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CAN SOLDIERS BE PEACE OFFICERS? THE WACO DISASTER AND THE MILITARIZATION OF AMERICAN LAW ENFORCEMENT

by

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I. INTRODUCTION

One of the most significant trends of federal law enforcement in the last fifteen years has been its militarization. The logical, perhaps inevitable, consequence of that militarization was seen in the disaster at Waco, Texas, resulting in the deaths of four federal agents, and seventy-six other men, women, and children. In this article, we use the Waco tragedy as a starting point to examine the militarization of federal law enforcement, and similar trends at the state and local level.

Part Two of this article sets forth the details and rationale of the Posse Comitatus Act—the 1878 law forbidding use of the military in law enforcement. Part Three explicates how that Act was eroded by the drug war in the 1980s. The article then discusses how the drug exception to the Posse Comitatus Act was used to procure major military support for the Bureau of Alcohol, Tobacco and Firearms (BATF) raid against the Branch Davidians—even though there was no real drug evidence against them—and how the drug exceptions to the Posse Comitatus Act have made such abuses endemic.

Part Four examines the fifty-one day FBI siege of the Branch Davidian residence, with a focus on the destructive role played by the FBI's Hostage Rescue Team, an essentially military force which has proved counterproductive in a civilian law enforcement context.^(pg.620)

In Part Five we look at the problem of groupthink, its role in the Waco tragedy, and the importance of keeping groupthink-prone institutions—like the military—out of law enforcement.

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Finally, Part Six offers a broader view of the problem of the militarization of federal law enforcement. We examine the proliferation of federal paramilitary units and federal efforts to promote the militarization of state and local law enforcement. After explaining the direct connection between the drug "war" and law enforcement militarization, we propose numerous statutory remedies to demilitarize law enforcement.

II. THE POSSE COMITATUS ACT

The Posse Comitatus Act of 1878 was passed to outlaw the use of federal troops for civilian law enforcement.¹ The law made it a felony to willfully use "any part of the Army...to execute the laws" except where expressly authorized by the Constitution or by act of Congress. The Act of 1878, as amended, 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 under this title or imprisoned not more than two years, or both.²

The idea was that law enforcement and the military are completely different, with the Army geared toward destroying enemies of a different nationality, while law enforcement must serve persons largely friendly, who are guaranteed presumptions of innocence and rights not appropriate when dealing with an enemy during times of war. Anything which made law enforcement seem militarized was un-American; our citizens are not supposed to perceive themselves as subjects of an occupying force.³ (pg.621)

As one modern court stated, the Posse Comitatus Act "is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing 'the inherited antipathy of the American to the use of troops for civil purposes.'"⁴ Indeed, during the debate over ratification of the Constitution, The Federalist assured Americans that the military would never be used against the American people.⁵

¹ See generally, 18 U.S.C. § 1385 (1994); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987); Kurt Schlichter, Note, *Locked and Loaded: Taking Aim at the Growing Use of the American Military in Civilian Law Enforcement Operations*, 26 LOY. L.A. L. REV. 1291 (1993).

² 18 U.S.C. § 1385 (1997).

³ "[O]ur Founding Fathers intended this separation of the civilians and the military. They did not want the military dominant, as it was in Europe and so the separation, the civilian control of the military became one of our tenets in the United States. And the Posse Comitatus Act is really a logical follow on to that." *Activities of Federal Law Enforcement Agencies Toward the Branch Davidians: Joint Hearings Before the Subcomm. on Crime of the Comm. on the Judiciary and the Subcomm. on National Security, International Affairs, and Criminal Justice of the Comm. on Government Reform and Oversight*, 104th Cong., 1st Sess., part 1, at 366 (1995) [hereinafter *Joint Hearings*] (testimony of Brig. Gen. Michael Huffman).

⁴ *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

⁵ If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force. If it cannot avail itself of the former, it will be obliged to recur to the latter. To render an army unnecessary will be a more certain method of preventing its existence than a thousand prohibitions upon paper. THE FEDERALIST No. 29 (Alexander Hamilton).

In *Laird v. Tatum*, Chief Justice Warren Burger referred to:

[A] traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.⁶

As another court put it:

Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces.⁷ (pg.622)

Use of the military in domestic law enforcement has repeatedly led to disaster. In 1899, the army was used to break up a miners' strike at Couer d'Alene, Idaho. Military forces arrested all adult males in the area, imprisoned men for weeks or months without charges, and kept the area under martial law for two years.⁸ During and after World War I, the army broke peaceful labor strikes, spied on union organizers and peaceful critics of the war, and responded to race riots by rounding up black "Bolshevik agitators."⁹ Historian Jerry M. Cooper observes that the army's efforts "substantially slowed unionization for a decade."¹⁰ One of the most egregious abuses of executive power in American history—President Truman's illegal seizure of the steel mills—was carried out by the military, which obeyed a plainly unconstitutional order.¹¹ During the Vietnam War, military

⁶ 408 U.S. 1, 15(1972). The case grew out of the U.S. Army's program of spying on anti-Vietnam War political activists in the United States. *Id.* at 2. A five-to-four majority of the Court refused to allow lower federal courts to hear the plaintiffs' complaints that the surveillance program violated their First Amendment rights. *Id.* at 1. The Court majority held that use of the military within the United States against American citizens was "nonjusticiable" and within the sole discretion of the Executive branch. *Id.* at 15. The four dissenters argued that the majority holding is an abdication of judicial responsibility to enforce the Constitution. *Id.* at 20, 28 (Douglas, J., dissenting).

⁷ *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985), *aff'd on reh'g*, 788 F.2d 812 (8th Cir. 1986), *aff'd*, 485 U.S. 264 (1988).

⁸ Jerry M. Cooper, *Federal Military Intervention in Domestic Disorders*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989*, at 123, 135 (in Richard H. Kohn ed., 1991).

⁹ *Id.* at 136-37.

¹⁰ *Id.* at 137.

¹¹ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952):

Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's

intelligence was again deployed against domestic dissidents. "Military investigation of civilian protest activity was precisely the kind of abuse of standing armies that eighteenth-century antimilitarists had feared."¹² The 1970 killings of student protesters at Kent State University were, of course, carried out by a National Guard unit.

One of the reasons for the disastrous February 28, 1993, BATF raid on the Branch Davidians and April 19, 1993, FBI tank attack on the same group was that they were both run as military exercises, planned and executed with the advice of the U.S. Department of Defense. As Rep. John Conyers later pointed out, "The root cause of this problem was that it was considered a military operation, and it wasn't."¹³ Attorney General Janet Reno, on the other hand, discussed the incident, and the President's involvement, as similar to her acting as a general during World War II, with the President not expected to exercise constant oversight.¹⁴ (pg.623) She acknowledged that the April 19 implementation of the "Plan B" tank and chemical warfare assault on the Branch Davidians meant that "in effect [the U.S. Army] Delta Force's recommendation was carried out."¹⁵

As evinced at Waco, there are several loopholes in the Posse Comitatus Act. For one, the prohibition on the use of military personnel and equipment does not mean personnel cannot be used to assist law enforcement, only that they can not be used directly.¹⁶ Thus, throughout the Waco standoff, military personnel had express legal authority¹⁷ to train FBI and other law enforcement officials to use military vehicles.¹⁸ In addition, the proscription on use of the military is limited to

lawmakers, not for its military authorities.

Id. at 587. "[O]ur history and tradition rebel at the thought that the grant of military power carries with it authority over civilian affairs." *id.* at 632 (Douglas, J., concurring).

¹² Cooper, *supra* note 8, at 141.

¹³ *Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas: Hearing Before the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 25 (1993) [hereinafter *Hearing*].

¹⁴ *Id.* at 40.

¹⁵ *Id.* at 65.

¹⁶ See 10 U.S.C. § 375 (1997), which provides:

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

Id.

¹⁷ See 10 U.S.C. § 373 (1997), which provides:

The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available (1) to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment, including equipment made available under section 372 of this title; and (2) to provide such law enforcement officials with expert advice relevant to the purposes of this chapter.

Id.

¹⁸ In the course of the siege, an FBI negotiator denied to Davidian Steve Schneider that the military was involved, but acknowledged that the military had trained FBI agents to drive tanks. Schneider indicated that he thought that was an erosion of the Constitution. Transcripts of BATF Tapes of the Negotiations between Federal Law Enforcement and the Branch Davidians, Feb.

personnel; military equipment can be used,¹⁹ although the usual procedure is to remove or cover military markings. The civilian agency must pay the military for use of the equipment.²⁰

III. THE DRUG WAR LOOPHOLE

The exceptions mentioned above are minor in comparison to the largest loophole in the Posse Comitatus Act: the "drug law" exception. Normally, the (pg.624) obligation to reimburse the military for the loan of equipment is a powerful incentive not to use military equipment in domestic law enforcement. A police chief will be hesitant to borrow military helicopters if his department will have to pay for them. However, when drug laws are involved, the military assistance is free and greater use of military personnel is allowed.²¹ As if to make the "drug war" a literal war, the U.S. military has created special Joint Task Forces (JTF) whose primary mission is to assist civilian drug law enforcement agencies.²² Some JTF leaders foresee that not-far-distant day when restrictions against use of the military in domestic law enforcement will be abolished completely.²³

A. *The Drug Claims as a Pretext for Federal Intervention at Waco*

As part of the planning for the Waco raid, BATF went to the Joint Task Force Six (JTF-6), which covers Texas, and asked for training, medical, communications, and other support. The JTF-6 staff explained that they could only be involved if the case were a drug case.²⁴ If the case were not a drug case, BATF could obtain assistance from other parts of the military, but would have to pay for it.(pg.625)

28-Apr. 19, 1993 [hereinafter Negot. Tapes], no. 103, at 41-42 (Mar. 10, 1993).

¹⁹ See 10 U.S.C. § 372 (1997).

²⁰ See 10 U.S.C. § 377 (1997).

²¹ See 10 U.S.C. § 374 (1997).

²² It is not entirely clear that BATF has the authority to request military assistance under the drug-law exception to the Posse Comitatus Act. The exception requires a "request from the head of a Federal law enforcement agency," defined as "an agency with jurisdiction to enforce" a variety of federal laws, none of which falls within the generally recognized jurisdiction of BATF. 10 U.S.C. § 374(b)(1) & (b)(4)(A) (1997).

The House joint committees investigating Waco, though, believed that BATF is authorized as a DLEA ("drug law enforcement agency") by virtue of its investigations of "narcotics traffickers who use firearms and explosives as tools of their trade, especially violent gangs." *Investigation Into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians Before the House Comm. on Gov't Reform and Oversight in Conjunction with the Comm. on the Judiciary*, 104th Cong., 2d., Sess., 35 n.177 (1996) [hereinafter *Committee Report*].

²³ See, e.g., Jim McGee, *Military Seeks Balance in Delicate Mission*, WASH. POST, Nov. 29, 1996 (detailing the expansion of military involvement in the "drug war" and the desires of some political leaders to expand the military's role in such missions).

²⁴ *Joint Hearings*, supra note 3, part 1, at 400. Maj. Gen. John M. Pickler: "If it were not for some kind of drug connection, we would not have been participants..." *Id.* Rep. Bill McCollum: "But this particular unit was not, under the rules of the Army or DOD [Department of Defense], permitted to give training to anybody that did not have a drug support connection like this; is that right?...If it had not been for the drug support, your particular unit would not have been permitted to train them?" *Id.* Gen. Pickler: "That is correct, sir." *Id.* Witnesses representing the Defense Department who emphasized in testimony that no active-duty military personnel were present or participants in the BATF raid on February 28, 1993 included. Asst. Defense Sec. H. Allen Holmes, Gens. John M. Pickler and Walter B. Huffman, Lt. Col. Philip Lindley, Maj. Mark Petree, Sgt. Steve Fitts, Sgt. Robert W. Moreland, and Chris Grain, U.S. Army Special Operations Command (Fort Bragg, N.C.). *Id.* at 345-410.

Immediately thereafter, BATF asserted that the Waco case was a drug investigation; Branch Davidian prophet David Koresh was supposedly running a methamphetamine laboratory.²⁵ The military should have known that the drug claim was merely a guise; BATF came up with the allegation only after being told of the benefits of such an allegation. In addition, the military prepared a memorandum for BATF on methamphetamine labs, and the precautions essential for dealing with such a lab.²⁶ However, when the paper was presented to BATF agents, they openly ignored the information in front of the soldiers who prepared it.²⁷ Further, agents from the civilian Drug Enforcement Agency (DEA) who were assisting BATF also expressed no concerns about how BATF was addressing the risks of a meth lab in its operational planning, which similarly should have indicated to the military that the allegation was a mere pretext.²⁸

With this knowledge, JTF-6 signed onto the mission of "training a National Level Response Team [BATF strike-force] for Counter Drug operations," in "Support of BATF Takedown of Meth Lab."²⁹ According to documents received from the U.S. Special Operations Command under Freedom of Information Act requests, the Joint Training operation (JT002-93) was approved due to a request from BATF dated February 2, 1993, requesting U.S. and Texas National Guard assistance in serving a federal search warrant "to a dangerous extremist organization believed to be producing methamphetamine."³⁰ The Army assistance at Waco would supposedly be "in direct support of interdiction activities along the southwest border."³¹ (Notwithstanding the fact that Waco is approximately 300 miles from the southwest border. Moreover, the original claim was that Koresh was manufacturing methamphetamine, not that he was importing it from Mexico.)^(pg.626)

Had BATF actually been planning to take down a methamphetamine lab, its plans would have been far different. Testimony at the 1995 congressional hearings indicated the potential dangers of an explosion if a meth lab is not taken down properly. For instance, because a stray bullet could cause a major explosion, a "dynamic entry" (a violent break-in, the BATF's method of "serving" the Waco search warrant) would be an extremely risky, disfavored approach.³² In addition, the chemicals

²⁵ U.S. DEPT. OF THE TREASURY, BUREAU OF ALCOHOL, TABACCO, AND FIREARMS INVESTIGATION OF VERNON WAYNE HOWELL ALSO KNOWN AS DAVID KORESH 212 (1993) [hereinafter TREASURY REPORT].

²⁶ See *Committee Report*, *supra* note 22, at 41.

²⁷ *Id.*

²⁸ *Id.* at 41-42.

²⁹ FRAGO "E" OORDER, Feb. 14, 1993; Memorandum for Record by Lt. Col. Douglas C. Andrews, Deputy Staff Judge Advocate, (no date, most of text redacted, on file with the *Akron Law Review*). At the raid itself, in addition to BATF personnel, there were representatives from the Immigration and Naturalization Service, and one agent from the Drug Enforcement Administration. *Hearing*, *supra* note 13, at 164.

³⁰ Maj. Gen. John M. Pickler testified that the request for military assistance came from both the Houston office and the Washington headquarters of BATF. *Joint Hearings*, *supra* note 3, part 1, at 360.

³¹ The briefing of the Texas National Guard was to William R. Enney, Interagency Coordinator, Counterdrug Support. *Hearing*, *supra* note 13, at 164.

³² See *Joint Hearings*, *supra* note 3, at 400. Rep. John Shadegg (R-Ariz.):

Did the ATF ever, to your knowledge, express any concern about the dangers that were presented by a methamphetamine lab?

Sgt. Fitts: Not to my knowledge, no, sir.

Rep. Shadegg: ...and the dangers that were exposed as a result of a lab being there?

Sgt. Fitts: No, sir. Nothing in the misconduct would indicate that.

involved in methamphetamine production are toxic, capable of injuring lungs, skin, liver, kidneys, the central nervous system, and potentially causing genetic damage.

DEA protocol for seizure of meth labs requires that agents wear special clothing and bring other specialized equipment. BATF not only made no such plans, but made express advance plans to use flashbang grenades—grenades which could set off a massive explosion in a real meth lab.³³ When requesting flashbangs for use in the raid, BATF omitted mention of any possible presence of a meth lab. Had BATF really thought there were a drug lab at Mount Carmel, BATF should have taken advantage of the DEA offer of assistance by a DEA (pg.627) Clandestine Certified Laboratory Team. But the offer was rejected.³⁴

When JTF-6 was not looking, BATF did not even bother to pretend that drugs were involved. Notably, the initial warrant application included nothing regarding drug law violations—even though the presence of a drug lab would have given BATF clear legal authority to search for the presence of any type of firearm (not just machine guns and explosives, which were the target of the search warrant), and even though the warrant affidavit threw in all sorts of other unsubstantiated allegations about Koresh.³⁵ After the February 28, 1993, BATF raid was repulsed, BATF sought and obtained a second warrant expanding the authorized scope of the search of Mount Carmel. Even the second warrant application did not include allegations of illegal drug activity.

Yet even after the botched raid, BATF still tried to use the drug claim to receive free military support. Richard L. Garner, Chief, BATF Special Operations Division, wrote to the Pentagon on February 28, 1993, asking for additional assistance related to "an on-going investigation in Waco, Texas involving apparent drug and firearms violations."³⁶ Although BATF maintained the pretense

Rep. Ed Bryant (R-Tenn.): ...I understand you were assigned to draft a plan under the contingency that ...there was a methamphetamine lab in there and what should occur in case there was an accident.

Sgt. Fitts: My planning for the ATF did not include a methamphetamine lab.

Rep. Bryant: ...there is a higher risk of danger, is there not, to ...using a dynamic entry into a facility that has a methamphetamine laboratory in it?

Sgt. Fritts: Yes, sir.

Rep. Bryant: And the risks...if there were a bullet shot into it...cause of it to explode, it could be a danger especially to children, to older people, to people around it?

Sgt. Fitts: I think there would be a danger to all people, regardless of age.

Id. Similar testimony was provided by John Coonce of the Drug Enforcement Agency. *Id.* at 311-12. BATF's response was, "[W]e 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...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." *Id.* at 447 (testimony of Phillip Chojnacki, the supervisor of the assault on Mount Carmel Center). Such an invitation to the DEA would have followed the arrest expected to involve a shootout.

³³ *Committee Report, supra* note 22, at 44.

³⁴ *Id.* at 45.

³⁵ Even if the drug allegations had been sincere, they would have provided no justification for conducting a "no-knock" raid to prevent the destruction of evidence. It is rather difficult to flush a methamphetamine lab down the toilet, and the Branch Davidians did not have flush toilets. See David G. Bromley and Edward D. Silver, *The Davidian Tradition: From Patronal Clan to Prophetic Movement*, in *ARMAGEDDON IN WACO: CRITICAL PERSPECTIVES ON THE BRANCH DAVIDIAN CONFLICT* 43, 55 (Stuart A. Wright ed., 1995).

³⁶ Letter from Richard L. Garner, Chief, Special Operations Division, BATF, to Headquarters, Department of the Army (Feb. 28, 1993) (on file with the *Akron Law Review*).

into late March, the Army was slowly recognizing the obvious. As of late March,³⁷ the Army had come to believe that its assistance to BATF and the FBI would be reimbursed³⁸ as is required when there is no drug nexus. By May 15, 1993, the military suspected the possibility that "drug-connection was overstated to secure cost-free SOF training and assistance. No mention of drugs in public media."³⁹ (pg.628)

The drug enforcement exception to the Posse Comitatus Act has been very effective at undermining the honesty of law enforcement personnel, who are encouraged to allege a drug nexus in many investigations for the purpose of getting, gratis, federal military assistance.⁴⁰ The U.S. Marshals Service claimed a possible drug problem involved with the Randy Weaver family at Ruby Ridge, Idaho in order to get military reconnaissance flights over the cabin, which revealed no evidence of drugs.⁴¹

According to an anonymous JTF-6 employee, JTF is often aware that civilian agencies are fabricating a pretext for military involvement, but, "the JTF doesn't even care, because there is little or no oversight involved. There's no independent authority looking over anyone's shoulder."⁴²

What was the basis for the claim that David Koresh was running a drug lab? First, one person associated with the Branch Davidians had been convicted of using drugs, and was paroled to McLennan County (Waco), Texas.⁴³ Second, ten Branch Davidians had been arrested or investigated for some "drug activity" at some time in their lives, apparently with no convictions.⁴⁴

³⁷ James L. Pate, *Waco's Defective Warrants: No Probable Cause For Raid on Ranch Apocalypse*, SOLDIER OF FORTUNE, Aug. 1993, at 46, 48. Pate's Waco series was given the Mencken Award by the Free Press Association "in recognition of his investigative articles about the Waco massacre for *Soldier of Fortune*." The Award is established for "outstanding journalism in support of liberty as chosen by their professional peers."

³⁸ *Approval of Request for Helicopter Support to the FBI and Bradley Fighting Vehicle Support to the Bureau of Alcohol, Tobacco, and Firearms (BATF)* by Lt. Col. Paul G. Marksteiner, (Feb. 28, 1993); Memorandum for Record, for the Acting Assistant Secretary of the Army Michael W. Owen by Major Alexander S. Wells (March 25, 1993) (on file with the *Akron Law Review*).

³⁹ From the mass of documents the Treasury Department eventually provided to the subcommittees investigating Waco, Rep. John Shadegg read into the record from an unsourced document with a stamp marked "A00010228": "The use of the National Guard was a scam...this was a scam initiated by Bureau [BATF] headquarters...in my opinion, to obtain the additional resources of the National Guard, air support assistance, etc." *Joint Hearings, supra* note 3, part 1, at 379.

⁴⁰ Most of the military assistance—including training, equipment, and expert advice—can be provided as long as there is reimbursement. But "the military is not to be involved in arrest, search or seizure or similar activities such as stop and frisk." *Id.* at 352 (testimony of Gen. Walter Huffman). Further, there are certain units in the military, including JTF-6, which are geared toward drug-law enforcement and which would not get involved in assisting general law enforcement even with reimbursement. *Id.* at 400 (testimony of Gen. Pickler).

⁴¹ *Hearing of the Senate Judiciary Comm., Terrorism, Technology, and Gov't Inf. Subcomm., Federal Raid in Ruby Ridge, Idaho*, 104th Cong. 1st Sess. 54 (1995); Interview of Herb Byerly, Special Agent, Bureau of Alcohol, Tabacco and Firearms, Feb. 20, 1991 (transcript on file with the *Akron Law Review*).

⁴² James L. Pate, *No Peace Without Justice*, SOLDIER OF FORTUNE, May 1995, at 58, 81.

⁴³ Application and Affidavit for Search and Arrest Warrants for Vernon Wayne Howell and the Residence of Vernon Wayne Howell, and others *7 (Waco, Tex., Feb. 25, 1993) (filed by BATF agent, Davy Aguilera), *available at* <<http://www.shadeslanding.com/firearms/read6.html>>.

⁴⁴ TREASURY REPORT, *supra* note 25, at 212.

In the mid-1980s, after the death of Branch Davidian prophet Lois Roden, there had been a schism in the Branch Davidians between the followers of George Roden (Lois Roden's son) and the followers of David Koresh (who thought him Lois Roden's proper successor). George Roden took over the Branch Davidian's "Mount Carmel Center" at Waco, and drove Koresh's followers away at gunpoint. Roden, currently confined in an institution for the criminally insane, did in fact (pg.629) set up a meth lab. But in March 1988, when Roden was sent to jail on unrelated charges and Koresh's group took back the Mount Carmel Center, they found the meth lab, and promptly reported it to the sheriff.⁴⁵

The fall 1993 Treasury Department report on the BATF raid on the Branch Davidians insisted that the investigation of alleged drug use was valid.⁴⁶ Treasury reasoned that the sheriff's office had planned to collect the lab equipment but found no record it had done so, "raising the possibility that the illegal equipment might still have been at the Compound."⁴⁷ The Treasury Report ignores the fact that Marc Breault (a disaffected ex-Davidian), the source for BATF's information that there had once been a meth lab at Mount Carmel, simultaneously told BATF agent Davy Aguilera that the building in which the meth lab was housed had burned down in Spring 1990.⁴⁸ Koresh was thoroughly anti-drug, and it is improbable that he would have started operating a methamphetamine lab after telling the sheriff about its presence.

The limit of the Treasury criticism was that there should be clearer standards about what constitutes a drug nexus, and that BATF probably should have told the Texas National Guard (which can only be used when there is a drug nexus) more than a day in advance that their pilots might be shot at.⁴⁹ Treasury noted, accurately, that BATF could have had just as much military assistance without any alleged drug nexus had it been willing to reimburse the Defense Department although the assistance could not have come from JTF-6, and the Texas National Guard could not have been used.

B. *Military Support for BATF*

What kind of military support did BATF receive? Throughout February 1993, BATF agents learned at Fort Hood how to carry on a surprise military raid against the Mount Carmel Center.⁵⁰ The training was conducted by Army Special (pg.630) Forces (Green Berets) from Fort Bragg, North Carolina. The Green Berets also allegedly wrote a specific assault plan for BATF to use at Mount

⁴⁵ DICK REAVIS, *THE ASHES OF WACO: AN INVESTIGATION* 82 (1995). Branch Davidian David Thibodeau stated: "There was absolutely no drugs at Mount Carmel, period, other than alcohol...." *Joint Hearings*, *supra* note 3, part 1, at 125.

⁴⁶ TREASURY REPORT, *supra* note 25, at 16, 212.

⁴⁷ *Id.* at 212. Social worker Joyce Sparks, no fan of Koresh's, had told the BATF investigators: "David Koresh explained to me that the previous prophet had been involved in drugs, had a lab there, and [Koresh] said he had given that material—the needles and the drugs book explaining how to make drugs—he'd given that all to the sheriff's department in McLennan County." *Joint Hearings*, *supra* note 3, part 1, at 611 (responding to a question by Rep. Steve Chabot). *See also Committee Report*, *supra* note 22, at 46

⁴⁸ *Committee Report*, *supra* note 22, at 46.

⁴⁹ TREASURY REPORT, *supra* note 25, at 213 n.74, 214.

⁵⁰ Lee Hancock, *ATF Official Defends Raid Planning*, *DAL. MORN. NEWS*, Mar. 27, 1993 at A25.

Carmel, and four Green Berets were allegedly present at Mount Carmel as observers on the day of the raid.⁵¹

To carry out the raid, BATF had procured helicopters from the Texas National Guard.⁵² Unlike federal law, which allows some reimbursed use of the military even when drugs are not involved, Texas law only allows the use of its National Guard helicopters for law enforcement when there is a drug nexus.⁵³

BATF also made use of the Alabama National Guard for aerial photography. The use was authorized by a "memorandum of agreement" between the Adjutant Generals of the Texas and Alabama National Guards.⁵⁴ Even if the drug nexus had been real, there are a number of problems with employing the Alabama National Guard in Texas. Texas law expressly requires the governor's approval for the entry of a military force that, like the Alabama National Guard, is not part of the U.S. armed forces.⁵⁵ But Texas Governor Ann Richards never knew about the use of the Alabama or Texas National Guards until after the raid.⁵⁶ Alabama law limits the operation of the Alabama National Guard to the state boundaries of Alabama.⁵⁷ Thus, the deployment of the Alabama National Guard in Texas was a flagrant breach of the laws of Alabama and Texas.

In addition, the "memorandum of agreement" providing for use the Alabama National Guard in Texas violated the United States Constitution. Agreements between two or more states require congressional consent, and Congress had not consented to the Alabama/Texas "agreement."⁵⁸ In other words, (pg.631) the Adjutant Generals of the National Guards of Alabama and Texas executed a "memorandum of agreement" which purported to authorize cross-border use of the Alabama

⁵¹ James L. Pate, *Special Forces Involved in Waco Raid!*, SOLDIER OF FORTUNE, May 1994, at 34-35; Pate, *No Peace*, *supra* note 42, at 58-61. For the government's version of the training, see TREASURY REPORT, *supra* note 25, at 73, 78, & App. B-56.

⁵² The Texas Army National Guard helicopters were two OH-58 Kiowas and a UH-60A Black Hawk. James L. Pate, *ATF's Bloody Sunday*, SOLDIER OF FORTUNE, June 1993, at 52.

⁵³ *Committee Report*, *supra* note 22, at 39.

⁵⁴ *Id.* at 34.

⁵⁵ *Id.* The National Guard is a complex entity which most of the time is under state control, and in that capacity would be known as the "Alabama National Guard." The President has the option of calling the National Guard into federal service, at which point the entity becomes known as the "National Guard of the United States." Most National Guard troops are dually-enlisted in the state and federal Guards, and take separate oaths of loyalty to each. (A few high-ranking officers may serve only in a State Guard, and are not subject to induction into federal service.) The Alabama National Guard, not in federal service, was covered by the Texas law requiring the Texas Governor's permission to enter Texas.

⁵⁶ *Committee Report*, *supra* note 22, at 34.

⁵⁷ *Id.* (citing Ala. Code § 3 1-2-7 (1995)).

⁵⁸ "No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State...." U.S. CONST., art. I, § 10, cl. 3; *Committee Report*, *supra* note 22, at 34-35. The general rule of interpretation for this clause of the Constitution, as stated in *Virginia v. Tennessee*, 148 U.S. 503 (1893), and *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), is that Congressional consent is required for agreements which increase the political power of the states to the possible detriment of federal powers. See *Committee Report*, *supra* note 22 n. 166, 169. Since the Alabama Governor has no legal authority to command the Alabama National Guard beyond the boundaries of Alabama (Ala. Code § 3 1-2-7 (1995)), and since the Governor of Texas was not even aware of the Alabama Guard's presence in her state, the Alabama Guard was under the practical command of neither Governor, and was thus, in essence, a rogue military force, answerable only to itself. The existence of such a force poses an obvious danger to federal supremacy, and hence would likely be unconstitutional under the principles of *Virginia* and *United States Steel*.

National Guard, even though the "agreement" as implemented was in defiance of the law of Alabama, the law of Texas, and the Constitution of the United States. It is precisely such military usurpation of civil authority—the destruction of the rule of civil law—which is the ultimate, and real danger posed by use of the military in law enforcement.

Shortly after the raid, Governor Richards blasted the BATF for having lied to obtain the Texas helicopters.⁵⁹ BATF then claimed that a British surveillance airplane, recently brought onto the Waco scene, had found new thermal evidence of the methamphetamine lab.⁶⁰ Later, a law enforcement expert from the federal government's Sandia National Laboratories would describe evidence of a methamphetamine lab as based on "an overflight using some very unsophisticated, forward-looking infrared devices" and detecting "the so-called hot spot on the compound."⁶¹ That hot spot could have come from any number of heat sources," but the government chose it to be indicative of a meth lab.⁶² (At Ruby Ridge, the thermal "hot spot" which was asserted to be the site of Randy Weaver's drug lab was actually a dog house.) An anonymous BATF source told a reporter that the new drug allegation "was made up ... out of whole cloth ... a complete fabrication" to avoid further criticism from Governor Richards.⁶³

C. *Helicopters, Machine Pistols, and other Weapons*

1. Helicopters

While the National Guard helicopters were not armed, at least some of ^(pg.632) the BATF agents on board the helicopters were carrying MP-5 machine pistols, contrary to assertions by some government officials.⁶⁴ Significant evidence suggests that the BATF agents in the helicopters strafed the roof of the building. For example, Dr. Bruce Perry examined the Branch Davidian children who left the compound in the weeks following the BATF raid. One child drew a picture of a house beneath a rainbow. Perry asked, "Is there anything else?" and the child then drew bullet holes in the roof.⁶⁵ Newsweek magazine reprinted the Davidian girl's picture of her home with a dotted roof. "Bullets" the girl explained.⁶⁶

⁵⁹ DAVID B. KOPEL & PAUL H. BLACKMAN, *NO MORE WACOS: WHAT'S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT* 89 (1997).

⁶⁰ *Id.*

⁶¹ See *Joint Hearings*, *supra* note 3, part 1, at 308-309 (testimony of Wade Ishimoto).

⁶² *Id.*

⁶³ James L. Pate, *Gun Gestapo's Day of Infamy*, *SOLDIER OF FORTUNE*, June 1993, at 48, 50.

⁶⁴ *Joint Hearings*, *supra* note 3, part 1, at 383 (statement of Rep. Steve Chabot). During the siege, a heated discussion between BATF negotiator Jim Cavanaugh and Koresh regarding guns on the helicopters ended with their calmly agreeing that there were no guns mounted on the helicopters but that agents on the 'copters had guns. *Negot. Tapes*, *supra* note 18, no. 42, at 29-31 (Mar. 4, 1993).

⁶⁵ Sue Anne Pressley, *Waco Cult's Children Describe Beatings, Lectures, War Games*, *WASH. POST*, May 5, 1993, at A1, A17.

⁶⁶ Melinda Beck, *Someone Dropped the Ball*, *NEWSWEEK*, May 17, 1993, at 51. See also Lynne Lamberg, *Children and Families Need Help After Disasters*, 275 *JAMA* 1714-1715 (June 12, 1996).

Catherine Matteson, a seventy-two-year-old Branch Davidian woman not accused of any crimes, was interviewed by the Las Vegas Review-Journal. She clearly recalled seeing helicopters firing through the roof and walls of the residence, stating "I saw the yellow flashes."⁶⁷ When machine guns fire, there is a yellow flash of muzzle blast, visible even in daylight. During the negotiations, Koresh and his chief aide, Steve Schneider, insisted that there were at least five witnesses who saw three helicopters come over and start shooting into Koresh's room, destroying his television set.⁶⁸

Schneider's attorney, Jack Zimmermann, who went into the Branch Davidian house during the siege, later testified that he saw many bullet holes in the ceilings with a downward trajectory, indicating that the helicopters had been firing into the compound from above.⁶⁹ There is no nearby high ground from which BATF agents not in helicopters could have shot bullets into the building (pg.633) with a steep downward trajectory.

The BATF stated the helicopters were simply used as a "diversionary device" during the raid, to draw attention to the back of the building, while the BATF ground forces entered the front; no shots came from the helicopters.⁷⁰ BATF agent Davy Aguilera, who was in one of the helicopters, testified to Congress that the agents in the helicopters were armed, and had been told that they were allowed to fire in self-defense.⁷¹ Aguilera maintained that no shots were fired from the helicopters.

At least during wartime, there are sound tactical reasons for beginning an assault on a building by strafing the second story roof. The bullets coming through the ceiling will force people on the second floor to retreat to the first floor. It will therefore be easier for assault personnel to enter the second story (a key element of the BATF raid was getting an entry team into the "gun room" on the second story, where the Branch Davidian rifles and ammunition were kept). In addition, riflemen defending the building against ground attack will be deprived of the advantage of an elevated firing position. Also, strafing the second-floor gun storage room would prevent the Davidians from retrieving their weapons prior to the imminent arrival of BATF land forces.

⁶⁷ Vin Suprynowicz, *Speaking the Unpalatable Truth*, THE LIBERTARIAN, Sep. 15, 1996, available at <<http://www.nguworld.com/vindex/>> (visited May 12, 1997).

⁶⁸ Negot. Tapes, *supra* note 18, no. 50, at 16 (Mar. 4-5, 1993); no. 109, at 20 (Mar. 10-11, 1993). Some of the guns were at a gun show with Davidian financier and gun-show regular, Paul Fatta. He missed the shootout, made no effort to break in, and was arrested long after the battle, peacefully, and tried and convicted on gun-law violations. REAVIS, *supra* note 45, at 37-38, 152-53, 291-92; Michael deCourcy Hinds, *A Believer, Says Cult in Texas is Peaceful Despite Shootout*, N.Y. TIMES, Mar. 6, 1993, at 1, 8.

⁶⁹ *Joint Hearings*, *supra* note 3, part 2, at 25. Dick DeGuerin, Koresh's attorney, went inside the compound during the siege, to try to convince Koresh to surrender. *Id.* DeGuerin said that he saw "bullet holes in the ceiling of the highest room in the compound.... The only way those bullets could have been made was from someone standing on the roof shooting down, or someone shooting from the helicopters." *Id.* at 25, 37. DeGuerin and Jack Zimmermann (Steve Schneider's attorney, who went into the compound with DeGuerin) said they saw bullet holes in Koresh's bedroom, in addition to bullet holes in the gun room. *Id.* at 105, 138. The bullet holes in the gun room, unlike those in the bedroom, could have come from agents who climbed onto the roof and who participated in the firefight at the gun room. *Id.*

The Texas Rangers, who investigated the February 28 gun battle, testified that they found no evidence of shooting from helicopters, although the Rangers were unable to offer an alternative explanation for how the bullet holes described by DeGuerin could have been created. *Id.* at 197-98.

⁷⁰ *Defense Rests without Calling Cultists*, N.Y. TIMES, Feb. 18, 1994, at A20.

⁷¹ *Joint Hearings*, *supra* note 3, at 270.

But strafing a building is not a particularly effective way to rescue children who are thought to be in danger. The second story of the Mount Carmel Center was known to be the living quarters for the women and children, and for Koresh; other men were not allowed up there.⁷²

Strafing the roof, if it happened, might well be considered grotesquely excessive use of force for serving a search warrant. The persons who did the strafing (pg.634) might be considered guilty of reckless endangerment or homicide. If the Davidians fired first at the helicopters, then return fire at particular targets would be lawful, but not random firing through a roof.⁷³

Whether lawful or not, the federal government's alleged machine-gunning a roof that covered dozens of women and children would probably have been ill-received by the press and public. If there were hundreds of bullet holes in the roof, there would have been a motive for the federal government to destroy the evidence by having the building burned down, as Steve Schneider noted in the course of the subsequent negotiations.⁷⁴

2. Armor-piercing Ammunition

If BATF forces on the ground were using the armor-piercing 9mm Cyclone ammunition (as some sources claim)⁷⁵, such action was in disregard for the safety of noncombatants. BATF knew, or should have known, that the armor-piercing ammunition it was using could easily penetrate the thin walls of the compound at Mount Carmel Center, endangering the children whom the BATF claimed to be protecting from abuse.⁷⁶

BATF's perception was very different, that the agents were expressly armed mostly with 9-mm machine pistols. "We knew there was a lot of children in there. And we knew there were a lot of women and innocents in there.... And with all these innocents in there, our teams ... took mostly 9-mm firearms that they knew would not penetrate those walls, they knew would not go through and hit innocent children. And, so, in essence, the beating we took was because we were trying not to have firearms that would go through the walls."⁷⁷ Actually, (pg.635) 9-mm rounds can penetrate thin walls like those at the Mount Carmel residence.

⁷² In the course of the negotiations, when the FBI suggested sending in a videotape showing the children who had left the residence, Koresh and his followers remarked that helicopter fire through the ceiling had damaged his television, and the Davidians would have to check to see if they had working TVs to use with their VCRs. Negot. Tapes, *supra* note 18, no. 50, at 16, 17, 22 (Mar. 4-5, 1993).

⁷³ Branch Davidian rifle shots did hit at least one of the helicopters, forcing it to make an emergency landing.

⁷⁴ Negot. Tapes, *supra* note 18, no. 122, at 18 (Mar. 13, 1993).

⁷⁵ Pate, *Day of Infamy*, *supra* note 63, at 62. The Treasury Report does not address the issue of Cyclone ammunition. See TREASURY REPORT, *supra* note 25.

⁷⁶ *Joint Hearings*, *supra* note 3, part 1, at 91 (testimony of Stuart Wright). The Treasury Report states that the Davidians killed by BATF agents were struck with 9mm HydraShok rounds, not the Cyclone. TREASURY REPORT, *supra* note 25, at 104.

The Cyclone, as armor-piercing handgun ammunition, is banned from sale to civilians. 18 U.S.C. § 922(a)(8)&(9) (1994). Perhaps it is worth considering whether sale of such deadly ammunition to the government should also be prohibited.

⁷⁷ *Joint Hearings*, *supra* note 3, part 2, at 329 (testimony of BATF Agent James Cavanaugh). BATF Deputy Director for Enforcement, Dan Hartnett, confirmed that he curtailed AR-15 use because of the rifle bullets' ability to penetrate, but some AR-15s were used since they were requested, and the assault was to occur in a non-urban setting. *Id.* part 1, at 266.

3. Machine Pistols

More fundamentally, BATF's claim that it went into the Mount Carmel Center underarmed is ludicrous. Ten agents were carrying AR-15 semiautomatic rifles.⁷⁸ This rifle, whose rounds can certainly penetrate walls, has been described by the BATF itself as an extremely powerful "assault weapon" primarily useful for mass murder.⁷⁹

The majority of agents, though, were armed with Heckler & Koch MP-5 machine pistols.⁸⁰ These weapons are sold almost exclusively to the military and police. The advertising to civilian law enforcement conveys the message that by owning the weapon, the civilian officer will be the equivalent of a member of an élite military strike force, such as the Navy SEALs. The ad copy links civilian law enforcement to military combat, with lines like "From the Gulf War to the Drug War." As one criminologist notes, "The MP5 series is the pride and the staple of police tactical operations units, and it holds a central place in the paramilitary police subculture. Its imposing, futuristic style overshadows its utility as a superior 'urban warfare' weapon."⁸¹

Functionally, the MP-5 is a perfectly fine weapon. But when law enforcement agencies are procuring weapons, they need to consider not only their mechanical characteristics, but also how officers in the field will use them. When a weapon's advertising and styling deliberately blur the line between warfare and law enforcement, it is not unreasonable to expect that some officers—especially when under stress—will start behaving as if they were in the military. That is precisely what happened when the BATF agents began firing indiscriminately into (pg.636) the building.⁸²

No one will ever be certain whether more agents might have obeyed BATF training and the law—to fire only at visible targets who pose a threat—if the agents had been armed with other weapons. But it is hardly likely that Heckler & Koch's militaristic marketing of the MP-5 helped promote responsible law enforcement behavior at Waco. As the Waco disaster illustrates, there are profound dangers to allowing domestic law enforcement agencies to acquire weapons of war.

IV. THE WACO SIEGE AND THE HOSTAGE RESCUE TEAM

⁷⁸ An "AR-15" is an automatic rifle. Many persons informally use "AR-15" for semiautomatic rifles which have the same outward appearance—but not the same internal components—as the automatic AR-15. The BATF rifles were semiautomatics, but we follow BATF's usage in calling them "AR-15s," since we do not know exactly which model the BATF rifles were.

⁷⁹ We do not agree with this characterization of the semiautomatic rifle, or of any other so-called "assault weapons." The point is that BATF, while claiming to be only lightly armed, was using ten rifles described by BATF officials as extremely powerful mass murder weapons.

⁸⁰ A machine pistol is a machine gun that is also a pistol (as opposed to a rifle). Such weapons are also called submachine guns. The government sometimes defines things differently for government and private use. At the trial of the Davidians, agents frequently testified that the MP-5 was a semi-automatic firearm even though it can fire a two-round burst, which would make it a machinegun under federal law. *United States v. Brad Branch*, No. W-93-CR-046 (W.D.Tex., 1994), at 2025, 2030-33, 2589, 2815-16, and 3152-53.

⁸¹ Peter B. Kraska, *Enjoying Militarism: Political/Personal Dilemmas in Studying U.S. Police Paramilitary Units*, 13 JUSTICE Q. 403, 412 (Sept. 1996).

⁸² At the trial, Texas Rangers testified that they found forty used shell casings (in the same caliber as the BATF weapons) more than 300 yards from the house. *Much Evidence and Conflict in Branch Davidians' Trial*, N.Y. TIMES, Jan. 17, 1994, at A12. Agent Timothy Gaborie testified that he fired twenty-five to thirty shots in the direction of the house, without looking where he was shooting. *Lift for Defense in Cultists' Trial*, N.Y. TIMES, Jan. 30, 1994, at A28.

After the Branch Davidians repelled the BATF raid on February 28, 1993, the FBI was called into Waco to add professionalism to a law-enforcement disaster. While there were over 600 FBI employees at Waco, two groups were most important: the negotiators, and the hostage rescue team.⁸³

The negotiating team, with the support of FBI psychological and research staff, conducted telephone negotiations with the Branch Davidians.⁸⁴ The FBI Hostage Rescue Team (HRT) took control of the perimeter of the 77-acre Branch Davidian ranch. As it turned out, the militaristic Hostage Rescue Team repeatedly sabotaged the progress being made by the negotiators.

The Hostage Rescue Team was originally created to rescue Americans abroad who were being held hostage by terrorists. The HRT is trained by Delta Force, the U.S. Army's counter-terrorism squad. But the HRT has frequently been deployed not to rescue hostages in other countries, or even in the United States, but instead as some kind of special force to deal with particularly troublesome domestic criminals. This deployment—at Ruby Ridge, Waco, and elsewhere—has led to predictably disastrous consequences. A team trained to rescue hostages being held by foreign terrorists is an élite strike force. They must attack rapidly, neutralize the terrorists (i.e. kill them), and extricate the hostages. Rather than (pg.637) shooting only when clearly necessary to prevent harm to an innocent, a hostage rescue team must neutralize the terrorists at the first opportunity, before the terrorists have an opportunity to pose an imminent threat.

Persons trained for this specific, important mission, are highly unfit for domestic law enforcement tasks, in which the objective is to capture suspected criminals (not kill them), to minimize the use of force, and to act with a scrupulous regard for the United States Constitution.

Philip Heymann, who served as deputy attorney general in the first year of the Clinton administration, has suggested that the Hostage Rescue Team only be used for rescuing hostages. The problems caused by infrequent use of the HRT are far outweighed by use of the Hostage Rescue Team in non-hostage situations.⁸⁵ Professor Heymann's suggestion should be put into the United States Code.

At Waco, the Hostage Rescue Team had no hostages to rescue.⁸⁶ They defined themselves as being in a "Complex Hostage Rescue Barricade Situation." But to the extent there were hostages

⁸³ To be precise, there were 668 from the FBI, 136 from BATF, 6 from Customs, 15 from the Army, 131 from the Texas Department of Public Safety Patrol; 13 from the Texas National Guard, and 31 from Texas Rangers. CAROL MOORE, *THE DAVIDIAN MASSACRE* 223 (1995).

⁸⁴ See *Committee Report*, *supra* note 22, at 55-58; *Negot. Tapes*, *supra* note 18.

⁸⁵ Philip B. Heymann, *The Hostage Team is for Hostages*, WASH. POST, Oct. 20, 1995, at A19.

⁸⁶ The HRT's motto is "To save lives," but this would turn out to be a particularly cruel version of doublespeak. The hostage-holding Hostage Rescue Team was referred to by the FBI as the "tactical" component at Waco, with the other component being the negotiators. "Tactical" is the word currently used for paramilitary groups like the HRT or SWAT Teams. Members of these groups often belong to the National Tactical Officers Association. The primary meaning of "tactical" is "of or pertaining to military or naval tactics." 2 *NEW SHORTER OXFORD ENGLISH DICTIONARY*, 3201-02 (1993). Thus, "tactical" is a literally accurate, but lacks the frightening edge of words like "paramilitary" or "militaristic."

at Mount Carmel, the Branch Davidians were hostage in their own home because they were afraid of what the Hostage Rescue Team and the federal government would do to them and their children.⁸⁷

The Hostage Rescue Team's arrogance is a well-known problem in law enforcement. As Treasury Undersecretary for Law Enforcement Ron Noble observed, "when they come into an operation, they take over, and I've been with other law enforcement officers when it happens, and it is not something that makes law enforcement officers, who believe they're able, happy. That's just the way it is."⁸⁸ At Waco, the HRT rapidly established bad relations with the Texas Rangers.^(pg.638)

The HRT began with an anti-negotiation bias. Jeffrey Jamar, the Special Agent in Charge of the San Antonio FBI office, was commander of the entire operation at Waco, and of sorting out the conflicting views of the HRT and the FBI negotiation team. Jamar's immediate superior was Larry Potts, the Assistant Director of the Criminal Investigation Section.⁸⁹ Jamar personally had no training in negotiations; he "left that to the experts."⁹⁰ The advice of negotiators generally was ignored in favor the HRT's position to steadily increase pressure on the Branch Davidians. This proved to be a fatal error.⁹¹

One of the negotiators later noted that while sometimes negotiators and "tactical component" (the HRT or SWAT teams) agree about how to achieve success, in Waco:

there was a fundamental strategy disagreement and what was the best way to proceed?...the negotiation team wanted to have a lower-keyed approach. The team's approach was to apply pressure. Part of that...was driven by the fact that the tactical team, as Mr. Jamar indicated, was exposed to open fire. We were dealing with the most complex situation we have ever had in the United States, where there had already been a demonstrated willingness to use force.... So the need to provide them with adequate cover, to contain the situation, had an impact on conveying, perhaps, a message that Mr. Koresh did not want to hear.⁹²

⁸⁷ See Negot. Tapes, *supra* note 18; KOPEL & BLACKMAN, *supra* note 59, at 130.

⁸⁸ *Joint Hearings*, *supra* note 3, part 1, at 917. Chief FBI negotiator Gary Noesner explained that the tactical forces, such as the HRT, are inclined toward the "action imperative" while the negotiators lean toward "active listening," where they try to "find ways to explain to the barricaded subject why it is in his best interest to seek a nonviolent solution." *Committee Report*, *supra* note 22, at 56. He went on to note: "I do not awake from nightmares or have trouble sleeping at night...because everything that I predicted would happen, did happen." *Id.* at 57.

⁸⁹ MOORE, *supra* note 83, at 222-23.

⁹⁰ *Joint Hearings*, *supra* note 3, part 2, at 299 (testimony of Jeffrey Jamar).

⁹¹ "I didn't know at the time that there were conflicts between the people and the negotiators...." *Id.* at 428 (testimony of Janet Reno).

"Smerick notes that the FBI commanders were action oriented. They wanted to treat Koresh not as a negotiating partner, but rather as a psychotic criminal, who needed to be caught and punished." *Id.* (quote read by Rep. Hyde).

⁹² *Id.* at 316 (testimony of Gary Noesner).

But it was not just Koresh who was upset by HRT actions. The ordinary Branch Davidians were also upset, particularly by the actions of the Bradley tanks driven by the HRT.⁹³ It was their understanding that the original cease-fire agreement included Davidians not threatening law enforcement with firearms in exchange for law enforcement staying off Davidian property. Instead, the tanks (pg.639) not only ran around the Davidian property, but damaged outbuildings and desecrated a cemetery.⁹⁴

The tanks frightened the children remaining at Mount Carmel Center.⁹⁵ The FBI negotiators insisted there was nothing to worry about, since "nobody's going to run tanks through buildings that contain people."⁹⁶ In response to the expressed concerns of Cyrus Koresh (David Koresh's oldest child, age eight) about a tank assault on the building, the FBI negotiator promised "the last thing in the world that's going to happen is for the government to take any type of offensive action here. It's just not going to happen. You know, we don't hurt babies, you know, we don't hurt women, we don't do those types of things."⁹⁷

HRT commander Dick Rogers later testified that the sole purpose for the Bradley Fighting Vehicles (BFVs) was agent safety; some BATF agents had been wounded by grenades, and the Branch Davidians had a pair of .50 caliber rifles.⁹⁸ When Koresh told negotiators that he could destroy the nine Bradley Fighting Vehicles (BFVs) that were originally brought on-site, the BFVs were supplemented with two M-1A1 Abrams tanks and five M278 Combat Engineering Vehicles.⁹⁹ Once in place, however, the tanks were used for purposes that did not seem defensive. At various times, tanks would charge at the building. One person (pg.640) inside the building reported that men

⁹³ Shortly after the siege had begun, former McLennan County District Attorney Vic Feazell (who had unsuccessfully prosecuted Koresh for attempted murder in 1987), noted the mobilization of military equipment. "The feds are preparing to kill them," said Feazell. "That way they can bury their mistakes." Roy Bragg, *Standoff At Cult Compound/Ex-Prosecutor Laments Agents' "Storm Trooper" Tactics*, HOUS. CHRON., Mar. 2, 1993, at A7.

⁹⁴ See *infra* note 119.

⁹⁵ Negot. Tapes, *supra* note 18, no. 88, at 13-14 (Mar. 7, 1993). One FBI explanation for the wild driving of tanks was that it was young agents' only chance to drive tanks, so they were acting a bit reckless, like kids. *Id.* no. 53 at 13-14 (Mar. 5, 1993). FBI official Larry Potts later explained, with an infelicitous choice of words, "We had to put our hostage rescue people through a crash course on learning to drive those vehicles." *Joint Hearings, supra* note 3, part 3, at 68. In response to the suggestion that the Bradley's 25mm barrels posed a threat, the FBI insisted the tanks had no barrels, just "tubes in a barrel mount." Negot. Tapes, *supra* note 18, no. 84, at 37 (Mar. 7, 1993); no. 85, at 32 (Mar. 7, 1993).

The FBI offered to remove the tanks if the Davidians agreed first to send out four women and four children, and then, once the tanks were removed, if everyone else in the compound came out. *Id.* no. 68, at 9-10 (Mar. 6, 1993).

⁹⁶ Negot. Tape *supra* note 18, no. 95, at 9 (Mar. 8-9, 1993).

⁹⁷ *Id.* no. 88, at 13 (Mar. 7, 1993).

⁹⁸ "No Question" Fire was Set by Davidians, WASH. TIMES, Aug. 1, 1995 (Federal News Service transcript).

⁹⁹ Victoria Loe, *FBI'S "A-Team" Plying Varied Skills in Sect Talks But Experts Say Obstacles Numerous*, DAL. MORN. NEWS, Mar. 14, 1993 at A1; Moore, *supra* note 83, at 233; U.S. DEPARTMENT OF JUSTICE, REPORT TO THE DEPUTY ATTORNEY GENERAL ON THE EVENTS AT WACO, TEXAS, FEBRUARY 28 TO APRIL 19, 1993, at 123-24 (1993) [hereinafter JUSTICE REPORT].

While Steve Schneider complained regularly about the tanks, Koresh was more threatening, saying the Davidians would use something bigger than .50 caliber, something that could incinerate part of a tank, and then saying the Bradleys were not a concern, "that's why we haven't done nothing to them yet." Negot. Tapes, *supra* note 18, no. 49, at 2-3 (Mar. 4, 1993); no. 53 at 15-16 (Mar. 5, 1993); no. 68, at 8 (Mar. 6, 1993).

in the vehicles were "shooting the finger at these kids,"¹⁰⁰ and in at least one case "mooned" the Davidians.¹⁰¹

There were numerous problems in the negotiations between the FBI and the Branch Davidians. The FBI had no expertise—and no interest in acquiring any expertise—regarding the Branch Davidian religion. Koresh was, very likely, mentally ill.¹⁰² The Branch Davidian negotiators and the FBI negotiators were both often guilty of dishonesty or disingenuousness; and while the Branch Davidians preached at the FBI negotiators—to the extent the negotiators would allow them—the Davidians generally refused to provide straightforward explanations of their religion or intentions. But of all the factors impeding negotiations, perhaps the greatest factor—in retrospect, the decisive factor—was the Hostage Rescue Team. While the FBI negotiators were in a building miles away from Mount Carmel, at Texas State Technical College, the FBI team (the HRT) was laying siege to the Branch Davidians. HRT sniper teams stared at Mount Carmel, while Branch Davidian sentries stared back. At times, the action-oriented HRT would take action, simply because it could stand the inaction no longer. For example, the HRT temporarily cut off the electricity to the Mount Carmel Center—not for any negotiating or safety purpose—but simply to boost the morale of the tactical "people," and the rest of law enforcement "who [were] out and cold and away from (pg.641) home."¹⁰³ As Dr. Alan Stone (an independent reviewer of the Justice Department report on Waco) later observed, some of the tactical measures were mainly used "to relieve [the action-oriented] agents' desire to act."¹⁰⁴

¹⁰⁰ Like BATF, the FBI made extensive use of U.S. military equipment and training. Materials supplied under the Freedom of Information Act make it clear that, unlike BATF, the FBI did not pretend Waco was a drug operation. Therefore, the Defense Department was reimbursed by the Justice Department, military equipment had military markings covered, and military personnel trained FBI personnel but did not themselves use the equipment in operations against Mount Carmel Center. JUSTICE REPORT, *supra* note 99, at 123. In practical terms, the FBI actions appeared as militaristic as the BATF's: a tank attack looks military even if some markings are covered up, and even if the unseen driver is not a soldier. As the House Committee Report observed, "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." *Committee Report, supra* note 22, at 7.

¹⁰¹ *Joint Hearings, supra* note 3, part 3, at 117 (testimony of Clive Doyle). The mooning was condemned by negotiators as unprofessional and unacceptable, and caused by "frustration and anguish," *Negot. Tapes, supra* note 18, no. 89, at 16 (Mar. 7, 1993); REAVIS, *supra* note 45, at 249.

¹⁰² Ever since a 1985 trip to Israel, Koresh had been hearing a disembodied voice which revealed Bible secrets to him. In a 1987 teaching session, Howell described one of his experiences with the voice:

What—what if you turned on the water in the shower and all of a sudden it said, "Drop down ye waters from above, let the faucets pour out righteousness. I the Lord have created it." Huh? You know. Sh- and, and the songs of blessing, showers of blessing, starts being heard in your room or in the bathroom, right? I mean let's face it. Let's be realistic now. This guy is freaked out, isn't he? OK? He's—this—Cyrus [Koresh] has an experience which none—very few and far in between have had.

The Shower Head Tape 26 (Aug. 24, 1987) (teaching session of David Koresh) <<http://www.ime.net/~mswett/shower.html>> (the authors have changed some of the punctuation in the transcript, which the transcriber describes as a first draft.).

¹⁰³ *Joint Hearings, supra* note 3, part 2, at 320 (testimony of Jeffrey Jamar).

¹⁰⁴ *Committee Report, supra* note 22, at 57.

A modicum of apparent conflict between negotiators and the tactical commanders can be useful—the out-of-custody equivalent of "good cop, bad cop" interrogations¹⁰⁵—but the conflict between the negotiating and tactical team was much more profound. The negotiating team found itself having to come up with excuses for aggressive tactical actions that the tactical team had not bothered to tell the negotiators about. The tactical team grew increasingly frustrated with the negotiators' allegedly excessive patience with the Branch Davidians. The two FBI teams were often at cross purposes.

For example, after days of discussions, the negotiators finally decided to send some milk in for the Branch Davidian babies; the tactical team promptly cut off the electricity, making it difficult to store the milk. The electricity cut-off postponed the departure of two Davidians whom the negotiators had convinced to make plans to leave, but would no longer even talk about it.¹⁰⁶

Shortly after midnight on March 21, two Davidians left, and later during the day, five more exited. The number of people inside had declined to about 84, from a total of about 127 on the morning of the BATF raid.¹⁰⁷ The negotiators and Schneider agreed in general that it had been a very successful day.¹⁰⁸

That same day, FBI commander Jeff Jamar and HRT leader Dick Rogers decided to increase tactical pressure in order to "demonstrate the authority of law enforcement."¹⁰⁹

That evening, a loudspeaker barrage began. Among the items blasted on the loudspeakers were the sounds of dentists' drills, locomotives, helicopters hovering, loud obnoxious music,¹¹⁰ Christmas songs, Tibetan Buddhist chants, previously (pg.642) recorded negotiations,¹¹¹ squawking birds, cows mooing, clocks ticking, telephone busy signals, and the cries of rabbits being killed.¹¹²

The loudspeakers were used contrary to the negotiators' advice, and the advice of the FBI's psychological experts, who had warned that tactical pressure "would succeed in shutting down negotiations and convince Koresh and his followers that the end was near."¹¹³ FBI psychologist Peter Smerick warned that tactical pressure "might unintentionally make Koresh's vision of a fiery end come true."¹¹⁴ Commander Jamar later evaded questions at a Congressional hearing and from a

¹⁰⁵ At one point, when a negotiator blamed the commanders, Koresh summarized the commanders' viewpoint: "They want patience, and they want it now." Negot. Tapes, *supra* note 18, no. 99, at 34 (Mar. 9, 1993).

¹⁰⁶ *Id.* no. 122, at 8, 28-30 (Mar. 13, 1993).

¹⁰⁷ See JUSTICE REPORT, *supra* note 99, at 76-77, 112; TREASURY REPORT, *supra* note 25, at 104, 106; *Joint Hearings*, *supra* note 3, part 2, at 496 (testimony of Byron Sage).

¹⁰⁸ Negot. Tapes, *supra* note 18, no. 152.

¹⁰⁹ JUSTICE REPORT, *supra* note 99, at 135.

¹¹⁰ See KOPEL & BLACKMAN, *supra* note 59, at 171 n.70; JUSTICE REPORT, *supra* note 99, at 78.

¹¹¹ See KOPEL & BLACKMAN, *supra* note 59, at 171 n.70; JUSTICE REPORT, *supra* note 99, at 82.

¹¹² JUSTICE REPORT, *supra* note 99, at 88.

¹¹³ Edward S.G. Dennis, Jr., *Evaluation of the Handling of the Branch Davidian Stand Off in Waco, Texas, February 28 to April 19, 1993* (U.S. Dept. of Justice, Oct. 8, 1993) (redacted version).

¹¹⁴ *Committee Report*, *supra* note 22, at 57-58.

Justice Department investigator about who, if anyone, advised Jamar that the increased tactical pressure would be wise.¹¹⁵

The Davidian response was fury and dismay. Koresh said that no more people would be coming out. In fact, only three more persons did exit, once the increased pressure began. Livingstone Fagan left on March 23. The other two exits were non-Davidians who had sneaked into the Mount Carmel Center during the siege out of curiosity.¹¹⁶

Over the course of the siege, FBI tank drivers destroyed a mobile home, a dozen motorcycles, two dozen children's go-carts (expensive presents, recently acquired), tricycles, and bicycles; knocked out the windshield of a bus; and flattened a pickup truck.¹¹⁷ Cars belonging to the adults were crushed by tanks, or ripped apart with crowbars, with the windows smashed and the tires slashed.¹¹⁸ The Hostage Rescue Team "carried away the fence from Mount Carmel's front yard, flipped a bass fishing boat, and overturned a bulldozer that the community had rented—for some \$3,000 per month—from a local building supply house."¹¹⁹

Neither destroying children's toys, nor desecrating the cemetery of highly religious people is apt to facilitate negotiations. Instead, the destruction undermined (pg.643) the FBI negotiators who were promising gentle treatment for children and adults who left the compound. The tactical team's decisions to increase pressure, often undertaken without consulting the negotiating team, made the efforts of the negotiating team to build trust increasingly difficult.¹²⁰ FBI negotiator Byron Sage later acknowledged that having the tanks flatten the cars was a huge mistake that dramatically changed the course of negotiations.¹²¹

It is impossible to know if negotiations would have succeeded but for the aggressive acts of the HRT, but it is clear that the "tactical" activities played a major role in destroying the negotiators' efforts to create an atmosphere of trust.

V. GROUPTHINK

Neither the Branch Davidians, nor the BATF, nor the FBI, were composed of or led by stupid persons. Yet at Waco, all of these groups made extremely bad decisions. One reason for the high-risk, low-quality decisions of the Branch Davidians, BATF, and FBI is what is known as "groupthink."¹²² The term group think was created by academics in the early 1970s, to describe how

¹¹⁵ MOORE, *supra* note 83, at 269.

¹¹⁶ JUSTICE REPORT, *supra* note 99, at 83, 88, 97, 107.

¹¹⁷ REAVIS, *supra* note 45, at 224.

¹¹⁸ *Id.* See also Negot. Tapes, *supra* note 18, nos. 69-70 (Mar. 6, 1993).

¹¹⁹ REAVIS, *supra* note 45, at 224. "The government's tracked vehicles also planed the surface of the Mt. Carmel cemetery, leaving Anna Hughes, among others, to await Judgment in an unmarked plot." *Id.*

¹²⁰ Peter J. Boyer, *Children of Waco*, THE NEW YORKER, May 15, 1995, at 40.

¹²¹ Richard Leiby, "Frontline": *What Went Wrong at Waco?* WASH. POST, Oct. 17, 1995.

¹²² The discussion of groupthink is based on PAUL T. HART, GROUPTHINK IN GOVERNMENT: A STUDY OF SMALL GROUPS AND POLICY FAILURE (1990), which summarizes previous research on groupthink, while also making substantial original contributions.

groups of intelligent individuals could collectively make decisions much worse than the individuals might have made if they had decided alone. Public policy disasters which have been studied as instances of groupthink include the Bay of Pigs invasion during the Kennedy administration; the Johnson administration's escalation of the Vietnam War; the Carter administration's Iranian hostage rescue mission; the decision of Morton Thiokol managers to proceed with the Space Shuttle Challenger launch in 1986 despite the warnings of engineers, in order not to interfere with NASA's desire for a timely launch which would help NASA politically; and the Reagan administration's Iran-Contra fiasco.

Many of the factors leading to groupthink were present, on all sides, at Waco. First, in groups which are vulnerable to groupthink, group members tend to value the group above everything else. The social isolation of law enforcement officers from the non-police community has been documented by many researchers.¹²³ Unquestioning adherence to group norms is likely all the higher in special high-prestige law enforcement groups, such as the FBI, the HRT, or the Special Response Teams (the BATF versions of the HRT). The Branch Davidians, of course, explicitly saw their church as the only good thing in a Babylonian World permeated by sin.^(pg.644)

Groupthinking groups tend to have certain structural flaws: insularity; no tradition of impartial leadership; no norms requiring methodical decision-making; and a homogeneous background for their members. The militaristic HRT and SRTs, heavily drawn from ex-military personnel, had these flaws, as did the BATF and the FBI. While the Branch Davidians were highly heterogeneous in terms of race, nationality, and social background, they were intensely homogeneous in their ideology.

Groups likely to suffer from groupthink often overestimate their group's morality and invulnerability, while also stereotyping out-groups. The Branch Davidians thought themselves the only righteous people in the world, thought themselves invulnerable if God wanted them to be invulnerable, and stereotyped their adversaries as the Babylonian tools of Satan. Conversely, the FBI and BATF stereotyped their adversaries as "cultists," and acted as if resistance to the armed might of the government were inherently immoral.

Groupthink tends to produce self-censorship among the dissenters, as when FBI behavioral psychologist Peter Smerick changed his memos to support the aggressive "tactical" approach that his superiors wanted.

Groupthink is more likely to occur in a provocative situation with high amounts of external stress. In these situations, groupthink is especially likely when the members of the group have little hope for better solutions than those proposed by the leader. The attractiveness of the Branch Davidians' alternative to Koresh—surrendering to the FBI—was greatly undermined by the government's treatment of the adults and children who did surrender.¹²⁴

¹²³ See, e.g., JONATHAN RUBINSTEIN, CITY POLICE 434-35 (1973).

¹²⁴ Every adult who left was immediately arrested. The children were put in a group home, contrary to negotiators' promises that the children would be sent to relatives.

Deindividuation results in individuals becoming less self-aware, and more inclined to go along with group decisions. Rather than taking personal responsibility for their own actions, de-individuated people see responsibility as diffused, and placed on the group as a whole. The diffusion of responsibility leads to more aggressive behavior towards outsiders.

Some social scientists believe that an important factor leading to deindividuation is anonymity, and at least at Waco, the results were consistent with this theory. Except for Koresh, the Branch Davidians were thoroughly anonymized. They were treated—and they acted—as if they were just a mass of indistinguishable followers of Koresh.^(pg.645)

Anonymity is intensified when the group all wears the same clothing. The HRT and SRT members not only wore identical "assault" clothing, they even wore identical tactical masks, the most anonymizing piece of clothing possible.¹²⁵ The individual members of SRTs never would have shot wildly into a building containing women and children. Nor would the HRT members, as individuals, torture children with chemical warfare agents, or destroy someone else's home. It was only in the context of groupthink, of the diffusion of responsibility, that people could collectively perpetrate atrocities they would never perpetrate individually.¹²⁶

Bad decisions tend to breed more bad decisions, "the tendency to become entrapped in a spiral of ineffective policies."¹²⁷ In the Iran-Contra cases, the North-McFarlane group made more and more commitments to arm the Iranians "because so much had been invested already and the alleged costs of stopping would be unacceptable."¹²⁸ At Waco, the heavy commitment to training for the BATF raid helped create a perceived necessity to going forward with the raid, no matter what. Once four lives of federal agents had been lost, federal law enforcement became entrapped into finding some way to rationalize those four deaths, by achieving a "victory" over the Branch Davidians. The Branch Davidians were even more heavily invested in their previous mistakes. Most had given up their old lives to move to the Mount Carmel Center. Husbands and wives had given up their marriages. To admit that Koresh was a false messiah, not a person who was worth dying for, would be to admit that the Branch Davidians had squandered their careers, their families, and their earlier faiths, for nothing at all.^(pg.646)

¹²⁵ [I]n the repressive and military parts of the state apparatus, there is a large reservoir of the type of highly-cohesive, uniformity-inducing, depersonalizing groups acting under external pressures which most closely fit the deindividuation profile ... [P]olice and military are uniformed (compare the appearance of modern anti-riot police, complete with helmets, gas masks—indeed the unrecognizability of individual officers has been a constant source of criticism and claims from protesting groups who claimed this had a disinhibiting effect upon police officers during disturbances, leading to excessively violent behavior).... [T]ight discipline and uniformity of conduct are part of the occupational socialization and culture.

¹²⁶ Moreover, by the mere fact that he forms part of an organised crowd, a man descends several rungs on the ladder of civilization. Isolated, he may be a cultivated individual; in a crowd, he is a barbarian—that is, a creature acting by instinct. He possesses the spontaneity, the violence, the ferocity, and also the enthusiasm and heroism of primitive beings... to be induced to commit acts contrary to his most obvious interests and best-known habits.

¹²⁷ HART, *supra* note 122, at 280.

¹²⁸ *Id.* at 281.

Groupthink often leads the group to ignore risks which affect only the stereotyped outgroup. While the BATF and the Branch Davidians both exposed themselves, as well as their "enemies" to high risks, the FBI's April 19 tank and chemical warfare assault was a risky decision in which almost all the risks would be borne by the outgroup—even though the outgroup included many innocent children.

The military, with all of its internal pressure for conformity, including adherence to a "can-do" spirit, is especially vulnerable to groupthink. The April 19 assault was planned by the military's Delta Force, and executed by the FBI counterpart to Delta Force, the HRT.¹²⁹ The military during peacetime has an institutional overeagerness to take on high-profile missions, while underestimating the risks of failure. Quasi-military units, such as the HRT, likewise spend long periods sitting idle, and may be overeager to contribute their "solution" to a high-profile problem, while underestimating the dangers of their involvement.

How can groupthink, and its resultant risky decisions, be minimized? Three reforms would have been particularly relevant at Waco, and should be implemented by decision-makers in crises. First, every group meeting should have a designated devil's advocate, who will point out potential risks. Second, special care should be taken so that no one agency or coalition of experts can monopolize the flow of incoming information. Janet Reno, by allowing the FBI to monopolize the information coming to her, made it almost inevitable that she would eventually do what the FBI wanted. Finally, the virtues which make the military such an effective international killing force—such as uniformity, obedience, and group cohesion—make it especially susceptible to groupthink. For this reason, the military should have no participation in law enforcement; quasi-military units such as the FBI's HRT and the BATF SRT should be thoroughly demilitarized, and should play, at most, a very subordinate role in law-enforcement decision-making.

VI. DEMILITARIZING LAW ENFORCEMENT

Although it might be hoped that the Ruby Ridge and Waco disasters would prompt a cutback in federal military-style strike forces intended for use against Americans, just the opposite has happened.

A. *The Proliferation of Federal Paramilitary Units*

The United States Marshals Service now has a 100-man Special ^(pg.647) Operations Group which is "ready to go anywhere in the world at a moment's notice." The SOG is located at the William F. Degan Memorial Special Operations Center in Louisiana, which is named after one of the men involved in the senseless shootout at Ruby Ridge, Idaho, in which non-suspect fourteen-year-old Sammy Weaver was shot in the back as he attempted to flee to his cabin.

Attorney General Reno has stated that one reason for the April 19 tank and chemical warfare attack on Mount Carmel was that the FBI Hostage Rescue Team was tired. So the HRT is now expanded to 91 men, although there is no indication that the Hostage Rescue Team's mission has

¹²⁹ See *Hearing, supra* note 13, at 19 (testimony of Attorney General Janet Reno).

been narrowed to rescuing rather than holding hostages. The only reforms are that FBI Director Freeh promises that before the HRT is deployed in nonemergency situations, he will make the decision personally, and that negotiators and the HRT will henceforth be placed under the same command.¹³⁰

The proliferation of BATF squads whose names imply violence continues: Tactical Response Teams, High-Risk Warrant Teams, Forced Entry Teams, Entry Control Teams, and Special Response Teams (SRTs). In fiscal years 1993 through 1995, the SRTs were used 523 times, carrying out a dynamic entry in about half of the 157 SRT utilizations in 1995.¹³¹

BATF continues to recruit the SRTs, in the words of one ex-BATF agent, "hand-picking these superhormone guys."¹³² As Jim Jorgenson, of the National Association of Treasury Agents points out, this means that SRTs are composed of people who may run 300 yards and shoot better than anyone else, but who lack the maturity and judgment to think where they are running.¹³³ Absolute discipline and adherence to orders may be virtues in the military, but not in civilian law enforcement. Perhaps if the three SRTs that were used in the Waco raid included a larger share of older, slower, and wiser agents, someone would have spoken up when the raid commanders yelled "He knows we're coming" and "Let's go." Rank-and-file defiance of the order to launch a surprise attack with no element of surprise would have saved the lives of the four BATF agents, and of the Branch Davidians.^(pg.648)

BATF has stepped up the training of its field commanders in military tactics, under the supervision of the Army.¹³⁴ In 1994, the Army's Joint Task Force Six oversaw BATF training in the use of Bradley Infantry Fighting Vehicles, including the 25mm machine guns on the BFVs. This training was necessitated by BATF planning to use BFVs in future operations such as Waco, to avoid government casualties.¹³⁵

¹³⁰ See David Johnston, *F.B.I. Chief Restricts Unit Criticized in Idaho Standoff*, N.Y. TIMES, Sept. 16, 1995, at 9; *Joint Hearings, supra* note 3, part 2, at 509 (testimony of Larry Potts); James L. Pate, *Ask Us No Questions, We'll Tell You No Lies*, SOLDIER OF FORTUNE, Mar. 1996, at 45.

¹³¹ GENERAL ACCOUNTING OFFICE, GAO/GGD-96-17, USE OF FORCE: ATF POLICY, TRAINING AND REVIEW PROCESS ARE COMPARABLE TO DEA'S AND FBI'S 7 (1996).

¹³² Carol Vinzant, *ATF-Troop*, SPY, Mar. 1994, at 49.

¹³³ Interview of Jim Jorgenson by David Kopel; see also Erik Larson, *ATF Under Siege: Demon Agency?*, TIME, Jul. 24, 1995 (discussing criticism of the ATF and its SRTs).

¹³⁴ According to a memo written by BATF Director John Magaw:

ATF has contacted the U.S. Army Training and Doctrine Command regarding its need for command post training.... This training would include Tactical Operations Center (TOC) functions, stress/crisis management, and decision making. ATF was notified in January 1994 that the Army Military Police is developing a tactical commanders course and would provide this training to ATF at no cost. This course would be mandatory for those SACs/ASACs [Special-Agent-in-Charge, Assistant-Special-Agent-in-Charge] who are currently being identified to serve as future "Incident Commanders" or "Tactical Coordinators" of major operations.

Bob Lesmeister, *Bad Influence: Corruption within the Ranks of BATF*, in AMERICAN FIREARMS INDUSTRY, June 1995, at 73.

¹³⁵ *BATF Goes Mechanized*, THE RESISTER, (Winter 1995) available at <http://www.accessone.com/~rivero/POLITICS/ARCHIVE/resister_3.html> (visited May 6, 1997).; Lesmeister, *supra* note 134, at 73, 107.

In 1994, BATF acquired three OV-10 light attack aircraft, a type of plane used in the Gulf War and for counter-insurgency, which is commonly equipped with rockets, although machine guns and chain guns can also be attached. Twenty-two such planes had been acquired in 1993.¹³⁶ None of the planes were registered to BATF, but at least seven are registered to American Warbirds in Maryland. No company named "American Warbirds" has ever acquired a license to do business in Maryland, and thus, to the extent that American Warbirds actually exists, its operations are a criminal misdemeanor.¹³⁷ Aircraft title records indicate that American Warbirds acquired the planes from Mid-Air Salvage, a company with a New Jersey address, but which (like American War Birds) does not exist in the Federal Aviation Administration database. Mid-Air acquired the planes from the federal government's General Services Administration.¹³⁸ It is not clear why the transfer of aircraft from the military to the BATF needed to be laundered through two civilian corporations.¹³⁹ (pg.649)

According to BATF Director John W. Magaw, the BATF's OV-10 aircraft have their weapons removed. Mr. Magaw describes the OV-10's capabilities as "reconnaissance" and "command and control and insertion of troops."¹⁴⁰ He states that the forward-looking infrared system on the OV-10, which can be used to identify objects at night or under poor visibility conditions, will be used "to enhance the safety of ATF special agents and other law enforcement officers working to combat firearms trafficking and other violent street crime."¹⁴¹ In 1996, Congress defunded the BATF air force.

Beginning in 1973, the FBI set off a national trend in law enforcement by creating a SWAT (Special Weapons and Tactics) team. Now, every one of the FBI's fifty-six field offices has its own SWAT team (the 400 FBI satellite offices do not).¹⁴² Abandoning former Director J. Edgar Hoover's principle that FBI agents should be well-trained generalists, the new FBI SWAT units specialize in confrontation, rather than investigation, even though investigation was, after all, the very purpose of the Federal Bureau of Investigation. Whereas Hoover's agents wore suits, and typically had a background in law or accounting, SWAT teams wear camouflage or black ninja clothing, and came from a military background.¹⁴³ They are trained killers, not trained investigators. In the early 1980s,

¹³⁶ James L. Pate, *ATF Watch: ATF's Shadow Air Force*, SOLDIER OF FORTUNE, Sept. 1995, at 22.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* At least some of the planes were put through Service Life Extension Program (SLEP), which upgraded the engines from 750 horsepower to 1,040 h.p., replaced all of the electronics in the plane, put in the latest military cockpit electronics, and inserted the same FLIR/video system as the Apache helicopter has (allowing surveillance of a target or object from two to three miles away). After the expensive SLEP reconditioning, the planes were immediately decommissioned (in some cases before the SLEP process was completed), and transferred to BATF. *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Letter from John W. Magaw, Director, BATF, to Rep. C.W. Bill Young (Sept. 5, 1995).

¹⁴² RONALD KESSLER, *THE FBI: INSIDE THE WORLD'S MOST POWERFUL LAW ENFORCEMENT AGENCY* 282 (1993).

¹⁴³ One SWAT team head observed, "Most of the agents who try out for SWAT are former police or people with military backgrounds.... Their psychological makeup is they like to go out and do things." *Id.* at 154.

an FBI super-SWAT team was invented: the Hostage Rescue Team.¹⁴⁴ Like the SWAT team, it received military training, carried military weapons, and was composed mostly of former military personnel. But rather than rescuing hostages, the Hostage Rescue Team has become notorious for two incidents in which it held hostage people who only wanted to be left alone: at Ruby Ridge, and at Waco.¹⁴⁵ "The swashbucklers are in control," laments Iowa Senator Charles Grassley.¹⁴⁶

B. *Direct Military Intervention*

In addition to federal law enforcement agencies becoming more militarized,^(pg.650) the military itself has become increasingly involved in domestic law enforcement. On any given day, more than five thousand troops conduct law enforcement operations within the United States.¹⁴⁷ This figure does not include the much larger number of National Guard troops involved in law enforcement every day.

Like other military assets, the National Guard is something which many state officials would like to use, but are reluctant to pay for. They know that their constituents may want a "drug war" in the abstract, but they may not be willing to pay higher taxes for it. In contrast to most state governments, the federal government has no balanced budget requirement, and thus can spend money on all sorts of wish-list programs, without having to pay for them.

Federal deficit financing provides a major source of funding for use of the National Guard in law enforcement. The huge federal subsidies provided by the federal government to the state National Guards are what allows Guard units to participate heavily in the drug war.

The National Guard has begun to lobby for even broader law enforcement privileges. For example, in Rhode Island, the National Guard proposed that it be allowed to share in profits from asset forfeiture operations.¹⁴⁸

As illegal immigration has become an increasingly important political issue, the United States Army and Marines have been deployed along the Mexican border, to assist federal and local border patrol. These deployments have led to strong protests from the Mexican government, for militarizing the border of a nation with which the United States is at peace.¹⁴⁹

The Clinton administration is hard at work to remove the remaining restrictions on use of the military in law enforcement. An administration terrorism bill pushed by the President in 1995 defined all property offenses, and all violent crimes more serious than an assault as "terrorism," and

¹⁴⁴ The creator was Oliver "Buck" Revell, who also started the FBI's air force. *Id.* at 159.

¹⁴⁵ See Mark Levin, *What Became of the FBI?*, NAT. REV., Oct 9, 1995, at 18.

¹⁴⁶ Sam Vincent Meddis, *Survivalist Tells His Side of Idaho Raid*, USA TODAY, Sept. 7, 1995, at A3.

¹⁴⁷ Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 359 (1994) (citing Center for Defense Information broadcast of Apr. 11, 1993). Even the National Park Service and the Department of Health and Human Services now have their own SWAT teams.

¹⁴⁸ R.I. Senate Bill No. 1096 (1995).

¹⁴⁹ *World Sitrep*, SOLDIER OF FORTUNE, May 1996, at 16, 17.

authorized the Army, Navy, and Air Force to enforce "terrorism" laws.¹⁵⁰ A bill proposed by Senate Majority Leader Robert Dole did the same thing.¹⁵¹ (pg.651)

C. *State and local militarization*

The federal government actively works to militarize local law enforcement. For example, Mark Lonsdale, the Director of the federal government's Special Tactical Training Unit writes that there are various governmental programs, including those run by the federal Drug Enforcement Agency "available to local law enforcement" for marijuana control. "The thrust of this training is towards developing more of a military approach to tactics along with the study of the methodology of the growers."¹⁵²

The Navy SEALs and Army Rangers both conduct extensive training of paramilitary units such as local police SWAT teams. The United States Marshals Service and the Joint Task Forces (e.g., JTF-6, which helped provide military training to BATF for the Waco raid) act as liaisons between the police departments and the military trainers.¹⁵³

One morning the residents of Cass Corridor (a poor neighborhood in Detroit) were startled by the sounds of explosives and massive gunfire. While many residents hid, the few who dared to look outside found an eighty-person Detroit police department practice assault in progress on a vacant four-story building in the neighborhood. The Deputy Police Chief in charge of the practice assault explained that such drills are routinely performed by police agencies in conjunction with the U.S. Army and other federal agencies.¹⁵⁴ In June 1996, two hundred soldiers from Fort Bragg conducted urban warfare exercises in Pittsburgh and McKeesport, Pennsylvania, in conjunction with the Pittsburgh and Allegheny County SWAT teams. The noise from small explosives and the low-hovering helicopters (dropping troops practicing a nighttime invasion of an urban area) frightened many civilians, who had no warning of what was happening.¹⁵⁵ (SWAT exercises near the Mount Carmel Center in 1992 played a major role in convincing Koresh that an attack was imminent, and in spurring Koresh's paranoia and arms acquisition, although the exercises had nothing to do with him.)¹⁵⁶

The federal government's Advanced Research Projects Agency supervises (pg.652) a Joint Program Steering Group for Operations Other than War/Law Enforcement, which brings Defense Department and Justice Department officials together in order to find civilian law enforcement

¹⁵⁰ See H.R. 896, 104th Cong., 1st Sess. § 101(b)(1) & (f) (1995).

¹⁵¹ See S. 735, 104th Cong., 1st Sess. §102(b)(1) & (f) (1995).

¹⁵² MARK V. LONSDALE, RAIDS: A TACTICAL GUIDE TO HIGH RISK WARRANT SERVICE 194 (L.A.: S.T.T.U., Training Division, 1991).

¹⁵³ P.B. Kraska and V.E. Kappeler, *The Rise and Normalization of U.S. Police Paramilitary Units*, SOCIAL PROBLEMS (1997).

¹⁵⁴ *Detroit Residents Alarmed by Backyard Police "Raids"*, GUN WEEK, Jan. 13, 1995, at 2.

¹⁵⁵ Michael A. Fuoco, *Army War Games are Night Fright*, PITTS. POST-GAZETTE, June 5, 1996, at A1, A16; Michael A. Fuoco, *Military Retreats in Face of Anger*, PITTS. POST-GAZETTE, June 6, 1996, at B1, B6.

¹⁵⁶ See, e.g., Interview with Henry Stanley McMahan, Jr., and Karen J. Kilpatrick at National Rifle Association in Washington D.C. (May 25, 1993) (transcript on file with the authors).

applications for military technology.¹⁵⁷ The United States Army Aviation & Troop Command (ATCOM) is selling surplus OH6-A helicopters to state and local governments for use in drug law enforcement. Rep. Ed Royce (R-Calif.) has proposed that Congress give states the cash with which to buy more helicopters from the Army.¹⁵⁸

As a result of both federal and local actions, America is moving towards the normalization of paramilitary forces in law enforcement. For example, the police in Fresno, California, have taken the next step towards militarization of local law enforcement. The Fresno SWAT team, in full battle gear, now deploys a full-time patrol unit in the city. Deeming the SWAT patrol an "unqualified success," the Fresno police department "is encouraging other police agencies to follow suit."¹⁵⁹ About twenty percent of police departments in cities over 50,000 have already put their own paramilitary units into street police work. In many cases, funding for street deployment of paramilitary units is funded by "community policing" grants from the federal government. The majority of police departments use their paramilitary units to serve "dynamic entry" search warrants.¹⁶⁰

SWAT teams also get deployed in missions very foreign to ordinary police work:

The SWAT Team in Chapel Hill, NC conducted a large-scale crack raid of an entire block in a predominantly African-American neighborhood. The Raid, termed "Operation Redi-Rock," resulted in the detention and search of up to 100 people, all of whom were African-Americans. (Whites were allowed to leave the area.) No one was ever prosecuted for a crime.¹⁶¹

D. *The "Drug War"*

The major cause of the militarization of American law enforcement has been the "drug war." In 1981 and 1988, Congress created massive exceptions to (pg.653) the Posse Comitatus Act, to allow use of the armed services, including the National Guard, in drug law enforcement.¹⁶²

Because of drug war exceptions created in the Posse Comitatus Act, every region of the United States now has a Joint Task Force staff in charge of coordinating military involvement in domestic law enforcement. In region six, the JTF's Operational Support Planning Guide, in the edition current in 1993, enthused, accurately, that "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." Consistent with the trend noted by the JTF, the 1995 session of Congress saw a proposal to create a 2,500 member federal

¹⁵⁷ *Police to Benefit from Defense Gadgets*, LAW ENF. NEWS, Nov. 30, 1994, at 9.

¹⁵⁸ *Crime Fighting Bargain: Army Surplus Helicopters*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, Feb. 23, 1995, at 5.

¹⁵⁹ Kraska, *supra* note 81, at 417.

¹⁶⁰ Kraska and Kappeler, *supra* note 153.

¹⁶¹ Kraska, *supra* note 81, at 418 (citing *Barnett v. Karpinos* 460 S.E.2nd 208, 209-10 (1995)).

¹⁶² *See* 10 U.S.C. §§ 371-379 (1997).

Rapid Deployment Force for the Attorney General to deploy at her discretion to assist local law enforcement.¹⁶³

The collapse of the Soviet Union has, unfortunately, led many military officials to seek out a new enemy to justify continued funding. Often, that new military enemy turns out to be American citizens. The North American Aerospace Defense Command (NORAD) admits that it is no longer capable of protecting Americans from incoming nuclear missiles. Yet NORAD enjoys hundreds of millions of dollars in annual funding, as part of a 1.8 billion dollar systems upgrade, having convinced Congress to assign NORAD the mission of tracking planes and ships that might be carrying drugs.¹⁶⁴

Many other federal military programs have hitched themselves to the anti-drug bandwagon. For example, when President Clinton in April 1996 requested 250 million dollars in extra funding for anti-drug programs, over half that money was earmarked for the military.¹⁶⁵

The results of such programs are evident not only at Waco, but in Puerto Rico. There, the National Guard provides a large part of the manpower and the heavy military equipment for police-Guard assaults on public housing apartments.¹⁶⁶ (pg.654)

In 1987, the Secretary of Defense and the Attorney General were ordered to provide annual briefings to local law enforcement about available Department of Defense assistance, to set up a special office to assist civilian law enforcement, and even to provide a toll-free number for law enforcement inquiries.¹⁶⁷ In 1993, Congress ordered the Department of Defense to sell military surplus to state and local law enforcement for use in counter-drug activities.¹⁶⁸

Many "Patriot" organizations are comprised of members who have been terrified by the appearance of unmarked black helicopters over nearby rural property. These helicopters (which are actually a very dark green) have played a major role in intensifying fear of the federal government. The helicopters are not from the United Nations, but are part of the National Guard's marijuana eradication program. They are flying over rural property as a result of 1981 and 1989 Congressional amendments which created a partial drug exception to the Posse Comitatus Act. In conjunction with the Supreme Court decision in *Oliver v. United States*,¹⁶⁹ which allows law enforcement officials to

¹⁶³ See H.R. 97, 104th Cong., 1st. Sess. (1995).

¹⁶⁴ Jim Malloy, *These Days, NORAD Key Player in Drug War*, DEN. POST, Apr. 23, 1996, at B4.

¹⁶⁵ Specifically: \$98 million to modify two Navy P-3B aircraft into "specialized radar warning aircraft" which would be transferred to the U.S. Customs Service; \$15 million to install a TPS-70 ground-based radar system in an unspecified foreign country; \$6 million for "non-intrusive" inspection systems along the Mexican border; \$3 million more for National Guard marijuana eradication; and \$10 million for "classified" Department of Defense drug activities.

¹⁶⁶ For a favorable view of these assaults, see Jerry D. Fitz, *Taking Back the Projects*, POLICE, May 1996, at 56-61. At the end of the article, the following "Editor's Note," appears: "Police does not necessarily endorse the methods used to enforce the 'Mano Dura' program. We are merely reporting on the logistics of the take-overs." *Id.* at 61. It is very rare for *Police* to attach editorial disclaimers to its articles.

¹⁶⁷ See 10 U.S.C. § 380 (1994).

¹⁶⁸ See 10 U.S.C. § 381 (1994).

¹⁶⁹ 466 U.S. 170 (1984).

trespass on "open fields" without probable cause or a search warrant—even when the owner has taken all possible steps to exclude trespassers—many rural areas are subjected to low-level overflights and landings of dark helicopters carrying men in military uniforms with automatic weapons. Who would not be frightened by the sudden invasion of an unmarked helicopter and men with machine guns on private property?

Every fall, Humboldt County, California, is invaded by National Guard forces, as part of the Campaign Against Marijuana Production (CAMP). In a typical year, 100 harassment complaints are logged against airborne and ground activities of CAMP personnel.¹⁷⁰

Tanks, helicopters, and men pointing automatic rifles at children have no place in a free society. Neither the push to make America a drug-free society nor desire to "do something" about terrorism should be accomplished at the expense of losing our freedom.^(pg.655)

The incentives for lawless violence and militarization do not come entirely from law enforcement itself. As sociologist Phillip Jenkins observes, "Media images can also frame the expectation and behavior of individual agents and administrators...."¹⁷¹ Sensationalistic "reality television" shows which glorify violent, illegal police conduct play a role in legitimating violence in the mind of law enforcement officers who watch such programs¹⁷²—movies such as *Dirty Harry*, *Lethal Weapon*, and many others.¹⁷³

Another cause is the use of military rhetoric by politicians. Political talk about a "war on drugs" or a "war on crime" confuses the objectives and methods of war (destroying a foreign military force, and not worrying about proper procedure) with law enforcement in a free society, involving suspects who are American citizens, and entitled to the full protection of the Bill of Rights. As New York University law professor Paul Chevigny explains:

Armies are organized and trained for killing an enemy, usually more or less well-defined, and not for service and law-enforcement among a civilian population to which they themselves belong, in situations for which they have to make fine-grained legal and social distinctions about what action is required....

[T]he results of ["war on crime" rhetoric] distort and poison police relations with citizens. The police think of themselves as an occupying army, and the public comes

¹⁷⁰ *Trouble in the Fields: Residents Fed up with Anti-Marijuana Drive*, LAW ENF. NEWS, Oct. 31, 1994, at 5. Use of the National Guard for marijuana eradication is typically preceded by a declaration from the Governor that marijuana cultivation represents an "emergency" which necessitates the use of the Guard. While most persons think of an "emergency" as a spontaneous and unexpected event (such as a flood), the Orwellian military use of "emergency" means "something that the Governor thinks is a serious problem, even if the problem has persisted at endemic levels for many years." Micheal Dorgan, *California Loses War on Weed*, DEN. POST, Nov. 19, 1995, at A30.

¹⁷¹ PHILIP JENKINS, USING MURDER: THE SOCIAL CONSTRUCTION OF SERIAL HOMICIDE 233 (1994).

¹⁷² The very first episode of the supposedly realistic *N.Y.P.D. Blue* involved the police protagonist publicly beating up a man he believed to have been guilty of a crime for which he had just been acquitted by a jury of his peers, with only minimal sanction threatened against the officer.

¹⁷³ While the effects of violent television on children have received a great deal of attention, the effects of violent entertainment on adults, including adults in law enforcement, have rarely been analyzed.

to think the same. The police lose the connection with the public which is a principal advantage to local policing, and their job becomes progressively more difficult, while they become more unpopular.¹⁷⁴

One can be in favor of drugs being illegal, and still oppose "the war on drugs," just as one can want food stamp fraud to be illegal without wanting a "war on welfare cheaters," because to have "a war" is to make it likely that the military will become involved. As Police Studies professor Peter B. Kraska writes:

[T]he militaristic nature of the discourse on crime and drug (pg.656) control—wars on crime and wars on drugs—constitutes more than ineffectual media/political rhetoric. Filtering solutions to the complex social problems of crime and substance abuse through the "war" metaphor helps to structure our values in use, our theories, and most important, our actions.... A metaphor and associated discourse materialized, for example, into urban police departments deploying paramilitary police groups to patrol U.S. neighborhoods.¹⁷⁵

Regarding the First World War, Randolph Bourne observed that war is the health of the state. The drug war has been the health of the military state, and may in the long run be the death of the Constitution.

E. Suggestions for Reform

The military operates on the principle of authoritarian control, with no room for dissent, for waiting for a consensus to form, or for democracy. Most members of the armed forces live in enclaves separate from the rest of society—enclaves that are orderly and authoritarian, often quite different from the chaotic civilian world.¹⁷⁶ The military lifestyle and military housing enclaves are ill fitted to building the values of due process, democracy, and diversity on which civilian law enforcement must be founded.

Reforms to reduce the trend to militarization of domestic law enforcement should include tightening the Posse Comitatus Act so that it proscribes all use of military personnel and equipment, not just use of the Army and Air Force, and not just unreimbursed use.¹⁷⁷ (Currently exempt from Posse Comitatus, the Navy's SEAL Team Six has allegedly participated in several "take-downs" of

¹⁷⁴ PAUL CHEVIGNY, *EDGE OF THE KNIFE: POLICE VIOLENCE IN THE AMERICAS* 124 (1995).

¹⁷⁵ Kraska, *supra* note 81, at 420. Of course the United States had a "war on poverty" in the 1960s without sending in the Army. But the "war on poverty" rhetoric, along with President Carter's assertion that energy crisis was "the moral equivalent of war," helped pave the way for "war on crime" and "war on drugs" rhetoric, rhetoric that has led to military intervention.

¹⁷⁶ Dunlap, *supra* note 147, at 388.

¹⁷⁷ Contrast *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (interpreting statutory language literally, so that Posse Comitatus Act does not apply to the Navy) with 32 C.F.R. § 213.10(c) (Department of Defense regulation applying Posse Comitatus Act to the Navy and Marine Corps, while allowing Secretary of the Navy to make exceptions on a case-by-case basis). The Act does not currently apply to the Coast Guard, which in peacetime is considered part of the Department of Transportation. See 14 U.S.C. § 1 (1997).

crack houses in the Los Angeles area.)¹⁷⁸ In particular, Congress should eliminate (pg.657) the loophole that exempts the National Guard from the Act.¹⁷⁹

Congress should also repeal the drug exceptions and other exceptions to the Posse Comitatus Act, expressly making the only exceptions those involved with law-enforcement in international waters or requiring unique military expertise related to nuclear weapons.¹⁸⁰

Several reforms could be made to deter abuses of the Posse Comitatus Act. For example, knowingly violating the Posse Comitatus Act should be a predicate felony for felony murder. In addition, federal courts should not allow evidence obtained in violation of the Posse Comitatus Act to be admitted in court. Congress could also create a civil cause of action for persons injured by Posse Comitatus Act Violations.

In the years before the Posse Comitatus Act, any soldier who did engage in police activity was deemed to be acting as a private citizen, rather than as a soldier. Under this Mansfield Doctrine, the individual, since he was not acting as a soldier, could be personally sued or criminally prosecuted for any wrongs he committed. Courts should revive the Mansfield Doctrine at once, and allow injured victims to bring lawsuits against individual "law enforcement" soldiers who perpetrate civil torts.

Congress should repeal 10 U.S.C. § 372, which authorizes the Secretary of Defense to make "any" Department of Defense equipment available to "any Federal, State, or local civilian law enforcement personnel for law enforcement purposes." Like previous steps to militarize domestic law enforcement, this provision grew out of the "drug war," in this case the omnibus 1988 drug law, but the language does not restrict the military equipment to drug enforcement purposes.

Even in the case of drug law enforcement, military equipment—such as tanks—has no legitimate role in civilian law enforcement. The type of equipment which is used to attack hostile nations is not the type of equipment which should (pg.658) be used against Americans, even Americans who are suspected of violating the law.

¹⁷⁸ *Total Hogwash, THE RESISTER, (Winter 1995)* <http://www.accessone.com/~rivero/POLITICS/ARCHIVE/resister_3.html> (visited May 6, 1997). See also John P. Coffey, Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution*, 75 GEO. L. REV. 1947 (1987) (criticizing loophole that allows use of navy ships firing artillery in drug law enforcement, under pretext of having the ship fly Coast Guard colors when it begins aggressive activities).

¹⁷⁹ While the Guard is almost entirely funded by the federal government, it is exempt from *Posse Comitatus* when it is in "state status," under the immediate command of state officials, as opposed to "federal status," when the Guard is commanded by federal officers.

¹⁸⁰ Besides the drug exceptions, there are various *Posse Comitatus* exceptions for matters which are well within the competence for civilian federal, state, and local law enforcement: civil disorders (10 U.S.C. §§ 331-36) (1997); protection of federal parks (16 U.S.C. §§ 23, 78) (1997); protection of foreign officials and other foreign guests (18 U.S.C. §§ 112(f), 116) (1997); crimes against members of Congress (18 U.S.C. § 351) (1997); crimes against the President (18 U.S.C. §§ 1751, 3056) (1997); neutrality laws (22 U.S.C. §§ 408, 461-62) (1997); threats to federal property (42 U.S.C. § 1885) (1997); execution of certain civil rights warrants (42 U.S.C. § 1989) (1997); broadly defined "disasters" (42 U.S.C. §§ 4401-84) (1997); removing unlawful fences from public lands (43 U.S.C. § 1065) (1997); and customs laws (50 U.S.C. § 220) (1997). We are not suggesting that the substantive laws in question be repealed. Rather, these laws should be enforced by civilian law enforcement.

Of course, any person who has served honorably in the military should be allowed to apply for any civilian job, including law enforcement. But the federal government should not use subsidies to bias police departments into hiring persons with a military background, as opposed to a civilian background. Much of the training which makes a good soldier is contradictory to the training necessary to be a peace officer.

Congress should also repeal the new statute allowing weapons of war to be given away free to federal, state, and local police.¹⁸¹ A 1968 law had allowed the military to sell, "at fair market value," surplus firearms and ammunition to local law enforcement agencies.¹⁸²

Congress should require that all international warfare treaties signed by the United States be binding on domestic operations of the federal government. If the United States is willing to agree not to use certain particular deadly types of chemical or biological weapons against foreign troops, the U.S. government should also be willing to forswear use of those same weapons against American citizens.

Various federal statutes authorize different federal agencies to allow their employees to carry firearms. Certainly there are many federal employees with a legitimate need to carry firearms. Sensibly, the statute authorizing Forest Service employees to carry firearms states that no more than one thousand employees shall be so authorized.¹⁸³ This sensible cap should be extended to all other agencies with gun-carrying employees, with a view to reducing gun-toting by federal employees only to cases of genuine need. The right to keep and bear arms, after all, is for "the People," not the government.

To the extent that non-discriminatory state laws authorize ordinary persons to obtain firearms carry permits and to carry firearms while at work, there is nothing wrong with federal employees within that state obtaining such permits for themselves. But cases of federal employees carrying firearms in contravention of relevant state law, as if the federal employees were some kind of superior class, should be kept to an absolute minimum.

Law enforcement use of masks in the service of search or arrest warrants should be prohibited, except when specifically authorized by a court when authorizing (pg.659) the warrant, based on compelling need. Masks not only make peace officers look inappropriately terrifying, they prevent identification of rogue officers so that they cannot be sued later for criminal acts.

As an important symbolic step, federal law enforcement should give up its black or near-black uniforms and replace them with a color (such as ordinary blue) more consistent with law enforcement in a democracy.¹⁸⁴ Rutgers University professor Michael Solomon, a scholar of the

¹⁸¹ See 10 U.S.C. 371-79 (1997).

¹⁸² See 10 U.S.C. 371-79 (1994).

¹⁸³ 16 U.S.C. 559(c) (1997).

¹⁸⁴ The BATF's outfits, including their Ninja clothes, are actually blue, but the color is so dark that the clothes are usually described as black. Moorman Oliver, Jr., *Killed by Semantics: Or Was it a Keystone Kop Kaleidoscope Kaper?*, in *FROM THE ASHES: MAKING SENSE OF WACO* 71, 75 (James R. Lewis ed., 1994).

psychology of clothing, explains that black law enforcement uniforms tap "into associations between the color black and authority, invincibility, the power to violate laws with impunity."¹⁸⁵

VII. CONCLUSION

Soldiers are not peace officers. At all levels of policing, it is time that police officers be restored to their honored status as peace officers. Police ethicist John Kleinig notes: "Were police to see themselves primarily as social peace-keepers, they would be less inclined to 'overkill' in their dealings with both ordinary citizens and those whose disruptive activities properly require their intervention."¹⁸⁶ To help prevent future Wacos, and the needless loss of life of law enforcement personnel and other persons, law enforcement in the United States should be demilitarized. Cicero's advice to the Roman republic, "Let the soldier give way to the civilian,"¹⁸⁷ must be heeded by those who are intent on preserving the American republic, and the rule of civil law.

¹⁸⁵ William F. Powers, *Dressed to Kill?*, WASH. POST, May 4, 1995.

¹⁸⁶ JOHN KLEINIG, *THE ETHICS OF POLICING* 102 (1996).

¹⁸⁷ "Cedant arma togae." Marcus Tullius Cicero, *Orationes Philippicae* (ca. 60 B.C.).