter pilots encountered unexpected gunfire from the Compound as soon as their aircraft came within range, and they were forced to abort their mission.[34]

Analysis

ATF did not mislead U.S. military or Texas National Guard officials in obtaining their assistance on a nonreimbursable basis. ATF conducted a legitimate inquiry into whether a drug nexus existed in the investigation after military representatives told ATF officials about the possibility of nonreimbursable assistance. ATF officials were aware that they could have obtained military support for the operation even if no drugs were involved in their investigation. However, in the absence of a drug nexus, ATF was told by both the U.S. military and the National Guard that the assistance would be reimbursable.

[34] ATF should have notified the National Guard earlier than February 27 that its pilots might be exposed to dangerous gunfire. In any event, the helicopters could not serve effectively as an airborne command platform while being used simultaneously as a diversion on the day of the raid.

Once ATF gathered information about a possible drug nexus at the Compound, it presented this information to the U.S. military and the Texas National Guard. Representatives of these groups evaluated the information and found that it was sufficient to warrant assistance on a nonreimbursable basis. Because there is no formal standard by which the military defines a drug nexus in a law enforcement investigation, a substantive review of this decision cannot be conducted.

Nonetheless, the Review finds that the standards for nonreimbursable military support raise questions about the appropriate scrutiny that should be given when considering the issue of a drug nexus. The lack of a formal standard by which the military defines a drug nexus in a law enforcement investigation raised questions regarding the nonreimbursable assistance provided to ATF. It would be appropriate therefore that federal law enforcement, the U.S. military and National Guard develop more precisely defined criteria for determining when a drug nexus is sufficient to justify nonreimbursable military assistance.