Sorry, Wrong Number Why Media Polls on Gun Control are so Often Unreliable

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How scientific are the polls reported in the media on the gun control issue? Without arguing for or against gun controls, this article examines the interviewing and sampling methods used by media polls and finds that some polls claiming impressive majorities in favor of severe gun controls may not be accurate.

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I. INTRODUCTION

THIS ARTICLE EXAMINES THE QUALITY OF THE SURVEYS USED BY THE MEDIA TO INVESTIGATE THE CONTROVERSIAL PUBLIC POLICY ISSUE OF GUN CONTROL. THE CENTRAL QUESTION IS THE SCIENTIFIC QUALITY OF THE METHODS USED BY MEDIA IN THEIR USE OF PUBLIC OPINION POLLS. AFTER DISCUSSING THE METHODOLOGICAL PROBLEMS IN THE MEDIA POLLS, THIS ARTICLE PER SUGGESTS THAT MANY MEDIA POLLS ARE METHODOLOGICALLY FLAWED AND UNRELIABLE. IN SOME CASES, THE POLLS ARE SO FLAWED TO SUGGEST THAT THE POLLS ARE NOT SCIENCE BUT "SAGECRAFT," WHICH TONSO DEFINES AS A QUASI-SCIENTIFIC DATA MANUFACTURED TO BOLSTER A PREDETERMINED IDEOLOGICAL POSITION.1

The questions of whether gun control is itself a good public policy, or whether opinion polls form a sound basis for public policy are not addressed. The focus is only on the reliability of polling about the gun issue.

This paper deals only with "media polls"_that is, polls which are produced either by or for the media, and intended mainly to run as news stories. Examples of "media polls" include the polls commissioned by Time magazine, CNN, major urban newspapers, and other major media organizations. "Media polls" also refers to polls conducted by the Gallup and Harris organizations, because many Gallup and Harris polls are marketed for newspaper syndication, and since the Gallup and Harris polls suffer from many of the same methodological flaws as do the polls conducted by the media.

This paper does not deal with in-depth analytical surveys conducted by reputable survey research organizations_academic or professional. In contrast to the "media polls," the analytical polls use lengthy question series to fully assess the public's complex attitudes on sensitive issues such as gun control. The analytical polls are typically commissioned by a customer with a strong interest in the gun policy debate and typically with a strong interest in obtaining quality results. Polls which will be used to formulate political strategy have strong reasons to be methodologically solid.

Analytical polls may be paid for by anti-gun organizations, such as the Center for the Study and Prevention of Handgun Violence, or by pro-gun organizations, such as the National Rifle Association. Although it might be expected that the agendas of the customers would bias the polls, the analytical polls conducted for both sides of the gun debate appear to be reliable. Analytical polls paid for by anti-gun organizations achieve results remarkably similar to polls paid for by pro-gun organizations.2 The similarity suggests that there is a real "public opinion" about the gun control issue, and that scientifically conducted polls can measure that opinion with reasonable accuracy.

Media polls, on the other hand, often report "findings" that are incorrect. In 1976 in Massachusetts and 1982 in California, handgun prohibition referenda questions were on the ballot. Media polls conducted

before the election reported a tight race, but the prohibition measures were defeated in large landslides. (In Massachusetts, 69.2% voted against prohibition, as did 63% in California).3

One of the better-known media polls which was clearly in error was Time magazine's survey of American gun owners. That survey claimed that four million Americans possessed fully automatic machine guns, a number that is approximately 10 times higher than the number estimated by any criminologist, and 20 times higher than the number of legally registered machine guns.4

This article attempts to identify and explore some of the methodological flaws that may lead to errors in the media polls. While other researchers have criticized the ideological bias of media polls, this paper attempts to evaluate the impact of the methodological flaws upon newspaper poll results.5

Public attitudes are complex, particularly with respect to contentious issues such as gun control, abortion, or capital punishment. It would not be surprising if the public were to hold complex or even contradictory views on controversial issues such as gun control. Not only are many people still thinking through their feelings on many controversial issues, but such issues inherently involve competing values, so that people are required to make difficult trade-offs between two or more highly desirable values before they can comfortably support one side or another in the debate. Very little of this complexity is found in media reported polls.

If issues are complex, then subtle differences in question wording could yield quite different results. Unfortunately, many subtleties are not recognized by the researcher until after the fact. Conscientious researchers deal with this problem by probing the issue area with a variety of questions. In contrast, questions in media polls are often highly selective and occasionally quite biased. Questions about firearms touch sensitive issues and need to be approached with the highest standards of sampling and interviewing quality. Too often this is not the case.

Typically, due to cost constraints perhaps, the media use methods that at best skirt the border of minimally acceptable standards.6 Such an approach may be penny-wise, but it risks introducing biases, which can be particularly severe in dealing with sensitive issues such as gun control.

Moreover, the interviewer effect is, this paper suggests, a greater problem in media polls on gun control than has been previous recognized. While interviewer effects have been known to exist for other public policy issues, the importance of such differences for researching gun control is less well known. Interviewer bias is a potential problem whenever there are significant social or cultural differences between the interviewer and respondent. The classic problem is race, but examples have been found for sex, social class, and age differences.7

The social and cultural differences between interviewers and respondents are fertile ground for potential distortion. This article identifies these problems and empirically analyzes the interviewer effects in a survey conducted recently in the United States and Canada.

II. Accuracy and Reported Accuracy of Polls

A. Sampling Error

The scientific accuracy of polls is typically exaggerated by the media. Almost all media reports of polls include a one-sentence paragraph explaining that "the survey is considered accurate within 2.5 [or 3 or 5] percentage points," and giving the sample size.8

This standard caveat refers to sampling error, that is, the statistical error introduced theoretically by using a sample rather than a complete census of the target population. The "explanation" gives the erroneous impression that the stated error is the maximum error contained in the poll, when in reality it is the minimum. This explanation assumes that no errors or biases that exist in either the sampling or interviewing methods. Such perfection is highly unlikely even in the best of surveys. This paper argues

below that scientific flaws in the media polls introduce additional error at least as large as, and sometimes many times larger than, the sampling error.9

In addition, the stated error refers only to the sample population as a whole, and not to subgroups within the sample population. In many cases, the results from the subgroups are considered more important that the result from the national sample. For example, in polling about "waiting periods" for handgun purchasers, the fact that most Americans support a waiting period may be less newsworthy than the fact that most handgun owners support a waiting period. But the results for handgun owners are far less reliable than the results for the nation as a whole, since the handgun-owning sample is so much smaller.10

The media claim that they are required to give only the briefest treatment of methodological questions because of the low level of expertise of the audience or the reporter. This argument is not very convincing. Such over-simplification, at the very least, acts to enhance the readers' perceived quality of the survey and, arguably, may even augment the impact of the poll because it exaggerates the "scientific" nature of the poll. But keeping the methodology secret can have much more serious consequences, such as enabling cost-conscious media managers to cut corners in quality that could jeopardize the accuracy of the results.

Particularly in magazines_where gun control articles often run for thousands of words_it would not be difficult for articles discussing media polls to include a paragraph noting that the stated sampling error is valid only for the population as a whole, and not for any subsets. Nor would it be difficult to note that inaccuracies may exist in addition to the sampling error.

B. Additional Errors

If sampling error were the only error_as the media pollsters imply_then media polls on the same subject at the same time would rarely report results further apart than the sum of the sampling error of the two polls. In fact, simultaneous or near-simultaneous media polls on the same subject often yield results farther apart than the sum of the sampling error in each poll. For example, in early 1991, a CNN poll found 45% opposed to using nuclear weapons against Iraq. Yet a Gallup poll found 71% in favor of using the weapons.11

That media polls contain errors far larger than the statistical error also became apparent during the 1984 race for the Democratic Presidential nomination. National polls for organizations were conducted within days of each other, and often simultaneously. The polling results showed differences far larger than the statistical error. One poll might report Hart ahead nationally by 8 points, while another poll, taken at the same time, might show Mondale ahead by 5 points.

And of course clear examples of errors larger than the sampling error were seen in the polls of the 1976 Massachusetts and 1982 California handgun ban referenda, where pollsters predicted a close election, but the prohibition referenda were defeated in landslides.

Survey researchers call any error other than sampling error "non-sampling errors." Three of the most important types of non-sampling errors are: coverage error, non-response error, and measurement error. "Coverage error" means failing to give any chance of being selected in the survey to some persons in the "target" population; "non-response error" arises from failing to collect data on all persons in the sample; and "measurement error" is any problem with getting the "true answer" from a respondent. The first potential for bias that will be discussed is that of problems with question wording, which is one of the most important sources of measurement error.

III. Questions

Small changes in wording can create large changes in results. In the polls regarding use of nuclear weapons against Iraq (discussed above) CNN simply asked whether such weapons should be used, whereas Gallup asked about "tactical" nuclear weapons, and hypothesized that such use could save American lives. While CNN had found Americans closely divided on the nuclear weapons issue, Gallup

reported a large majority of 71% in favor of use of such weapons.

This section examines the questions that are often used in gun control polling, and argues that a variety of flaws in the questions exaggerates public support for severe gun laws.

Gallup's question about nuclear weapons use was what this paper calls an "argumentative question"_a question that presents explicit or implicit facts or arguments in favor of one of the results the respondent is evaluating. By modifying the wording of a question, "You can come up with any result you want," says Peter Hart, pollster for the Dukakis campaign.

An example of an argumentative gun control question is Gallup's query about waiting period, which is posed in a way that assumes the waiting period really would help the police keep guns away from illegitimate owners: "Would you favor or oppose a national law requiring a seven-day waiting period before a handgun could be purchased, in order to determine whether the prospective buyer has been convicted of a felony or is mentally ill." Contrary to Gallup's hypothesis, even criminologists who favor gun control have concluded that criminal and mental records are frequently not accurate enough to allow the police "to determine whether the prospective buyer has been convicted of a felony or is mentally ill." Nor are they accurate enough to allow such a check to be completed within seven days. Indeed, the debate in Congress over a waiting period focused heavily on whether state criminal records were good enough for a waiting period to be implemented right away, or whether it would be better to first spend several years improving the quality of existing records. Gallup, however, told his respondents to assume the very point that was at the heart of the controversy. One of the most central disputed facts having been assumed away, it was not surprising that Gallup found a huge majority in favor of a waiting period.

How much effect does the argumentative question have on gun control responses? In 1977, Schuman and Presser investigated that issue. They asked about support for requiring a police permit before a person could obtain a gun; one question was neutral, the other question (asked to a different sample) was argumentative against gun control. The anti-control argumentative questions resulted in 1.7% to 6.4% drops in support for control, depending on the year. On average, then, the argumentative pro-control questions increase the stated level of support for control by roughly 4%.

Sometimes a question itself may be neutral, but the meaning of the question may be distorted by the media pollster. For example, a media pollster may announce that the results of a question about one issue indicate the public's attitude on an entirely different issue. For example, in 1975 Gallup asked Americans: "In Massachusetts a law requires that a person who carries a gun outside his home must have a license to do so. Would you approve or disapprove of having such a law in your state?" Seventy-seven percent approved of such a law in their state.

The result was to be expected, for the vast majority of Americans as of 1975 lived in a state that has similar legislation. Requiring a permit for carry outside the home was not unique to Massachusetts. Over three-quarters of the states required either a permit to carry a gun or a permit to carry a concealed gun.

Yet Gallup did not announce "Most People Support Existing Gun Carry Laws," even though that was all his survey had shown. What Gallup claimed in his article was that the public supported "a specific plan...based on a law now in effect in Massachusetts." Gallup explained that the new Bartley Fox law in Massachusetts requires that "Anyone who is convicted of carrying a gun without a license is given a mandatory sentence of one year in jail."

The one year mandatory sentence was, of course, precisely what made the Massachusetts law different from every other state's. Gallup claimed that the American public supported the stern mandatory sentencing law; but Gallup had never asked them about it. Gallup's actual question merely mentioned the (ubiquitous) permit to carry provision and omitted the (controversial) mandatory sentence provision.

How many Americans actually do favor a one-year mandatory minimum? The analytical poll conducted by Cambridge Research Associates in 1978 asked that question, and found 55% support. The fifty-five

percent is still a majority, but far from the overwhelming consensus falsely reported by Gallup. Gallup's misreporting had exaggerated public support for the mandatory sentence by 22%.

A. Questions about "Assault Weapons"

On the "assault weapon" controversy, most of the questions in media polls were argumentative, or were cited for a policy that had never been included in the polls, or both. Pollsters often asked questions about guns that were very different from the subject of the legislative controversy.

Before looking at the polls, it is necessary to examine precisely what guns the controversy involved.

The Department of Defense's Defense Intelligence Agency has long had a simple definition of "assault rifle": an intermediate caliber rifle or carbine capable of selective fire. In other words, a rifle like a soldier carries, capable of fully automatic fire. Examples would be the U.S. Army M-16, and the Soviet Army AK-47.

Only a few hundred AK-47s have ever been imported into the United States. Ever since the National Firearms Act of 1934, possession of automatics, such as assault rifles, has required an FBI background check, a $200 tax, and a six-month wait. Even stricter legislation was enacted in 1986 concerning civilian ownership of military assault rifles (and other full automatics).

The intense national controversy over "assault weapons" that occurred in 1989, and lingers to some degree today, had nothing to do with those fully automatic guns. Automatics, such as assault rifles, fire automatically. If the shooter squeezes the trigger, bullets will fire automatically and continuously until the trigger is released. It would not be surprising to find that most people favor strict controls over such rapid-fire guns.

In contrast, semiautomatic firearms cannot fire automatically. If the shooter squeezes the trigger, only one shot is fired. Each shot requires an additional trigger squeeze. A semiautomatic's rate of effective fire is nearly the same as (about 1/10th of a second faster) most other guns. Old-fashioned and common guns such as bolt action, lever action, pump action, and revolver all fire at essentially the same rate as a semiautomatic. All of the common gun types (semiautomatic, bolt action, lever action, pump action, and revolver) fire much slower than full automatics.

Some semiautomatics have brown, natural wood stocks attached. Other semiautomatics come with black, futuristic plastic stocks. Functionally, the guns are identical, since their internal parts operate on exactly the same principle. Some of the black-stock semiautomatics look like assault rifles (which are automatics). For example, the semiautomatic AKS looks like the fully automatic AK-47, but does not function like the AK-47. According to the Bureau of Alcohol, Tobacco and Firearms, guns like the (semi-automatic) AKS are functionally identical to common and well-known sporting guns such as Remington hunting rifles. The guns that were the subject of anti-gun lobby's push for weapons control were all semiautomatics. Examples were the Colt AR-15 Sporter, and the Norinco AKS. The guns looked like assault rifles, and had names similar to assault rifles. But they were not fully automatic.

Nevertheless, pollsters often asked questions that about full automatics. Questions are frequently asked about a ban on the "AK-47," which is a full automatic. It impossible to know what respondents thought when they were asked a question about rapid-fire guns, which the semi-automatic is not. For example, Gallup asked about banning "semi-automatic assault guns, such as the AK-47."

The polls sometimes hypothesized a degree of legal regulation of full automatics far less than the law existing since 1934. The Texas Poll asked if sale of "assault weapons remains legal, should there be a mandatory seven-day waiting period to purchase a high-caliber, fast-firing assault rifle." Ever since 1934, there has been not a "seven-day waiting period," but a six month transfer application period. Thus, the Texas Poll found 89% of Texans in favor of something far less strict than the existing federal law_one that had been in place for 56 years. Yet the Texas Poll was used to promote prohibition on

semiautomatics_which the question had not even asked about.

Further, the Texas Poll incorrectly described the guns as "high caliber." In contrast, the Defense Intelligence Agency definition of "assault rifle" includes only guns that are intermediate in caliber or stopping power. Real assault rifle ammunition is "intermediate" in stopping power between handgun ammunition and full battle-rifle ammunition (such as for a Browning Automatic Rifle).

Semiautomatics which look like real assault rifles are also intermediate in caliber. They, like true assault rifles, fire intermediate rifle calibers like the .223 Remington. Many traditional big game weapons fire larger calibers, such as .378 Weatherby. Most people's common sense would suggest that larger calibers are more deadly, and medical research confirms this intuition.

Thus, it would be expected that persons asked a question about controls on "high caliber" guns in particular would be more supportive than they might be about gun control in general. The results from the "high caliber" gun question were touted in legislatures to promote laws that did not regulate high caliber guns, but instead applied to intermediate caliber arms.

In 1990, the anti-gun lobby Handgun Control, Inc. circulated a report listing the results of sixteen organizations' national and state polls, all claiming huge majorities in favor of a strict control. Fourteen of the media pollsters had factual errors in their questions of the type detailed above. Several of them were also argumentative.

Unfortunately, the pollsters who did not have factual errors did not ask about prohibition of semi-automatics, but instead asked about lesser control. Therefore, it is difficult to guess what percentage of the population actually does favor prohibition of some or all semi-automatics.

The two (non-flawed) questions did, however, reveal public support for treating semi-automatics with approximately the same strictness that the public supports for handguns. Virginia's Mason-Dixon Poll found 81% in favor of requiring "a permit in order to purchase a semi-automatic firearm." This percentage is very similar to what the public favors for handguns; Caddell's survey found 82% in favor of a "permit or license to purchase."

The Wisconsin Policy Research Institute found 91% in favor "requiring the owners of semi-automatic rifles to register their weapons with the state."12 Again, the result was within the sampling error range of Caddell's result for handguns. He had found 84% in favor of registering handguns at the time of transfer.13

The 14 pollsters, including Gallup and Harris, who asked factually incorrect (and sometimes argumentative) questions found gigantic majorities in favor of complete prohibition. The results were probably an accurate gauge of public opinion too_for what they asked about. They asked about the guns as a soldier carries like an "AK-47" or an "M-16" or an "assault rifle" or "assault weapon." Thus, the public seems to favor the currently federal policy, which bans all automatics manufactured after 1986.

Unfortunately, the 14 polls finding large public support for prohibition of military guns were misused to promote controls on very different guns.

Most states that studied the semiautomatic issue studied proposals for a total ban. Total bans were rejected in over two dozen states, and enacted in two (California, New Jersey). Despite the rhetoric of organizations such as Handgun Control, Inc., the rejection of the bans in most places was not necessarily contrary to popular will. The pollsters (Gallup) had found that bans were supported nationally by 72% of the population, from a low of 57% (Georgia) to a high of 78% (Massachusetts)_but they had asked about guns that were already banned (like the AK-47 and M-16). Sloppy question construction essentially ruined the utility of the polls conducted by 14 of the 16 organizations. They found, unsurprisingly, a large majority in favor of a gun ban that had been on the books since 1986. The public's affirmation of a law (about automatics) already in effect was misused to promote passage of entirely different laws, having

nothing to do with "high caliber" "assault weapons" like the "M-16" and "AK-47."

In Virginia and Maryland, the legislatures passed laws making some semiautomatics subject to the same police background check as handguns.14 The Virginia and Maryland legislatures seemed to come closer to what the two non-flawed polls actually showed the larger segment of the public to want (approximately the same controls as are applied to handguns).

Because media reports of the polls do not reprint the actual question that was asked, readers are often prevented from even attempting to evaluate the distorting effect of misleading questions.15

B. Sloppy Questions

The propensity for sloppy questioning leading to results of little practical value is not confined to questions about "assault weapons." At least in regard to "assault" guns, pollsters might be excused for making a technical error in describing guns, a subject with which their question-writers apparently had little practical familiarity.

Other sloppy questions do not stem from technical mistakes. One of the most opaque gun questions was asked by Harris in January 1969, a few months after Congress had passed the first comprehensive national gun control law, the Gun Control Act of 1968: "Specifically, how would you rate the job Congress has done on not passing gun control legislation_excellent, pretty good, only fair or poor?"16 A strong opponent of gun control would have to answer "only fair" or "poor," because Congress had just enacted gun control legislation; a person favoring an absolutist interpretation of the right to bear arms could hardly say that a Congress which had just enacted the most sweeping federal gun control law in American history had done an "excellent" or "pretty good" job in "not passing gun control legislation."

Harris found that 59% of the country gave Congress low marks on the job of "not passing gun control legislation." While the results would seem to indicate opposition to federal gun control, the results were claimed to show public support for strict gun laws. And it is true that a gun prohibitionist, feeling that the Gun Control Act of 1968 did not go nearly far enough, might also give Congress low marks on "not passing gun control legislation." Thus, persons who thought there was too much federal gun control, and persons who thought there was too little, might both answer that Congress had done a "fair" or "poor" job of "not passing gun control legislation."

The question was, accordingly, worthless for research purposes. The most that the question revealed was that Harris himself apparently did not know about the 1968 Act, or thought that it did not go nearly far enough.

C. Overly General Questions

Another type of question which may lead to misleading results is the overly general question. Since at least 1975, Gallup has been asking if "the laws covering the sale of firearms should be more strict, less strict, or kept as they are now."17 Yankelovich asks the same question.18

The question is only a useful policy guide if the public actually knows that the current "laws concerning the sale of firearms" are. Unfortunately, Wright, Rossi, & Daly found "a substantial degree of misinformation on the matter." As a result, public "opinion that the existing measures should be made tougher is rather difficult to interpret meaningfully."19 For example, one Missouri newspaper excitedly headlined "Voters Back Gun Control." Yet analysis of the question indicated that a majority opposed laws as strict those in effect in Missouri for 65 years (apparently unbeknownst to most of its population).20

A question about whether present gun laws should be made stricter will be even less meaningful if the interviewer creates the incorrect impression that present laws are much weaker than they actually are. Gallup's first question in 1989 and 1990 asked about banning the "AK-47." The question assumed that the AK-47 (banned since 1986) was legal. If respondents believed that the first question was factually accurate

(that AK-47s were legal), then they would be likely to favor making laws stricter than "they are now." Not surprisingly, most of Gallup's respondents thought that gun laws should be stricter than "they are now."

Of all social science work conducted, media polling such as Gallup's is near the top in influence on public policy. Unfortunately, it may be that Gallup's staff is not in touch with the world of academic social science. If the Gallup staff were even peripherally in touch with academic social science, Gallup might stop asking flawed question such as whether gun laws should be stricter "than they are now." It is unfortunate that the Gallup Poll apparently never became aware of the Wright, Rossi & Daly critique of the type of question Gallup uses.

Even questions which are slightly more specific may involve huge ambiguities. For example, a pollster may ask about requiring a "license" to own a gun. Do the "yes" respondents favor a system like that in Illinois, where everyone who is not insane or a criminal is readily granted a license, or like that in New York City, where virtually none of the applicants get a license?21

D. Questions that are Never Asked

One gun control question which has been conspicuous by its absence is the "instant check" for handgun buyers. Since 1988, there has been no disagreement about the issue of federally mandated pre-purchase screening of gun buyers. Both the largest anti-gun lobby, Handgun Control, Inc., and the largest pro-gun lobby, the National Rifle Association, have agreed that the federal government should encourage states to check handgun purchasers for records of criminal convictions. The two organizations have sharply disagreed, however, about the mechanism for the check. Handgun Control, Inc. favors a seven day waiting period, during which police officials would have the option of conducting a background check. The National Rifle Association prefers an instant telephone check, whereby a gun dealer calls criminal justice records number to verify a prospective purchaser's eligibility, much as the dealer already calls a credit card hotline to verify the purchaser's use of a credit card.

Because for the last four years the debate has been "waiting period" vs. "instant check," it might be expected that media pollsters would have repeatedly queried the public about which screening mechanism the public endorsed. But in fact, no media pollsters asked such questions. Instead, the pollsters asked only whether a waiting period was a good idea, and not whether an instant check was an even better idea. Regarding the waiting period in isolation, Gallup (using an argumentative question) found 95% support, and other pollsters reported similar numbers. Handgun Control, Inc. insisted that polls proved that the public favored the Handgun Control waiting period.

In May 1991, Lawrence Research conducted an analytical poll, and found that while 85% of the public liked the idea of a waiting period, only 33% liked a bill with the features of Handgun Control's bill (such as making the check optional, and allowing lawsuits against police for an insufficiently thorough check).22 When presented with a choice between the instant telephone check and the waiting period, the public preferred the instant check 78% to 14%. It is unfortunate that during a four year period when Congress was debating the merits of a waiting period vs. an instant telephone check, no media pollster bothered to survey public attitudes on the question.

Would it be cynical to suggest that the reason the question was never asked was that the media pollsters (correctly) feared that the answer would be an overwhelming preference for an instant check?

A person who read only media polls might develop the impression that a substantial tightening of gun laws is a very important public policy objective for a very large majority of the American people. But when pollsters ask the general open-ended question, "What should be done about violent crime?" The percentage of people who answer "gun control" is often smaller than the sampling error.23 Reports of such polls do not, however, run under headlines such as "Few See Gun Control as Solution to Crime." If, on the other hand, the open-ended questions did find large spontaneous support for gun control, we expect that the media reports would focus on "Record Support for Gun Control."

In sum, the formulation and reporting of gun control questions in media polls is seriously flawed. The flaws are so pervasive as to significantly undermine the reliability of the pro-control numbers reported by the media pollsters.

The next section of the paper examines serious practical problems in conducting representative samples that threaten the accuracy of media polls. Two of the most serious errors are coverage errors and non-response errors.

IV. SAMPLING BIASES

ALL TOO OFTEN MEDIA POLLS EXHIBIT METHODOLOGICAL LIMITATIONS IN SAMPLING WHICH CAN COMPROMISE THEIR ACCURACY. THESE METHODOLOGICAL PROBLEMS ARE NOT UNIQUE TO GUN CONTROL POLLS, BUT THE PROBLEMS MAY HAVE A PARTICULARLY LARGE IMPACT ON QUESTIONS ABOUT SENSITIVE QUESTIONS SUCH AS GUN OWNERSHIP AND ATTITUDES TOWARDS GUN CONTROL. SOME ERRORS EXAGGERATE SUPPORT FOR GUN CONTROL WHILE OTHERS WORK IN THE OPPOSITE DIRECTION. THIS SECTION EXAMINES "COVERAGE ERRORS" AS WELL AS "NON-RESPONSE ERRORS." AFTER DISCUSSING THE VARIOUS SOURCES OF ERRORS, WE CONCLUDE THAT THE NET RESULT ARTIFICIALLY EXAGGERATES POPULAR SUPPORT FOR GUN CONTROL MEASURES IN MEDIA POLLS.

A. COVERAGE ERROR

"COVERAGE ERROR" MEANS FAILING TO GIVE ANY CHANCE OF BEING SELECTED IN THE SURVEY TO SOME PERSONS IN THE "TARGET" POPULATION. THE THEORETICAL PRINCIPLES OF SAMPLING HAVE LONG BEEN KNOWN TO STATISTICIANS, BUT THE PRACTICAL PROBLEMS ARE STILL QUITE DAUNTING _ AND QUITE EXPENSIVE.24 This section looks at problems that can invalidate a sample's accuracy over and above the purely statistical limitations of sampling, known as sampling error. Since almost all public surveys are conducted over the telephone, this discussion will be limited to telephone surveys.25

Conducting a sample of the general population involves two distinct stages: [1] selecting a random sample of households, and [2] selecting respondents randomly from within households. In selecting a sample of households, the first consideration is to get a complete list of the telephone numbers for the target population. If the target population has been selected as "all households in the state," failure to include households without telephones is called "coverage error," as is failure to include people who are not-at-home or who refuse to participate when the interviewer calls their household. Such errors are critical because the resulting sample may not reflect all segments of the target population.

The proliferation of computers during the past few decades has meant a tremendous increase in the use of "random digit dialing" [RDD] methods.26 Only the smallest and least sophisticated media polls still depend upon directory-based sampling methods. Polls using directory-based methods simply cannot be relied upon. Nevertheless, despite the widespread use of RDD, it is still not possible to guarantee coverage of all households in a state. This might seem surprising because of the high penetration of telephones in the 1990's, but it is true. Across the United States, the percentage of households who do not have telephones varies from 4% to 7%. More importantly, the likelihood of telephone ownership varies with family income, race, age and region.27

These biases are well known to most professional pollsters, who attempt to correct for them by weighting the sample to achieve the regional, sex, or race distributions that they decide is best. Unfortunately, studies have shown that weighting only partially corrects for these biases and occasionally exacerbates them.28 Households without telephones differ from those with telephones, so no amount of weighting can replace the use of proper sampling methods.

The extent of bias in media polls that derives from the use of improper sampling methods remains to be

systematically evaluated, but it is non-trivial, particularly in media polls done for regional papers. Attitudes towards gun control varies across social groups so that differential sampling across these groups is bound to have an impact upon the relative support that is reported.29 However, it is difficult to assess the effects of sampling upon gun ownership or attitudes towards gun control legislation because reported gun ownership is negatively associated with some of these factors and positively associated with others.30 The likelihood of both firearm and telephone ownership increases with family income, but firearms ownership is higher in the West and the South where telephone coverage is its lowest.31 Telephone ownership is higher among whites than non-whites, and whites are more likely to report owning firearms.32 Finally, telephone ownership is lowest in rural areas_precisely where firearms ownership is highest.33 While it is difficult to fully assess, the net impact of coverage errors is probably in favor of gun ownership and thus would tend to exaggerate the anti-control opinions.

Proper sampling involves more than merely finding a representative sample of households. A more difficult challenge is to successfully interview respondents from within a household. The most important problem associated with within-household sampling is called "non-response error," which consists of two intertwined problems: finding respondents at home and getting them to participate in the survey. The key to reducing non-response error is the number of "callbacks." 34 If budgets are tight, it can be tempting to reduce the number of callbacks that are made to a household. Callbacks are expensive and it costs less for interviewers to simply call the next number on the list than to schedule time to pursue "incompletes." Top quality survey firms make as many as 20 attempts to call back after the targeted respondent, while low-quality survey houses may not make any.35

Callbacks are critical because the people who are easiest to contact differ from those who are more difficult to find, and who therefore require more callbacks to reach; for example, unemployed people, retired, or housewives are easier to find at home than are people who are employed, particularly men, or poorer people.36 For example, in a 1984 pre-election survey, Traugott found that repeated callbacks increased Reagan's plurality over Mondale from 3% to 12%.37

Refusals pose an even more important problem than not-at-homes. Not only are estimates of the refusal rate in commercial media polls over 25%,38 but, in addition, the demographics of the refusers is related to features which correllate with owning ot not owning guns. In a wide variety of studies, refusers have been found to be older males, people with a high-school level of education or lower, and to be non-whites.39 Since education level and gender have been found to be associated with opposition to stricter gun-control legislation,40 the net result is a small bias against those groups who oppose stricter gun-control laws.

Refusal rates are even higher for surveys dealing with sensitive issues such as gun ownership. In a survey of Louisiana automobile owners so few blacks participated that the survey had to be limited to whites only.41 Our knowledge of gun ownership is limited by how willing people are to report they own a gun. If some groups are more reluctant than others to admit to owning a firearm, than what we believe about the social patterns of gun ownership may be seriously skewed. As well, if people who own firearms are more likely to refuse to participate in surveys, then their opinions would be systematically under-represented in polls.

Non-response bias in media polls would appear to exaggerate support for stricter gun-control legislation. This follows primarily because errors due to non-response error (i.e., refusals and not-at-homes) are larger than those due to coverage errors. In short, the demographics that favor stricter gun legislation tend to be over-represented in media polls.

B. Fraud and Lies

Another potential problem with sampling is fraud on the part of the sampler. The media organizations which conduct media polls have no financial incentive to spend resources guarding against errors or fraud; the media have even less incentive to monitor closely the quality of the polling conducted by Gallup or Harris.

Accordingly, evidence of fraud is uncovered only sporadically, if ever. In 1968, the New York Times hired Gallup to conduct a survey of Harlem residents. The results were so interesting that an editor sent a reporter and photographer to do follow-up stories of some of the Harlem residents who had been interviewed. But at 7 of the 23 addresses that Gallup gave the Times, there was no dwelling. At 5 more, there was a dwelling, but the person allegedly polled did not live there, and the people who did live there had never heard of the person. Even the respondents that did actually exist turned out to be somewhat different than Gallup had reported. One "respondent" was a composite of four people playing cards.42

In one Harris poll, the employee selecting the sample cities chose them not for methodological reasons, but because they had interesting names.43 In another Harris poll (this one conducted for a private organization), the initial round of polling omitted some questions that the organization had wanted asked. At the client's insistence, Harris sent follow-up mail questionnaires to all the persons who had been interviewed. Twenty-five percent of second surveys sent to the original "respondents" were returned as undeliverable, because there was no such address, or no such person.44

The anecdotes illustrate one reason why analytical polls may be more accurate than the media polls: the client has a larger financial stake in quality control.

It is impossible to conclude from anecdotes that fraud is rife within media polling. It is also impossible to exclude the possibility, particularly since the persons hired to actually conduct the interviewers tend to be young, and poorly attached to the labor force.

If fraud were not uncommon, it might be expected that the fraudulent poll-takers would be more likely to make up anti-gun responses from their non-existent interviewees, since the population segment most commonly hired as poll-takers, urban females, is also the most anti-gun segment.

Interviewers are, of course, not the only people who lie. Respondents may lie too. It has been suggested the 1973 Gallup and Harris surveys on the impeachment of President Nixon underestimated the breadth of support for impeachment because respondents were afraid that a pro-impeachment answer might expose them to retaliation from the government.45 Whether the respondents' fears were realistic is irrelevant to the question of whether the fear induced the respondents to lie.

In regard to gun control polling, there could be potential for fearful respondents to lie. During the 1989-90 controversy over "assault weapons," many politicians were calling for the confiscation of all such weapons in private hands. If a respondent owned an "assault weapon" and feared confiscation, he might also fear that a strong pro-gun response might indicate that he could be seen as an "assault weapon" owner. Again, whether the fear was realistic does not matter.

The possibility that some gun owners may lie to "protect" themselves relates to the larger problem of respondent refusal to answer. Questions about firearms ownership are highly reactive, much like questions about personal income or sexual or criminal activities. Hence, these questions have a higher rate of refusal than other less reactive questions, so that people who answer such questions may differ from the full sample. It would certainly be consistent with the stereotype of gun owners for the typical (slightly paranoid) gun owner to refuse to answer any questions about guns with a stranger over the phone. But because media polls typically do not report raw figures, the drop-off is invisible.

While survey methods have vastly improved since Gallup first introduced polls in the 1930s, polling is still a challenging endeavor fraught with many perils. There are still many ways in which errors or biases can be introduced, in part because top quality survey methods are very expensive. In the case of media polls, where budgets are so tight, the commitment to top quality methods may too frequently have to be sacrificed to meager budgets. Additionally, it may be easy to sacrifice quality because it is so difficult for readers to discover what methods were actually employed and if any short cuts had been adopted. In sum, the problems with sampling are understood theoretically, but too often, due to budget constraints or lack of concern, ignored by the media pollsters.

V. INTERVIEWER EFFECTS

IN ADDITION TO PROPER QUESTIONS AND SCIENTIFIC SAMPLING METHODS, AN ACCURATE POLL REQUIRES PROFESSIONAL INTERVIEWING, A CHALLENGE AS COMPLEX AS SAMPLING BUT LESS WELL UNDERSTOOD THEORETICALLY. INTERVIEWING REFERS TO THE GENERAL PROBLEM OF QUESTIONING PEOPLE TO ELICIT THEIR OPINIONS OR BELIEFS. SINCE THE OBJECTIVE IS TO DISCOVER WHAT THE RESPONDENT BELIEVES, THE INTERVIEWER SHOULD NOT INTRODUCE HIS OR HER OWN OPINIONS.

AN INTERVIEW IS A CONVERSATION BETWEEN TWO PEOPLE, AND, DESPITE THE BEST TRAINING, ALL OF THE COMPLEXITIES OF HUMAN INTERACTION COME INTO PLAY. AT THE VERY START OF A TELEPHONE INTERVIEW, RESPONDENTS CAN IDENTIFY THE INTERVIEWER'S GENDER. WITHIN A FEW MINUTES, A RESPONDENT CAN OFTEN IDENTIFY AN INTERVIEWER'S RACE, SOCIAL CLASS, AND WHERE HE OR SHE GREW UP. EVEN IF RESPONDENTS ARE MISTAKEN, THEIR GUESSES STILL INFLUENCE THEIR ANSWERS.

INTERVIEWER EFFECTS ARE A POTENTIAL PROBLEM IN ALL SURVEY RESEARCH STUDIES, BUT THEIR IMPORTANCE IS SUBSTANTIALLY LARGER IN SURVEYS DEALING WITH SENSITIVE QUESTIONS.46 Interviewer effects have been found to be more important in telephone polls than in face-to-face surveys.47 This follows because each interviewer is responsible for a larger number of respondents in telephone surveys than in other kinds of surveys.

Awareness of interviewer effects is not new. Early survey researchers found that respondents were influenced by the race of the interviewer.48 The effect of race appears to be limited to race-related questions and has been found to exist for both white and black interviewers.49 Race is not the only interviewer characteristic that has been shown to influence respondents. Religion, age, social class, and sex differences have all been found to be important.50 In questions about abortion, female interviewers receive more "pro-choice" responses, and male interviewers receive more "pro-life" responses.51

The predominant explanation is that many respondents tailor their responses to conform to expectations or to perceived social norms.52 Respondents exaggerate their degree of schooling, and refuse to acknowledge their (private) support for political candidates considered extremist and unpopular (such as Barry Goldwater in 1964 and George Wallace in 1968). After President Kennedy was assassinated, few respondents admitted voting against him. During Watergate, a majority of Californians claimed to have voted for George McGovern_even though Nixon carried the state by 1,126,249 votes!53

In many cases, interviewer effects (or more precisely, respondents' desire to give responses which they think will please the interviewer) have been found to be substantially larger than sampling error.54 Two studies estimate that interviewer effects are about 5% to 7% of total response variance.55 However, this study averaged effects across both sensitive and non-sensitive questions.

Unfortunately, too many media polls ignore the problem of interviewer bias or assume it away. While it is true that no researcher can successfully deal with all possible problems in any given survey, it is necessary to address the major problems or else one is forced to accept a low level of quality.

Interviewer effects can be expected to cause problems in surveys on firearms issues not only because of the sensitivity of questions dealing with firearms, but also because of the social differences between interviewers and the respondents most likely to be pro-gun. Historically, urban-rural differences are one of the most important cleavages in politics, along with race, religion, and social class.56 In understanding public attitudes towards gun control, the most important variable is (not surprisingly) firearms ownership.57 Gun owners tend disproportionately to be rural and small town middle-class males.58 In contrast, telephone survey interviewers tend to be urban females, who are unlikely to own guns and are likely to support severe gun control. Accordingly, it is entirely possible that respondents answering questions about gun control posed by urban females might be inclined to give more pro-control answers.

VI. CONCLUSION AND DISCUSSION

For many years, academics have been discussing the significance of the large pro-control sentiment reported by the media polls. Hazel Erskine complained "It is difficult to imagine any other issue on which Congress has been less responsive to public sentiment for a longer period of time." More recently, Douglas Jeffe and Sherry Bebitch Jeffe examined gun control polling, and predicted that a wave of prohibitions on "semiautomatic assault weapons" would "reduce the NRA to a voice in the wilderness."59

Jeffe and Jeffe made their prediction in an article discussing the results of a 1989 CNN/Los Angeles Times poll. The prediction of Jeffe and Jeffe turned out to be inaccurate. Only one state besides California enacted an "assault weapon" law, and in that state (New Jersey) the legislature voted to rescind much of the law the next year. Jeffe and Jeffe were not, however, guilty of a unique error. Reports in media polls of huge pro-control majorities have often been accompanied by incorrect predictions of the enactment of stricter gun laws.

Various hypotheses have been offered as to why there is such a large discrepancy between public opinion polls and legislative action. One theory has been that opponents of control hold their views with more intensity than do proponents of control, and hence exert greater influence.

One way to test the intensity hypothesis has been to ask respondents how strongly they feel about the gun control issue. In the polls conducted by Schuman and Presser, and the polling conducted by Caddell (none of these polls being "media polls"), it was the proponents of control who were more likely to describe the gun issue as important to themselves, and as an important basis for their votes.60 If the polling results about intensity are accurate, the gap between public opinion and legislative action becomes even more difficult to explain, since the gun control advocates are not only more numerous, but also more inclined to take political action on their beliefs.

But actual behavior does not comport with the polling results. The largest pro-gun organization, the National Rifle Association, has 2.5 million members, while the largest anti-gun organization, Handgun Control, Inc., has only 200,000. The mail received by most legislative offices generally runs at least 12:1 in favor of the pro-gun side. (In rural districts, the pro-gun advantage may be 100:1.) Pro-gun rallies at state capitols routinely draw hundreds, and sometimes tens of thousands of people. Few anti-gun organizations have enough grassroots strength to even schedule a rally. In short, if "intensity" is measured by visible involvement in public policy questions, the pro-gun forces are far more intense.

Thus, the "intensity of activity" hypothesis seems plausible, and may explain much of the discrepancy between public opinion polls and actual political results. The fact that so many respondents claim to have intense feelings in favor of gun control, but very few of those persons seems to act on those stated "intense" feelings, may be further support for an interviewer effect in gun control polling. Some respondents may feel that they are pleasing the interviewer by claiming that the anti-gun position is one of their most important political beliefs.

Besides the intensity hypothesis, another explanation for why legislative results are so divergent from media poll results about gun control may be that the polls themselves substantially overstate public support for gun control. The only research done thus far on that question was conducted by Schuman and Presser, who found that variations in question formulation accounted for a 1.7% to 6.4% variance in survey results. Schuman and Presser rejected the hypothesis that polling results are far out of line with actual public opinion; the authors noted, correctly, than even with a 6.4% variance, the reported level of support for gun control was still quite high.

Schuman and Presser, however, analyzed only one of the potential factors potentially causing inaccuracy in polling_the impact of argumentative polling questions themselves. This paper has attempted to more broadly survey several factors which, cumulatively, could sharply skew the results in public opinion polls on gun control. These factors are most commonly present in the hastily-conducted surveys which we have dubbed "media polls."

Our review shows that media polls typically exhibit numerous problems. The poll questions themselves suffer from myriad flaws, which give an unduly simplified view of public opinion. Slanted, loaded, or technically incompetent questions are common, and results are often claimed to support a position that was never queried. For example, questions asking about bans on particular models of fully-automatic firearms are used as evidence of public support for prohibition of semiautomatics. Short question series fail to explore respondents' opinions adequately. Questions about whether gun laws should be made stricter do not examine whether the respondents understand what the present laws are. The media typically only ask about the desirability of gun control and not about the right to bear arms or about alternative strategies for dealing with violent crime.61

A second major possible distorting factor in media polls stems from the lack of outside quality controls on media polls, and the propensity to produce results in a hurry. Methodological limitations arise which may over-emphasize the views of relatively anti-gun segments of the population (urban females) and under-emphasize the views of pro-gun segments (males with full-time jobs). In addition, the most militant gun owners may have reasons of their own for refusing to communicate their militancy to strangers on the telephone. Lastly, since most interviewers are urban females (an anti-gun group), it has been suggested that interviewer effect might produce relatively more anti-gun answers. Preliminary research suggests that the interviewer effect relating to gender may change the intensity of an answer, but not the basic position expressed.

In sum, media polls on gun control are often not scientific and should be interpreted with caution. Media polls may tend to exaggerate popular support for sterner gun control measures.

ENDNOTES

1. David Bordua, "Gun Control and Opinion Measurement: Adversary Polling and the Construction of Social Meaning," in Don B. Kates, Jr. [ed] Firearms and Violence, Issues of Public Policy. (San Francisco: Pacific Institute for Public Policy Research, 1984); and William R. Tonso, "Social Problems and Sagecraft: Gun Control and the Social Scientific Enterprise," in Don B. Kates, Jr. [ed], ibid; William R. Tonso. Gun and Society, The Social and Existential Roots of the American Attachment to Firearms. (Washington, DC: University Press of America, 1982).

2. Cambridge Reports, An Analysis of Public Attitudes Toward Handgun Control (Cambridge, Mass., June 1978). Decision Making Information, Attitudes of the American Electorate Towards Gun Control 1978 (Santa Ana, California, 1978).

Both surveys reported consistent findings that about 40-50% of U.S. households owned some kind of gun, and about half of those households owned a handgun. The two surveys agreed that about 7% of adults carry a gun on their person, and that 40% of handgun owners bought their weapon mainly for self-protection. About 15% of all registered voters or their families had used a gun in self-defense (including by brandishing it). Caddell reported that 2% of all adults had personally fired a handgun in self-defense; DMI found that 6% of all registered voters or their families had fired a gun in self-defense. The incidence of firearms accidents was about equal to the incidence of firearms use for self-defense.

The two surveys also produced similar results about gun control. Regarding mandatory prison sentences for criminals who use a gun, Caddell found 83% support, and DMI found 93% support. Requiring detailed record-keeping by gun dealers was favored by 54% of the DMI respondents, and 49% of Caddell's. Caddell found about 62% of the population against a ban on handgun ownership, while DMI found 83% opposed. Each survey found 40-50% agreeing that stricter gun controls would reduce crime. 78% of Caddell's sample thought that gun control laws only affect law- abiding citizens; 85-91% of DMI's sample thought registration would not prevent criminals from acquiring handguns. About half of the DMI and Caddell samples agreed that national gun registration might eventually lead to total firearms confiscation.

To the extent the surveys seemed to differ, it was usually because the pollsters had asked different

questions. For example, 87% of DMI thought that the Constitution guaranteed an individual right to own a gun, and 53% of Caddell thought handgun licensing was Constitutional. The results were consistent, in that the majority may have felt that the Constitution guarantees a right to own a gun, but that handgun licensing does not violate that right.

Thus, Wright, Rossi and Daly concluded:

Despite the occasionally sharp differences in emphasis and interpretation...the actual empirical findings from the two surveys are remarkably similar. Results from comparable (even roughly comparable) items rarely differ between the two surveys by more than 10 percentage points, well within the "allowable" limits given the initial differences in sampling frame and the usual margin of survey error....[O]n virtually all points where a direct comparison is possible, the evidence from each survey says essentially the same thing. [p. 240].

In short, except for the fact that the two surveys came from different sides of the gun control debate and highlighted different aspects of their results, they were nearly identical. For a detailed comparison of these two polls, see Chapter 11, James D. Wright, Peter H. Rossi and Kathleen Daly. Under the Gun: Weapons, Crime and Violence in America. (New York: Aldine, 1983).

3. Don B. Kates, "Bigotry, Symbolism and Ideology in the Battle over Gun Control," Public Interest Law Review (Carolina Academic Press: 1992): 31-46.

4. "Under Fire," Time Magazine, January 29, 1990.

5. Gollin criticizes media polls for poor quality, but he does not specify which errors he is concerned about. Albert E. Gollin. "Polling and the News Media," Public Opinion Quarterly, 51 (no. 1, pt. 2), 1987, 86-94.

6. Cynthia Crossen, journalist for the Wall Street Journal, has argued that media polls are increasingly underfunded. See Globe and Mail, December 7, 1991, D5. For example, The Vancouver Sun, the largest daily in British Columbia, with a paid circulation of over 250,000, has a reputation of being cheap. For the past decade, the paper has relied upon the pollster with the worst record in the province because he was the low bidder. Since few editors were familiar with survey methods, the pollster had a free hand in conducting his polls, and because he is interested in profit, he has every reason to cut corners methodologically.

7. See Seymour Sudman and Norman M. Bradburn. Response Effects in Surveys: A Review and Synthesis. (Chicago: Aldine, 1974); Norman M. Bradburn, "Response Effects" in Peter H. Rossi, James D. Wright and Andy B. Anderson, (eds) Handbook of Survey Research, (New York: Academic Press, 1983); GE Lenski and J.C. Leggett. "Caste, Class, and Deference in the Research Interview," American Journal of Sociology. 1960. 65: 463-467.

8. For example, Associated Press, "Polls Shows Majority Favor Ban on Assault Weapons," Rocky Mountain News, March 19, 1989, p. 46: Los Angeles Times survey of "1,158 people...has a margin of error plus or minus 3 or 4 percentage points." For a Newsweek survey, "The telephone pole [sic] of 756 adults...has a margin of error of plus or minus 4 percentage points."

9. For a very readable account of the practical problems involved in conducting a modern survey study, and the kinds of potential errors, see Robert M. Groves, Survey Errors and Survey Costs. (New York: Wiley and Sons, 1989).

10. About 1/4 of American households contain a handgun, which means that about 1/4 of a nationwide sample of households would be expected to own a handgun. Thus, if the sampling error for the full sample is ± 2.5 percentage points, then for one-quarter of the sample the sampling error increases to ± 5 percentage points.

11. Robert S. Greenberg and John J. Fialka, "Calls by Some on GOP Right to Consider a Nuclear Strike Spark Heated Debate," Wall Street Journal, 1991.

12. Sept. 4-7, 1990.

13. Wright et al., supra, p. 223.

14. Maryland has a 14 day wait, and Virginia an instant telephone check. The Virginia check seems to have a lower error rate.

15. E.g., Associated Press, "Polls Shows Majority Favor Ban on Assault Weapons," Rocky Mountain News, March 19, 1989, p. 46 (reporting Los Angeles Times and Newsweek polls).

16. Reproduced in Hazel Erskine. "The Polls: Gun Control," Public Opinion Quarterly, vol. 36, 1972: 469.

17. "In general, do you feel the laws regarding covering the sale of firearms should be made more strict, less strict, or kept as they are now." Gallup Polls, Sept. 10-11, 1990, reporting results for 1980, 1986, 1989, and 1990. Should the laws covering the sale of handguns be made more strict. Gallup, 1975, discussed in Don B. Kates, Jr. "Toward a History of Handgun Prohibition in the United States," in Don B. Kates, Jr. ed., Restricting Handguns: The Liberal Skeptics Speak Out (North River Press, 1979), p. 27.

18. Douglas Jeffe and Sherry Bebitch Jeffe, "Gun Control: A Silent Majority Raises Its Voice," Public Opinion, May/June 1989, p. 9 (survey for CNN/Los Angeles Times).

19. Wright, et al, supra, p 232, citing 1975 DMI poll for evidence of public misunderstanding of current laws. George Gallup, "Gun Control Plan Favored," supra, 1975.

20. Kates, "Towards a History," supra, p. 27.

21. Kates, ibid., p. 28. Franklin E. Zimring. "Firearms, Violence and Public Policy," Scientific American, November 1991, 265[5]: 48-54.

22. Dr. Gary C. Lawrence, "Results of a National Telephone Survey of Registered Voters on Waiting Period and Immediate Check Legislation," May 1991. The poll was commissioned by the National Rifle Association. As discussed above, the fact that an organization with an interest in the result has paid for analytical polling does not make the poll invalid. Polls paid for the anti-gun Center for the Prevention of Handgun Violence and the pro-gun National Rifle Association have found strikingly similar results. Apparently if an organization is willing to pay the fee for thorough analytical polling by a professional polling firm, the results come out the same no matter who writes the check. Handgun Control, Inc., Assault Weapons: Polling Data (1990).

23. Bordua, supra, p. 347-348.

24. The principle is that all elements of the target population must have a known_often equal_probability of being selected.

25. A potential source of error is that not everyone in the general population has a telephone. In the mid-1980s it was estimated that approximately 93% of all households in the US have a telephone. Owen T. Thornberry, Jr. and James T. Massey. "Trends in United States Telephone Coverage Across Time and Subgroups," in Robert M. Groves, Paul P. Biemer, Lars E. Lyberg, James T. Massey, William L. Nicholls II, Joseph Waksberg, eds., Telephone Survey Methodology (New York: Wiley & Sons, 1988.), p 29.

26. See James M. Lepkowski, "Telephone Sampling Methods in the United States," In Groves et al., supra, p.73 The use of RDD in almost all state-wide polls has eliminated the problem of unlisted numbers that plagues directory-based sampling methods. RDD means that telephone numbers are created randomly

using computer-generated lists, based on the prefixes for the target area. Clearly, unlisted numbers_either new listings or private numbers_can be generated so that the researcher is not dependent upon published lists of telephone numbers.

27. Thornberry and Massey, in Groves et al., supra, p. 37.

28. James T. Massey and Steven L. Botman 1988. "Weighting Adjustments for Random Digit Dialed Surveys," in Groves, et al., supra, p 143.

29. See Gary A. Mauser and Michael Margolis. "The Politics of Gun Control: Comparing Canadian and American Patterns," Presented to the American Political Science Association, San Francisco, 1990, and Arthur L. Stinchcombe, Rebecca Adams, Carol A. Heimer, Kim L. Scheppele, Tom W. Smith and D. Garth Taylor. Crime and Punishment _ Changing Attitudes in America (San Francisco: Jossey Bass, 1980).

30. Another problem is that the willingness of people to admit that they own a firearm may vary across social categories. This is discussed in the next section.

31. The percent of households without telephones is the highest in the South (10%), followed closely by the West (7%), then comes the Midwest (6%), and is lowest in the Northeast (4%). Thornberry and Massey, supra, p 29

32. The percent of households without telephones is 6% for whites, 16% for blacks, and 11% for other non-whites. Ibid, p. 30.

33. The percent of households without telephones in urban areas is 8%, rural farm is 5%, while rural non-farm areas average 10%.

34. Robert M. Groves and Robert L. Kahn. Surveys by Telephone (New York: Academic Press, 1979), p 55.

35. Personal communication, Bruce Campbell, President, Campbell and Associates, Vancouver, BC.

36. Michael W. Traugott "Persistence in Respondent Selection." Public Opinion Quarterly (Spring 1987), p. 53.

37. Ibid., p. 54.

38. Groves, supra, p. 155.

39. Ibid., p. 205-207.

40. Mauser and Margolis, supra, p. 17.

41. Bankston, Carol Y. Thompson, Quentin A.L. Jenkins, and Craig Forsyth, "The Influence of Fear of Crime, Gender, and Southern Culture on Carrying Firearms for Protection," Sociological Quarterly, 31[2]: 287-305, p. 302.

42. Michael Wheeler. Lies, Damn Lies, and Statistics: The Manipulation of Public Opinion in America (New York: W.W. Norton, 1976; republished by Dell), p. 111.

43. Ibid., p. 95.

44. Ibid., p. 112.

45. Ibid., p. 117.

46. Robert M. Groves and L.J.Magilavy. "Estimates of Interviewer Variance in Telephone Surveys." Proceedings of Survey Research Methods Section, American Statistical Association, (1980), 622-62.

47. Groves and Magilvay, supra.

48. Daniel Katz. "Do interviewers bias poll results?" Public Opinion Quarterly (1942) 6:248-268; Henry Cantril, Gauging Public Opinion. (Princeton: Princeton University Press, 1944).

49. Howard Schuman and Jean M. Converse. "The Effect of Black and White Interviewers on Black Responses in 1968." Public Opinion Quarterly,(1971), vol. 35: 44-68.

50. H.H. Hyman, W.J. Cobb, J.J. Feldman, and C.H. Stember. Interviewing in Social Research (Chicago: University of Chicago Press, 1954); David Riesman, "Orbits of Tolerance, Interviewers and Elites," Public Opinion Quarterly (1956), vol. 20: 49-73; G.E. Lenski and J.C. Leggett. "Caste, Class, and Deference in the Research Interview," American Journal of Sociology, (1960) vol. 65: 463-467; Michael D. Grimes and Gary L. Hansen, "Response Bias in Sex-Role Attitude Measurement," Sex Roles, (1984), vol. 10 (nos. 1 & 2): 67-72.

51. In a 1990 Eagleton Institute poll, women gave 84% pro-choice responses to female interviewers, and 64% pro-choice responses to identical questions from male interviewers. Men gave 77% pro-choice responses to female interviewers, and 70% pro-choice responses to male interviewers. Ellen Goodman, "Lies, More Lies, and Then There's Good Ol' Pillow Talk," Rocky Mountain News, May 14, 1990, p. 142.

52. Seymour Sudman and Norman M. Bradburn. Response Effects in Surveys: A Review and Synthesis, (Chicago: Aldine, 1974).

53. Wheeler, supra, pp. 116-17.

54. Groves and Kahn, supra; and Groves and Magilavy, supra.

55. RH Hanson and ES Marks. "Influence of the Interviewer on the Accuracy of Survey Results," Journal of the American Statistical Association, (1958), vol. 53: 635-655.; Seymour Sudman, Norman M. Bradburn, Ed Blair, and Carol Stocking. "Modest Expectations: The Effects of Interviewers Prior Expectations on Responses," Sociological Methods and Research, (1977), vol. 6 (no. 2): 171-182.

56. Seymour M. Lipset Political Man: The Social Basis of Politics (Garden City, NY: Doubleday, 1964).

57. Stinchcombe et al, supra; Mauser and Margolis, supra.

58. Wright et al. supra, p. 107

59. Jeffe and Jeffe, supra, p. 57.

60. It is true that of the small number of respondents who said that gun control was "one of the most important" issues to them, comprised a larger proportion of the pro-gun respondents (7.3 - 8.7%) than of the anti-gun respondents (3.1% - 4.0%). But since the anti-gun respondents (those in favor of requiring a police permit to buy a gun) outnumbered the pro-gun respondents about 2:1, the absolute numbers of pro-gun and anti-gun persons calling the issue "one of the most important" would be approximately equal. Schulman and Presser, supra, pp. 432-35.

61. A commendable exception was the Yankelovich poll for CNN/Los Angeles Times, which asked a long battery of questions about firearms attitudes, and found 84% of respondents believing that they had a right to own a gun. See Jeffe & Jeffe, supra, p. 10.

The "Sporting Purpose" Issue in Gun-Control Policy

by Preston K. Covey

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In the context of gun-control policy, what does "sporting purpose" mean? Unfortunately, the term is ubiquitous but nowhere defined; its meaning must be divined from the legislative and enforcement debates. While the history of this notion in 20th-century gun control is itself very interesting, let's just take the most recent example: on February 28, 1994, the ATF reclassified certain 12-gauge shotguns as "destructive devices" on the basis of the following statutory provision (Section 5845(f)(2), Chapter 53, Title 26) of the United States Code:

" '[D]estructive device' means . . . any type of weapon . . . which will . . . expel a projectile . . ., the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . . which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes ...."

The archetypal "destructive device" this legislation meant originally to control was on the order of a grenade launcher or artillery piece. But the barrel of a 12-gauge shotgun, at .60 caliber, happens to be over half an inch in diameter. Hence, the explicit exemption for shotguns. However, this exemption leaves a discretionary loophole: it is limited to shotguns which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes. This provision evidently gives the Secretary of the Treasury (who oversees the ATF) the authority to add certain "non-sporting" firearms to the bin of banned weapons.

The express criterion for exemption is "sporting purpose." But what precisely is the standard for this privileged exemption? While the Secretary's discretionary judgment may legally be sufficient, the standard for guiding his appraisal of "suitability for sporting purposes" is whether a gun is generally recognized as such. But by what standard do we judge general recognition? This standard is nowhere defined. But the operative standard comes to this: the two most popular sporting purposes, hunting and target shooting, are evidently taken to satisfy the requirement.

Unfortunately, this statutory language governing "destructive devices" reflects the sum total specification of the "sporting purpose" standard available in federal law, as an internal ATF memorandum on the recent shotgun reclassification attests:

"This ruling represents a small step in imposing rational controls over the non-sporting assault-type weapons addressed in the Feinstein bill. With the exception of these large bore shotguns. There is currently no sporting purpose test in existing federal law governing the types of firearms that can be manufactured and sold commercially. [But] Feinstein's bill would ban . . . these shotguns as well as a host of other rifles and handguns that also provide tremendous firepower, while serving no legitimate sporting purpose."

(Tartaro, 1994, emphasis mine.)

In short, the ATF has the authority to ban only large bore shotguns; a ban on rifles and handguns which serve "no legitimate sporting purpose" must be effected by new legislation, such as the Feinstein bill. New legislation must now either beg the question of what constitutes "legitimate" sporting purpose or else clearly define a standard (which, of course, it does not do). But we see here a clue to the ulterior purpose of the de facto "sporting purpose" standard: to ban firearms that "provide tremendous firepower, while serving no legitimate sporting purpose." The targeted firearms are advisedly combat weapons that are currently legal to own. One combat weapon ban, the Schumer bill (HR 3527), is entitled (in part) the "Recreational Firearms Protection Act." By what principle of "legitimacy" or "recreational" utility are firearms nominated for such patronizing protection by our government? To paraphrase Uncle Remus, "The tar baby, he don't say nuthin."

The tacit hypothesis here is this: If combat firearms serve no "legitimate" sporting purpose, they may or should be banned.

I pose two problems for the "sporting purpose" hypothesis: (I) The hypothesis presupposes without argument that it is a proper function of government to prescribe "legitimate" leisure; such unprincipled and therefore arbitrary authority is politically pernicious, a threat to all socially harmless leisure, not to say morally controversial leisure. Hunting, as a so-called "blood sport," is morally controversial in many quarters of our society, but its tools as such are implicitly protected under the prevailing "sporting purpose" standard. With an essentially undefined and therefore arbitrary standard of "legitimate sporting purpose," just how long will the equally deadly tools of the recreational hunter or target shooter stay the ban? Be that as it may, (II) the assumption of this hypothesis is in any case demonstrably false _ namely, the assumption that combat firearms serve no "legitimate" sporting purpose.

Problem I

The "sporting purpose" hypothesis presupposes that government has the authority to judge what counts as "legitimate" leisure or sport and the power to curtail leisure activities which it deems illegitimate. The "Recreational Firearms Protection Act" decidedly does not protect all forms of firearms recreation, such as collecting and recreating with combat firearms.

This arrogation of authority is tantamount to legislating ethics in the discretionary realm of leisure, where our modes of creating meaningful lives are presumably innocent until proven guilty of actionable harm to others or to society. This arrogation of authority is pernicious because it offers no principled rationale or limitations and thereby threatens the freedom of moral choice at the heart of all leisure pursuits, not just those involving firearms.

We must distinguish here between two categorically different grounds for coercive limitations on liberty _ either for outlawing an activity itself (like gambling) or for outlawing the means for pursuing an activity (like child pornography or hard drugs). Two categorically different grounds for limiting liberty are: (1) moral disapproval and (2) demonstrable social harm. They are hardly on a par.

Of these, in our system of criminal justice, demonstrable social harm is presumably a necessary condition for criminalization: by this standard, not even all uncontroversial moral wrongs are proscribed by criminal law: for example, many forms of lying or promise-breaking are, at best, grounds for civil tort action. The burden of proof, then, is either to demonstrate serious harm, irrespective of moral disapproval, or else to produce a principled rationale for why certain activities which are morally controversial but not in themselves harmful should be criminalized. Moral disapproval by itself is no basis for criminalization, absent some further discriminatory principle that answers the perennial questions for legislating morality: What or whose standard of moral opprobrium shall prevail and be enforced by law in morally controversial cases? And by what rationale or principle?

One principle for prohibiting activities that may be morally controversial but that in themselves are not

harmful turns on the distinction between distributive and aggregative harms. Distributively harmful activity is such that serious harm or social cost attaches to each and every individual instance of the activity in itself. An example is murder, each act of which is harmful. Aggregatively harmful activity is such that harm does not accrue to each and every individual enjoyment of the activity in itself; rather, because some people's activity is harmful, serious social harm results in the aggregate. An example is the use of motor vehicles, which some people drive recklessly.

As a case in point, the civilian ownership of firearms is aggregatively rather than distributively harmful: merely owning a firearm produces no harm in itself; but a small minority who abuse firearms generate serious aggregative harm: the annual size of the offending minority happens to be small indeed _ less than 1/l00th of one percent of the law-abiding gun-owning public1 _ although the harm they do is serious. A prominent social philosopher puts the consequent dilemma in perspective:

"If the state prohibits [responsible and law-abiding] persons from possessing handguns [say, or firearms "not generally recognized as particularly suitable to sporting purposes"], it must tell them, in effect, that they cannot do something which is harmless, because others cannot be trusted to do the same thing without causing grievous harm." (Feinberg, 1984, p. 194).

On this view, the justification for gun bans (which disenfranchise a vast majority in order to try to affect a minuscule minority) must show at least two things: that the harms outweigh the benefits and that the prohibition in question will in fact redress the balance of harm over benefit. Both are problematic, particularly the latter: that disarming the law-abiding majority will in any wise affect the criminal minority (Polsby, 1993). But this is one proper function of government, balancing individual and social benefits and harms for the protection of the commonweal. If it is also a proper function of government to judge the "legitimacy" of leisure on moralistic grounds, absent a showing of harm, the standard of "legitimacy" must be specified; in the case of "legitimate" sporting purpose, the standard remains unprincipled and, thus, arbitrary.

The invocation of "sporting purpose" is also problematic because it presupposes without argument that "sporting purpose" should carry special privileged weight in the balancing of harms and benefits. I argue, on the contrary, that the weightiest interest in the balance scale of benefits is not the recreational value of firearms, but rather their value for the protection of innocent life against criminal threat.

The protective value of firearms has two dimensions: One is their defensive utility, the metric for which is the actuarial rate at which armed civilians successfully defend against criminal threats_most recently estimated at over two million cases a year (Kleck, 1993). The other is the incommensurable residual value of this option in self-defense itself, regardless of the actuarial utility of having a gun or ever having to use it. This residual value includes our claim right to be allowed effective means of self-defense (namely, firearms), which is directly derivative from our paramount right to self-preservation.

Actuarially, a firearm happens to be one's best option in the gravest extreme2 when, by the universal standard of justifiable homicide, an innocent person is in imminent and otherwise unavoidable danger of death or grave bodily harm. Removing this option imposes a severe limitation on the exercise of our uncontroversial right to self-defense.

Also included in the residual value of firearms for protection is our putative obligation to defend innocent life in the gravest extreme: many hold that this is not only a right but a moral and civic duty. In his article "A Nation of Cowards" (1993), Jeffrey Snyder put the matter forcefully:

"Although difficult for modern man to fathom, it was once widely believed that life was a gift from God, that not to defend that life when offered violence was to hold God's gift in contempt, to be a coward and to breach one's duty to one's community."

In addition to the distributive protective value of firearms, there are two aggregative benefits of armed citizens, a social value and a political value. Their social value consists in their role in the reduction of

criminal violence or social disorder by either deterrence or interdiction. Their political value consists in their role as a defense or deterrent against government violation of the social compact. These functions may be arguable, but they must be fairly accounted and weighed in the balance scales on their merits, not summarily ignored.

Now, the protective, social and political values of civilian firearms are all predicated on their utility for combat. Pace the more radical pacifists, combat is not inherently bad: combat can be defensive as well as aggressive and combat is therefore justifiable, and arguably obligatory, in defense of innocent life. There is a utopian concept that civil society must eschew the justifiable use of deadly force (or deadly weapons) in the hopes of thereby banishing violence; but a utopian mandate to eschew the moral right, nevermind the moral obligation, to defend innocent life belies the very value of human life itself. In his classic essay "Utopia and Violence," Karl Popper put the matter plainly:

". . . we must not allow the distinction between attack and defense to become blurred. We must insist upon this distinction, and support and develop social institutions . . . whose function it is to discriminate between aggression and resistance to aggression." (Popper, 1965)

As for delegating the obligation for the defense of innocent life to others, such as the police, Jeffrey Snyder poses another moral challenge:

"How can you rightfully ask another human being to risk his life to protect yours, when you will assume no responsibility yourself?" (Snyder, 1993)

". . . while we wait for laws to restrain men, we will be condemned to wonder why criminals have no respect for our lives, when we ourselves do not value our lives enough to assume the responsibility to defend them." (Snyder, 1994)

These are serious moral issues to weigh in the balance scales before dismissing combat firearms for serving "no legitimate sporting purpose."

Indeed, morally compelling (never mind "legitimate") interests in defensive combat place top priority on precisely those firearms that are "generally recognized as particularly suitable" for combat _ not merely sporting _ purposes.

The prevailing notion of "sporting purpose" in the gun-control debate is problematic in three respects: (1) because it assumes without argument that the government of a pluralistic society may legislate "legitimate" leisure absent demonstrable social harm, (2) because the privileging of "sporting purpose" firearms ignores the preeminent protective, social and political values of combat firearms and (3) because it is gratuitous if not disingenuous for the following reason: if "sporting purpose" or recreational value were the only interest in the balance scale to counterweigh the aggregative harms of civilian-owned firearms, gun bans would hardly be as controversial as they are today. Suppose, unrealistically (Polsby, 1994), that all combat firearms were effectively removed from both civilian and criminal hands. Hunting and sanitized target firearms would then become the tools of criminal violence: How long would their "sporting purpose" stay their banishment? The inexorable logic of selective gun bans is that they must evolve into total bans: in the end, "sporting purpose" would be revealed to be the gratuitous and question-begging ploy it has been from the beginning.

Problem II

Consider again the tacit hypothesis behind the prevailing notion of "sporting purpose": If combat firearms serve no "legitimate" sporting purpose, they may or should be banned. I argue by counter-example that the assumption of this hypothesis (that combat firearms serve no legitimate sporting purpose) is false. While I make a case for "legitimate" sporting uses of combat firearms, I do not hereby beg any questions about gun control. My argument here is simply that "sporting purpose" is quite beside the point in gun-control policy if only because combat firearms do in fact enjoy legitimate sporting uses.

The assumption that firearms can be neatly and categorically segregated by purpose and, hence, that firearms "generally recognized as particularly suitable for combat can serve no legitimate sporting purpose is based on a no-brainer fallacy, to wit:

"Some guns are useful only for assault, warfare, murder or mayhem _ like the so-called 'assault weapons' (which should properly be called 'combat' firearms).

"Law-abiding civilians have no legitimate interest in assault, warfare, murder, or mayhem.

"Therefore, law-abiding civilians have no legitimate interest in combat firearms."

The first premise and conclusion above are flatly false. Law-abiding civilians have a legitimate interest in combat for their own self-defense. Therefore, law-abiding civilians have a legitimate interest in combat firearms _ and, most certainly, in training therewith. This legitimate interest in firearms training for defensive purposes naturally gives rise to both legitimate and even socially useful sporting purposes for combat weapons, which I will call "combat weaponcraft," my own sport of choice.

Firstly: combat weaponcraft is a sport in any common sense of the term "sport" in which fishing, hunting, or target shooting are sports.

In fact, target shooting is itself but a variant of combat weaponcraft. Indeed, historically, in America and Europe, today's sanitized forms of target shooting_as "pure" sport_ are abstracted from the discipline of combat weaponcraft. Historically, in origin, target shooting was a practical sport with a clear social mission, promoting marksmanship and combat training; it served to ensure that the civilian population was "well regulated" in combat weaponcraft to perform their civic duties in maintaining the social order and serving the common defense. According to one leading historian of small arms:

"The concept of target shooting as a pure sport does not begin to emerge until after the First World War; indeed, Britain held aloof from the early development of international shooting competition because it was considered too abstracted from the military function of marksmanship.

"It was the goal of universal civilian training in marksmanship which also inspired the subsequent smallbore shooting movement. The .22 rifle, portrayed recently in the press as the archetypal 'purely sporting' firearm, was seen in urban Edwardian Britain as the prime tool of military training. At the same time, NRA service rifle marksmanship was directed by Lord Roberts towards the modern concept of 'combat shooting': rapid and snap shooting on moving and disappearing targets." (Munday, 1988)

Harking to these historical roots, and by contrast with more "pure" forms of target shooting, the regimens of combat weaponcraft include a vast variety of stress-inducing tactical drills and dynamic scenarios that test one's tactical judgment and moral decision making as well as safety and marksmanship under duress. Competition is both against the clock and rigorous standards of qualification as well as against other competitors. While there are hundreds of local, regional, national and international competitions, one can compete solo against the rigorous performance standards calibrated for survival in the gravest extreme. These rigors include the observance of ethical and legal standards for the judicious use of deadly force. Of the highest priority are firearms safety standards, which are religiously observed: the same rules of safety apply on the firing range and in a threat situation; there is no "double standard" for safety. Consequently, the practitioners of this sport are amongst the most reliable and conscientious in safety discipline. Amongst the many and varied competitions in combat weaponcraft, the epitome of this practical sport is the National Tactical Invitational Match. The NTI is attended by both law enforcement professionals and civilians, including leading police firearms instructors who are themselves private citizens, but it is organized by private citizens_an example of private enterprise with a socially responsible mission par excellence.

Secondly: The sport of combat weaponcraft is eminently and morally legitimate on the following forthright

grounds: those of us who engage in it do so safely and responsibly; we hold society and innocent others harmless thereby and continually improve ourselves in skill, judgment and responsibility. If there are other criteria of "legitimacy," I should like to know what they are. Certainly, general popularity is no more a requirement of legitimate sport than it is of religion or speech.

Thirdly: in addition, combat weaponcraft is a sport with a social mission and social utility: it serves as a technology-transfer mechanism by advancing the state-of-the-art of threat-management and defensive firearms training for both law enforcement and civilians.

Like most innovations in firearms training outside the military, the combat shooting arts have been pioneered by private citizens. Unlike the Olympic sporting events that were abstracted from age-old military experience (the marathon, biathlon, javelin, etc.), the practical shooting sports are devised to refine and inform modern technique "where the rubber meets the road"_with state-of-the-art combat weapons. Its techniques and technology are evolved through open competition, then applied, tested and refined through professional training and practical experience. The symbiotic feed loop is like that among research universities, industry, and government.

Many of the best ideas in combat training and technology evolve from the innovations of civilian practitioners. In my own case, one-handed mastery of combat weaponry proves informative to officer-survival training: necessity is the proverbial mother of invention, and my contributions to police survival training increase my satisfaction in my sport of choice. So I turn my recreation to a practical social purpose, by training police officers in combat weaponcraft as well as in the law and ethics of deadly force that properly delimit its use. Most of my colleagues do likewise, by sharing their knowledge and skills with others, either law enforcement or fellow citizens or both, thereby helping to ensure a safer and more responsible shooting public.

Finally, I must speak to the morally controversial nature of my sport, since some consider gun ownership itself, nevermind combat weaponcraft, "demented and bloodthirsty" (see the excellent discussion of moralistic objections to civilian gun ownership in Kates, 1991).

To quote Gerald Fain from his essay, "Moral Leisure" (1991), "Leisure. . . is the opportunity to choose how one 'ought live.' "

Spending one's discretionary time in the refinement of any of the combat or martial arts is such a choice. Combat weaponcraft is morally controversial in the important sense in which all moral choices are open to question and demand an accounting when moral sensibilities collide. I can only sketch the moral dimensions of my sport here; this stands as an account, not a proper defense against those who are radically and ignorantly at odds with the gun culture and regard it as "simply beastly" (quoted in Kates, 1991.) There, perhaps, n'er the twain shall meet.

". . . now a virtuous life requires exertion, and does not consist of amusement." (Aristotle, Nicomachean Ethics,1103)

The sport of combat weaponcraft is neither a leisurely recreation nor a mere amusement, but an avocation dedicated to the disciplined development of both moral virtues and practical skills in the service of an avowed moral obligation and social mission. While we may defend innocent life on the basis of the most fundamental of moral and legal rights, practitioners of combat weaponcraft also avow a moral and civic obligation as well_an obligation, at the least, to our loved ones, an obligation to prevent our spouses from being widowed or our children orphaned_or worse. Some take it further, as a civic or more altruistic obligation to defend any threatened innocent life. This is not a vigilante ethic; it is neither more nor less than the lawful defense of innocent life allows. (For a proper definition of vigilantism, see Kates, 1991).

Contrary to stereotype, practitioners of my sport are not training to shoot their way to glory in the Armed Citizen column of American Rifleman magazine. None but psychopaths and felons who understand the realities of lethal encounters romanticize the necessity of self-defense as an opportunity for glory. Law-

abiding practitioners of combat weaponcraft live in no such fool's paradise. The ethos that informs our sport is no less demanding than that of any serious martial art, wherein power and responsibility are commensurate: it requires soul-searching reflection on fearsome realities and on the rigorous requirements for transmuting the awesome responsibility for the judicious use of deadly force into decisive fortitude, a disciplined mindset, morally discerning judgment, well deliberated action, and the tactical skill to both "do the right thing" and survive in the "moment of truth," in the gravest extreme. Karl Popper's point bears repeating:

". . . we must not allow the distinction between attack and defense to become blurred. We must insist upon this distinction, and support and develop social institutions . . . whose function it is to discriminate between aggression and resistance to aggression." (Popper, 1965)

The lawful avocation of combat weaponcraft is, above all, a social institution that respects this distinction and defends this cornerstone of civil society.

Notes

1. The 1991 Chicago Police Department in-depth study of 20,264 homicides from 1965-91 found that 75% of criminal homicides are committed by recidivists with prior records of criminal violence. On this sample, assume that recidivists with prior records commit 75% of our homicides; then, 25% of our annual gun homicides are committed by previously law-abiding gun owners, such that less than 1/100th of 1% of the law-abiding gun-owning public turn homicidal each year: 18,000 gun homicides x .25 = 4500/60 million lawful gun owners = .000075 . .0075% = less than 75/10,000ths of 1% = .75/100ths = less than 1/100ths of 1%. This estimation is comparable to another measure of the minuscule number of irresponsible armed citizens: since the new concealed carry law in Florida was enacted in 1987, less than 1/100th of 1% of the issued licenses have been revoked for the commission of any crime involving a firearm (Snyder, 1993, p.49). Another telling indicator of the relatively low incidence of harm done by armed citizens is the following: only 2% of civilian shootings involve an innocent person mistakenly identified as a criminal, compared with an error rate of 11% for the police, while at the same time armed citizens justifiably kill three times the number of felons a year as do police (Snyder, 1993, p. 50).

2. According to Kleck (1991), resistors fare better than non-resistors and gun-defenders fare best of all. As stated by one prominent critic of defensive firearms ownership, Arthur Kellerman: "If you've got to resist, your chances of being hurt are less the more lethal your weapon. If that were my wife, would I want her to have a thirty-eight special in her hand? Yeah." (Japegna, 1994)

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THE RIGHT OF THE PEOPLE OR THE POWER OF THE STATE BEARING ARMS, ARMING MILITIAS, AND THE SECOND AMENDMENT

by
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Recognized as the foremost historian of the Second Amendment, Dr. Halbrook received his Ph.D. in philosophy from Florida State University, and his J.D. from Georgetown University. An attorney in Fairfax, Virginia, Dr. Halbrook has written two books: A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees (Greenwood Press 1989) and That Every Man Be Armed: The Evolution of a Constitutional Right (University of New Mexico Press 1984; reprinted by the Independent Institute, 1990. The book may be ordered by calling 1-800-927-7833). A longer version of this article was first published in Valparaiso Law Review, vol. 26, number 1, page 131 (1991).

Introduction

On this two hundredth anniversary of its adoption, the Second Amendment to the United States Constitution, like certain other provisions of the Bill of Rights, has been subjected to politically-valued, result-oriented interpretation.1 The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The ostensibly-harmless philosophical declaration about the militia which precedes the substantive guarantee belonging to "the people" has given rise to the argument that the amendment somehow protects only the power of a state to maintain a militia. While harboring no agenda for state militia powers, advocates of this hypothesis strongly oppose firearms ownership by the general public.2

There is a hidden history of the Second Amendment which is long overdue to be written. It is this: during the ratification period of 1787-1791, Congress and the states considered two entirely separate groups of amendments to the Constitution. The first group was a declaration of rights, in which the right of the people to keep and bear arms appeared. The second group, consisting of amendments related to the

structure of government, included recognition of the power of states to maintain militias. The former became the Bill of Rights, while the latter was defeated.3 Somehow, through some Orwellian rewriting of history, as applied to the issues of the right of the people to keep and bear arms and the state militia power, that which was defeated has become the meaning of that which was adopted.

The state power to maintain militias vis-a-vis the federal military power was already treated in the text of the Constitution before the Bill of Rights was proposed. Article I,paragraph 8 empowers Congress "to declare War,...to raise and support Armies...[and] to make Rules for the Government and Regulation of the land and naval Forces...." Congress is also empowered:

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress...."4

The writing of this hidden history of the Second Amendment is timely, given the current assault on firearms ownership in the Congress and some States. By happenstance, the Supreme Court decided two cases in 1990 which contribute to an understanding of these issues. First, in United States v. Verdugo-Urquidez, a Fourth Amendment case, the Court made clear that all law-abiding Americans are protected by the Second Amendment as follows:

"The people" seems to have been a term of art employed in select parts of the Constitution....The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law... abridging... the right of the people peaceably to assemble"); Art. I, paragraph 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States")(emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.5

In dissent, Justice Brennan argued even more broadly that

the term 'the people' is better understood as a rhetorical counterpoint 'to the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government'...'The people' are 'the governed.'6

Justice Brennan also reviewed the drafting history of the Fourth Amendment, noting that the Framers could have limited the right to 'citizens,' 'freemen,' 'residents,' or the 'American people.'...Throughout that entire process, no speaker or commentator, pro or con, referred to the term 'the people' as a limitation.7

Similarly, the Framers could have limited the Second Amendment right to select state militias, but instead used the terms "the people."

Finally, Justice Brennan pointed out that rights are not "given to the people from the government....The Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing." This statement is particularly applicable to the right to keep and bear arms, which has been recognized as a personal right for centuries.

The second 1990 Supreme Court opinion has relevance to the twentieth-century argument that the Second Amendment protects only the "right" of a state to maintain a militia, and that the "militia" is restricted to the National Guard. In Perpich v. Department of Defense (1990), the Court recognized that the National

Guard is part of the Armed Forces of the United States and that the Reserve Militia includes all able-bodied citizens.

The issue was whether the militia clause allows the President to order members of the National Guard to train outside the United States without the consent of a state governor or the declaration of a national emergency. Perhaps the most noteworthy fact about the opinion is its failure to mention the Second Amendment at all, that amendment being irrelevant to the issue of the state power to maintain a militia. In fact, the Court refers to the state power over the militia as being recognized only in "the text of the Constitution," not in any amendment:

Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize "the Militia."

The Court then reviewed Congress' various militia enactments. The first, passed in 1792, provided that "every able-bodied male citizen between the ages of 18 and 45 be enrolled [in the militia] and equip himself with appropriate weaponry...." In 1903, new legislation "divided the class of able-bodied male citizens between 18 and 45 years of age into an 'organized militia' to be known as the National Guard of the several States, and the remainder of which was then described as the 'reserve militia,' and which later statutes have termed the 'unorganized militia.'" Both of the above were passed under the Militia Clauses of the Constitution.

By contrast, in legislation dating to 1916, "the statute expressly provided that the Army of the United States should include not only 'the Regular Army,' but also 'the National Guard while in the service of the United States'...." Today's National Guard came into being through exercise by Congress of the power to raise armies, not the power to organize the militia.

The Court referred to "the traditional understanding of the militia as a part-time, nonprofessional fighting force," and as "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace." The Court also recognized the existence of "all portions of the 'militia'_organized or not...."

The Court concluded that "there is no basis for an argument that the federal statutory scheme deprives [a state] of any constitutional entitlement to a separate militia of its own."8 The Court failed even to suggest that the Second Amendment had any bearing on the issue.

In sum, it was clear enough to the Supreme Court in 1990 that "the people" in the Second Amendment means individuals generally, as it does in the rest of the Bill of Rights; that the "militia" means the body of armed citizens at large, organized and unorganized; and that the Second Amendment is not relevant to the power of a states to maintain the militia.

This analysis begins with the adoption of the militia clause, and the first calls for a bill of rights, in the constitutional convention of 1787. It then traces chronologically the ratification struggle in the state conventions and in the writings of federalists and antifederalists. The proposal and adoption of the Bill of Rights in Congress, first by the House and then by the Senate, is scrutinized, along with explanations and criticisms published in the public forum and ratification by the states. The historical portion of this study ends with a review of enactment of the militia act of 1792 by the First Federal Congress. Concluding remarks relate to pre-1990 Supreme Court jurisprudence.

I. THE CONSTITUTIONAL CONVENTION OF 1787

In the Constitutional Convention of 1787, the issue of the militia was first raised in reaction to a proposal that the national legislature be empowered to negate state laws. Elbridge Gerry of Massachusetts observed on June 8 "that the proposed negative would extend to the regulations of the militia_a matter on which the existence of the state might depend. The national legislature, with such a power, may enslave the states."9

George Mason of Virginia raised the topic on August 18, proposing "a power to regulate the militia."10 Reliance on the militia for the public defense would preclude a peacetime standing army. "Thirteen states will never concur in any one system, if the disciplining of the militia be left in their hands."11 By regulating or standardizing the militia, the general government would assist the states in preserving their powers.

Mason proposed a power "to make laws for the regulation and discipline of the militia of the several states, reserving to the states the appointment of officers."12 "He considered uniformity as necessary in the regulation of the militia, throughout the Union."13 Oliver Ellsworth of Connecticut proposed that "the militia should have the same arms and exercise, and be under rules established by the general government when in actual service of the United States; and when states neglect to provide regulations for militia, it should be regulated and established by the legislature of the United States."14 He explained: "The whole authority over the militia ought by no means to be taken away from the states, whose consequence would pine away to nothing after such a sacrifice of power."15

John Dickinson of Delaware supported both Mason and Ellsworth. A most important matter was "that of the sword. His opinion was, that the states never would, nor ought to, give up all authority over the militia."16 He proposed that the power extend to only part of the militia at any one time, "which, by rotation, would discipline the whole militia."17 Mason then incorporated this idea of "a select militia" into his proposal.18 That term had a less innocent meaning in the mind of Ellsworth, who "considered the idea of a select militia as impracticable; and if it were not, it would be followed by a ruinous declension of the great body of the militia. The states would never submit to the same militia laws."19

Roger Sherman of Connecticut opined that "the states might want their militia for defense against invasions and insurrections, and for enforcing obedience to their laws."20 Mason agreed, adding to his motion an exception that the general power would not extend to "such part of the militia as might be required by the states for their own use."21 Mason's proposals were then referred to committee.

When reported back to the convention, the militia clause provided that Congress may "make laws for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and authority of training the militia according to the discipline prescribed ...."22 On August 23, the following debate ensued:

MR. SHERMAN moved to strike out the last member, "and authority of training," &c. He thought it unnecessary. The states will have this authority, if not given up....

MR. [Rufus] KING [of Massachusetts], by way of explanation, said, that by organizing, the committee meant, proportioning the officers and men_by arming, specifying the kind, size, and calibre of arms_and by disciplining, prescribing the manual exercise, evolutions, &c.

MR. SHERMAN withdrew his motion.

MR. GERRY. This power in the United States, as explained, is making the states drill-sergeants. He had as lief let the citizens of Massachusetts be disarmed, as to take the command from the states, and subject them to the general legislature. It would be regarded as a system of despotism.

MR. [James] MADISON [of Virginia] observed, the "arming," as explained, did not extend to furnishing arms; nor the term "disciplining," to penalties, and courts martial for enforcing them.

MR. KING added to his former explanation, that arming meant not only to provide for uniformity of arms, but included the authority to regulate the modes of furnishing, either by the militia themselves, the state governments, or the national treasury; that laws for disciplining must involve penalties, and everything necessary for enforcing penalties.23

Thus, the power over the militia was intended to establish standards for exercises and for arms, which the people would furnish themselves. The objective was to provide discipline for the self-armed populace, not to arm or disarm select groups.

The provision would be adopted substantially as proposed. The convention rejected a more comprehensive substitute for the second clause to the effect that Congress would "establish a uniformity of arms, exercise, and organization for the militia...."24MR. [Jonathan] DAYTON [of New Jersey] was against so absolute a uniformity. In some states there ought to be a greater proportion of cavalry than in others. In some places, rifles would be more proper; in others, muskets, &c.25

Cavalry, of course, were armed with pistol and sword, and perhaps carbine. Rifles were long-range weapons used by independent frontiersmen and backwoodsmen, while muskets were medium-range arms favored in New England.26 Uniform bore sizes among militiamen in a given locale would allow interchangeable ammunition, but differing terrain and habits of the people precluded uniform types of arms.

In response to Madison's argument that the states neglect the militia, Luther Martin of Maryland replied that "the states would never give up the power over the militia; and that, if they were to do so, the militia would be less attended to by the general than by the state governments."27 After Gerry warned that granting Congress powers inconsistent with the existence of the states would lead to civil war, Madison rejoined that "as the greatest danger to liberty is from large standing armies, it is best to prevent them by an effectual provision for a good militia."28 The militia clause would protect the power of the states to maintain militias and to retain their sovereignty by precluding a need for standing armies.

On September 12, George Mason "wished the plan had been prefaced with a bill of rights....It would give great quiet to the people, and, with the aid of the state declarations, a bill might be prepared in a few hours."29 Roger Sherman thought the state declarations sufficed, and that Congress could be trusted.30 Mason pointed out that "the laws of the United States are to be paramount to state bills of rights."31 The convention narrowly killed the motion for a committee to prepare a bill of rights.32

On September 14, Mason moved to insert before the militia clause in Article I, paragraph 8, the declaration "and that the liberties of the people may be better secured against the danger of standing armies in time of peace."33 Draftsman of the Virginia Declaration of Rights of 1776, Mason was the leading author of such declaratory clauses, and would be responsible for a similar one in what became the Second Amendment. Madison supported the motion: "as armies in time of peace are allowed, on all hands, to be an evil, it is well to discountenance them by the Constitution...."34 However, the convention voted against the proposal.

Attempts to declare various rights also failed. Charles Pinckney of South Carolina and Elbridge Gerry offered a declaration "that the liberty of the press should be inviolably observed."35 Again, Roger Sherman killed that proposal with the remark, "It is unnecessary. The power of Congress does not extend to the press."36 This opinion held sway, and the convention proposed the Constitution without a bill of rights.

Two days before the convention ended, delegate Thomas Fitzsimons of Pennsylvania asked Noah Webster to write in support of the proposed Constitution.37 Webster responded with An Examination of the Leading Principles of the Federal Constitution, the first major pro-Constitution pamphlet.38 Webster explained why the armed populace would remain sovereign under a constitution with an army but no bill of rights:

Another source of power in government is a military force. But this, to be efficient, must be superior to any force that exists among the people, or which they can command; for otherwise this force would be annihilated, on the first exercise of acts of oppression. Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive.39

Tench Coxe, a friend of Madison and another prominent federalist, argued in his influential "An American Citizen" that, should tyranny threaten, the "friends to liberty... using those arms which Providence has put into their hands, will make a solemn appeal to 'the power above.'"40 Coxe also wrote: "The militia, who are in fact the effective part of the people at large, will render many troops quite unnecessary. They will form a powerful check upon the regular troops, and will generally be sufficient to over-awe them ...."41

Stating the case against ratification of the Constitution without a bill of rights was Richard Henry Lee's Letters from the Federal Farmer, which were first published in October and November of 1787. Predicting the early employment of a standing army through taxation, Lee contended:

It is true, the yeomanry of the country possess the lands, the weight of property, possess arms, and are too strong a body of men to be openly offended_and, therefore, it is urged, they will take care of themselves, that men who shall govern will not dare pay any disrespect to their opinions. It is easily perceived, that if they have not their proper negative upon passing laws in congress, or on the passage of laws relative to taxes and armies, they may in twenty or thirty years be by means imperceptible to them, totally deprived of that boasted weight and strength: This may be done in a great measure by congress; if disposed to do it, by modeling the militia. Should one fifth or one eighth part of the men capable of bearing arms, be made a select militia, as has been proposed, and those the young and ardent part of the community, possessed of but little or no property, and all the others put upon a plan that will render them of no importance, the former will answer all the purposes of an army, while the latter will be defenseless....I see no provision made for calling out the posse comitatus for executing the laws of the union, but provision is made for congress to call forth the militia for the execution of them_and the militia in general, or any select part of it, may be called out under military officers, instead of the sheriff to enforce an execution of federal laws, in the first instance, and thereby introduce an entire military execution of the laws.42

As federalist and antifederalist pens clashed, the state ratifying conventions began to meet to consider the Constitution. Delaware, New Jersey, Georgia, Connecticut, Maryland, and South Carolina would quickly ratify without proposing a declaration of rights. In the other states, amendments would be seriously debated and proposed.

II. THE STRUGGLE FOR RATIFICATION OF THE CONSTITUTION

A. The Pennsylvania Convention and the Dissent of the Minority

The Pennsylvania convention was divided between federalists, who saw Congress' power over the militia as conductive to an armed populace, and antifederalists, who feared that without a bill of rights, the people could be disarmed. The antifederalists also sought an entirely separate amendment to recognize the state power to maintain militias.

James Wilson had served in the constitutional convention of 1787 and was well familiar with the explanation that Congress' power to arm the militia meant standardization, not disarmament. Congress could prescribe common sizes of barrels for firearms required to be possessed by the populace so that ammunition would be interchangeable:

I believe any gentleman, who possesses military experience, will inform you that men without a

uniformity of arms, accouterments, and discipline, are no more than a mob in a camp; that, in the field, instead of assisting, they interfere with one another. If a soldier drops his musket, and his companion, unfurnished with one, takes it up, it is of no service, because his cartridges do not fit it. By means of this system, a uniformity of arms and discipline will prevail throughout the United States.43

John Smilie made the classic antifederalist argument against Congress' power: Congress may give use a select militia which will, in fact, be a standing army_or Congress, afraid of a general militia, may say there shall be no militia at all. When a select militia is formed; the people in general may be disarmed.44

This argument assumed that the right to keep and bear arms would be protected by the people combining into general militias to prevent being disarmed by select forces. By contrast, James Wilson used the following symbolic argument to contend that the Constitution allowed for the ultimate force in the populace: "In its principles, it is surely democratical; for, however wide and various the firearms of power may appear, they may all be traced to one source, the people."45

The majority of the Pennsylvania convention refused to propose amendments to the Constitution, which was ratified on December 12, 1787. However, the "Dissent of the Minority of the Convention" demanded a declaration of rights. Apparently written by Samuel Bryan, author of "Centinel," the document was first published on December 18, 1787 and was circulated throughout the country.46 Among the rights declared was the following:

That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil powers.47

The above tracked the language of the Pennsylvania Declaration of Rights of 1776 in guaranteeing the right to bear arms for self defense and defense of the state,48 adding defense of the United States and hunting purposes as well. Bearing arms to hunt was not out of place in the article, because Pennsylvanians were very familiar with British laws which disarmed the people under the guise of game laws.49 Similar to the federal First Amendment adopted later, which begins "Congress shall make no law," this proposal states that "no law shall be passed for disarming the people, or any of them"_except that criminals or particular dangerous individuals could be disarmed.

The above clarifies that the terms "bear arms" is not linguistically restricted to matters of the militia or the national defense. Bearing arms for self-defense and hunting were proper purposes. Mention of standing armies and the subordination of the military to the civil power in the same article did not detract from the individual character of the right guaranteed. Indeed, the state power to maintain a militia was proposed in a completely separate amendment:

That the power of organizing, arming, and disciplining the militia (the manner of disciplining the militia to be prescribed by Congress) remain with the individual states, and that Congress shall not have authority to call or march any of the militia out of their own state, without the consent of such state, and for such length of time only as such state shall agree.50

The "Dissent" deemed an analysis of some of the proposals to be necessary. The need to retain state power over the militia was explained as follows:

The absolute unqualified command that Congress have over the militia may be made instrumental to the destruction of all liberty, both public and private; whether of a personal, civil, or religious nature.

First, the personal liberty of every man probably from sixteen to sixty years of age may be destroyed by the power Congress have in organizing and governing of the militia. As militia they may be subjected to fines to any amount, levied in a military manner; they may be subjected to corporal punishments of the

most disgraceful and humiliating kind, and to death itself, by the sentence of a court martial....

Secondly, the rights of conscience may be violated, as there is no exemption of those persons who are conscientiously scrupulous of bearing arms. These compose a respectable proportion of the community in the state....

Thirdly, the absolute command of Congress over the militia may be destructive of public liberty; for under the guidance of an arbitrary government, they may be made the unwilling instruments of tyranny. The militia of Pennsylvania may be marched to New England or Virginia to quell an insurrection occasioned by the most galling oppression, and aided by the standing army, they will no doubt be successful in subduing their liberty and independency. ...51

Thus, the Pennsylvania convention minority made the first demand of a portion of a ratifying convention for a declaration of individual rights, including bearing arms, and a reservation of state powers, including organizing the militia.

Despite Pennsylvania having ratified the Constitution, antifederalists continued to demand amendments. One antifederalist expressed their attitude toward powder and lead (and hence arms) as follows: "the sons of freedom...may know the despots have not altogether monopolized these necessary articles."52

While the state had already ratified the Constitution, a number of Pennsylvanians gathered at the "Harrisburg Convention" which, on September 3, 1788, reiterated the call for amendments. Instead of a declaration of specific rights, the convention would have incorporated all of the rights declared in the state bills of rights: "that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution."53

In a totally separate article, the following amendment was proposed: "That each state, respectively, shall have power to provide for organizing, arming, and disciplining the militia thereof, whensoever Congress shall omit or neglect to provide for the same."54 Thus, individual rights were sharply contrasted from state powers, a linguistic usage which would prevail throughout the next three years.

B. The Federalist Response

The right of the people to keep firearms, particularly those with military uses, argued the Constitution's proponents, would be recognized even without a bill of rights. In The Federalist No. 29, first published in the New York Independent Journal on January 9, 1788, Alexander Hamilton expounded the argument that it would be wrong for a government to require:

the great body of yeomanry and of the other classes of citizens to be under arms for the purpose of going through military exercises and evolutions, as often as might be necessary to acquire the degree of perfection which would entitle them to the character of a well regulated militia....Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped....This will not only lessen the call for military establishments, but if circumstances should at any time oblige the government to form an army of any magnitude that army can never be formidable to the liberties of the people while there is a large body of citizens, little if at all inferior to them in discipline and the use of arms, who stand ready to defend their rights and those of their fellow citizens.55

In The Federalist No. 46, first published in the New York Packet on January 29, 1788, James Madison contended that "the ultimate authority...resides in the people alone." To a regular army of the United States government "would be opposed a militia amounting to near half a million citizens with arms in their hands." Alluding to "the advantage of being armed, which the Americans possess over the people of almost every other nation,"56 Madison continued: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."57

Madison sent a copy of the above to Tench Coxe, who found them "very valuable papers" and used the ideas in his own writings.58 Coxe responded to the "Dissent of the Minority" in Pennsylvania as follows:

The power of the sword, say the minority of Pennsylvania, is in the hands of Congress. My friends and countrymen, it is not so, for THE POWERS OF THE SWORD ARE IN THE HANDS OF THE YEOMANRY OF AMERICA FROM SIXTEEN TO SIXTY. The militia of these free commonwealths, entitled and accustomed to their arms, when compared with any possible army, must be tremendous and irresistible. Who are the militia? are they not ourselves. Is it feared, then, that we shall turn our arms each man against his own bosom. Congress have no power to disarm the militia. Their swords, and every other terrible implement of the soldier, are the birth-right of an American....[T]he unlimited power of the sword is not in the hands of either the federal or state governments, but, where I trust in God it will ever remain, in the hands of the people.59

C. Samuel Adams' Proposal at the Massachusetts Convention

The demand for a bill of rights reached a high pitch in Massachusetts before the ink on the proposed Constitution had time to dry. A "ships's news" satire poking fun at various bill of rights proposals had this to say about the right to keep and bear arms: "It was absolutely necessary to carry arms for fear of pirates, & c. and...their arms were all stamped with peace, that they were never to be used but in case of hostile attack, that it was in the law of nature to every man to defend himself, and unlawful for any man to deprive him of those weapons of self defence."60

Antifederalist John DeWitt published a series in Boston in late 1787 which articulated the position against the Constitution. The following appeared in the American Herald on December 3: "It is asserted by the most respectable writers upon government, that a well regulated militia, composed of the yeomanry of the country, have ever been considered as the bulwark of a free people. Tyrants have never placed any confidence on a militia composed of freemen."61

Dewitt predicted that Congress "at their pleasure may arm or disarm all or any part of the freemen of the United States, so that when their army is sufficiently numerous, they may put it out of the power of the freemen militia of America to assert and defend their liberties ...."62

In the Massachusetts ratifying convention, William Symmes warned that the new government at some point "shall be too firmly fixed in the saddle to be overthrown by any thing but a general insurrection."63 Yet fears of standing armies were groundless, affirmed Theodore Sedwick, who queried, "if raised, whether they could subdue a nation of freemen, who know how to prize liberty, and who have arms in their hands?"64

Samuel Adams, the most prolific proponent of the individual right to keep and bear arms in the pre-Revolutionary era,65 introduced the following amendments in the convention:

And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.66

It is noteworthy that the declaration stressed the "keeping" of arms, a favorite theme of Samuel Adams and the other founding fathers of Massachusetts, which experienced the most dramatic arms seizures by the British before the Revolution.67 However, the right to keep arms extended only to "peaceable citizens," not to criminals.

The federalist majority in the convention prevented passage of Adams' proposals. An antifederalist

explained:

It was his misfortune to have been misconceived, and the proposition was accordingly withdrawn_lest the business of the convention [the session of which was then drawing to a period] might be unexpectedly protracted. His enemies triumphed exceedingly, and asserted to represent his proposal as not only an artful attempt to prevent the constitution being adopted in this state but as an unnecessary and improper alteration of a system, which did not admit of improvements.68

The Massachusetts convention ratified the constitution on February 7, 1788 without demanding a declaration of rights. Nonetheless, other than the standing army provision, Adams' proposal would be seen as embodying the First, Second, and Fourth Amendments to the Constitution when they were being considered by Congress in 1789.69

D. "Congress Shall Never Disarm Any Citizen": The New Hampshire Demands

When it ratified the Constitution on June 21, 1788, the New Hampshire convention became the first in which a majority voted to recommend a bill of rights, albeit a brief one. The recommended amendments concerning individual rights, which would be reflected in the First, Second, and Third Amendments, were as follows:

X. That no standing army shall be kept up in time of peace, unless with the consent of three fourths of the members of each branch of Congress; nor shall soldiers in a time of peace, be quartered upon private houses without the consent of the owners.

XI. Congress shall make no laws touching religion or to infringe the rights of conscience.

XII. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.70

The prohibitions on Congress would be absolute_"Congress shall make no laws" on religion and "shall never disarm any citizen"_except that "actual" insurgents could be disarmed. The exception was prompted by Shay's Rebellion in Massachusetts and the smaller Exeter, New Hampshire riot of 1786.71

One federalist writer set forth an interesting analysis of the New Hampshire and Pennsylvania proposals. The Reverend Nicholas Collin of Philadelphia published a series under the penname "A Foreign Spectator" (from Sweden) entitled "Remarks on the Amendments to the Federal Constitutions" proposed by the state conventions. If the Constitution contained "a scrupulous enumeration of all the rights of the states and individuals, it would make a larger volume than the Bible...."72 Further, an army was no danger "especially when I am well armed myself." "While the people have property, arms in their hands, and only a spark of noble spirit, the most corrupt Congress must be mad to form any project of tyranny."73

Collin further held that "a good militia is the natural, easy, powerful and honorable defense of a country."74 Identifying "a citizen, as a militia man," he referred to "that noble art, by which you can defend your life, liberty and property; your parents, wife and children!"75

Collin then considered "those amendments which particularly concern several personal rights and liberties."76 Attacking a proposal that the privilege of habeas corpus should not be suspended for more than six months, he supported his position by referring to two of the proposed arms guarantees:

What is said on this matter, is a sufficient reply to the 12th amend. of the New-Hampshire convention, that congress shall never disarm any citizen, unless such as are or have been in actual rebellion. If, by the acknowledged necessity of suspending the privilege of habeas corpus, a suspected person may be secured, he may much more be disarmed. In such unhappy times it may be very expedient to disarm those, who cannot conveniently be guarded, or whose conduct has been less obnoxious. Indeed to prevent by such a gentle measure, crimes and misery, is at once justice to the nation, and mercy to deluded wretches, who may otherwise, by the instigation of a dark and bloody ringleader, commit many horrid murders, for which

they must suffer digan punishments.

The minority of Pennsylvania seems to have been desirous of limiting the federal power in these cases; but their conviction of its necessity appears by those very parts of the 3rd and 7th amendments framed in this view, to wit, that no man be deprived of his liberty except by the law of the land, or the judgment of his peers_and that no law shall be passed for disarming the people, or any of them, unless for crimes committed, or real danger of public injury from individuals. The occasional suspension of the above privilege [of habeas corpus] becomes pro tempore the law of the land, and by virtue of it dangerous persons are secured. Insurrections against the federal government are undoubtedly real dangers of public injury, not only from individuals, but great bodies; consequently the laws of the union should be competent for the disarming of both.77

This is the only discussion in the ratification period of the limited power of Congress to disarm any person or group under the two proposed amendments. Since persons involved in an insurrection could be arrested, Collin reasoned, they could certainly also be disarmed. This argument reflected the experiences of the Revolution, in that a Tory who could be tarred and feathered could be disarmed first, and a Redcoat who could be shot could surrender his person and weapons instead. There is no hint in Collin's discussion that Congress could pass any law restricting firearms ownership by law-abiding citizens.

E. " Things So Clearly Out of the Power of Congress":

Debate in the Public Forum

Alexander White published a strong reply to the Pennsylvania "Dissent," which had generated opposition to the Constitution throughout several states, including Virginia. White timed publication of his article to precede the election of delegates to the Virginia ratifying convention, for which White was running.78 White regarded the objections of the Pennsylvania minority as bordering on the dishonest, for Congress clearly had no power over rights such as the private bearing of arms:

There are other things so clearly out of the power of Congress, that the bare recital of them is sufficient, I mean the "rights of conscience, or religious liberty_the rights of bearing arms for defence, or for killing game_the liberty of fowling, hunting and fishing ...." These things seem to have been inserted among their objections, merely to induce the ignorant to believe that Congress would have a power over such objects and to infer from their being refused a place in the Constitution, their intention to exercise that power to the oppression of the people.79

White proceeded to repeat the federalist dogma that a bill of rights would be dangerous, because it would suggest that Congress had power over any subject not explicitly listed in the bill of rights: "But if they had been admitted as reservations out of the powers granted to Congress, it would have opened a large field indeed for legal construction: I know not an object of legislation which by a parity of reason, might not be fairly determined within the jurisdiction of Congress."80

Nonetheless, White recognized that abuse of a right could be penalized: "The freedom of speech and of the press, are likewise out of the jurisdiction of Congress._But, if by an abuse of that freedom I attempt to excite sedition in the Commonwealth, I may be punished ...."81 Similarly, Congress had no power over bearing arms for defense or hunting, but could punish armed sedition.

After publication of the above, White was elected as a delegate to the Virginia convention,82 where he voted with Madison and the other federalists to ratify the Constitution prior to amendments.83

An antifederalist who published a proposed declaration of rights in Virginia would have guaranteed a right to keep and bear arms for "the people," but would have stated "the national defense" as the objective of that right. Acting through Arthur Campbell in Pennsylvania, the "Society of Western Gentlemen"84 proposed a declaration with the following: "The people have a right to keep and bear arms, for the national defense; standing armies in time of peace are dangerous to liberty, therefore the military shall be

subordinate to the civil power."85

In a second series of Letters from the Federal Farmer, advertised in New York in early May 1788, Richard Henry Lee classified as "fundamental rights" the rights of free press, petition, and religion; the rights to speedy trial, trial by jury, confrontation of accusers and against self-incrimination; the right not to be subject to "unreasonable searches or seizures of his person, papers or effects"; and, in addition to the right to refuse quartering of soldiers, "the militia ought always to be armed and disciplined, and the usual defense of the country...."86 Since these rights were to be recognized in the Bill of Rights, Lee's concept of the militia warrants further examination:

A militia, when properly formed, are in fact the people themselves, and render regular troops in a great measure unnecessary....[T]he constitution ought to secure a genuine [militia] and guard against a select militia, by providing that the militia shall always be kept well organized, armed, and disciplined, and include...all men capable of bearing arms; and that all regulations tending to render this general militia useless and defenceless, by establishing select corps of militia, or distinct bodies of military men, not having permanent interests and attachments in the community to be avoided.87

Thus, Lee feared that Congress, through its "power to provide for organizing, arming, and disciplining the militia" under Article I, paragraph 8 of the proposed Constitution, would establish a "select militia" apart from the people that would be used as an instrument of domination by the federal government. The contemporary argument that it is impractical to view the militia as the whole body of the people, and that the militia consists of the select corps now known as the National Guard, also existed during Lee's time. He refuted it in these terms:

But, say gentlemen, the general militia are for the most part employed at home in their private concerns, cannot well be called out, or be depended upon; that we must have a select militia; that is, as I understand it, particular corps or bodies of young men, and of men who have but little to do at home, particularly armed and disciplined in some measure, at the public expense, and always ready to take the field. These corps, not much unlike regular troops, will ever produce an inattention to the general militia; and the consequence has ever been, and always must be, that the substantial men, having families and property, will generally be without arms, without knowing the use of them, and defenseless; whereas, to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them; nor does it follow from this, that all promiscuously must go into actual service on every occasion. The mind that aims at a select militia, must be influenced by a truly anti-republican principle; and when we see many men disposed to practice upon it, whenever they can prevail, no wonder true republicans are for carefully guarding against it.88

Lee's view that a well-regulated militia was the armed populace rather than a select group, or "Prussian militia,"89was reiterated by many others. "Aristocratis" feared that the active militia would "quell insurrections that may arise in any parts of the empire on account of pretensions to support liberty, redress grievances, and the like."90 "The second class or inactive militia, comprehends all the rest of the peasants; viz., the farmers, mechanics, labourers, & c. which good policy will prompt government to disarm. It would be dangerous to trust such a rabble as this with arms in their hands."91 "M. T. Cicero" wrote to "The Citizens of America":

Whenever, therefore, the profession of arms becomes a distinct order in the state... the end of the social compact is defeated....

No free government was ever founded, or ever preserved its liberty, without uniting the characters of the citizen and soldier in those destined for the defence of the state....Such are a well regulated militia, composed of the freeholders, citizen and husbandman, who take up arms to preserve their property, as individuals, and their rights as freemen.92

F. "That Every Man Be Armed":

The Virginia Convention

Lee's antifederalist colleagues in Virginia, Patrick Henry and George Mason, would effectively argue the above positions in that state's ratifying convention. The result would be an irresistible push for what became the Second Amendment and the rest of the Bill of Rights.

Apparently before the convention began, the Virginia antifederalists had already drafted a declaration of rights which the convention would later adopt nearly verbatim. Its apparent author was George Mason, who merely added to the Virginia Declaration of Rights of 1776, which he also authored.

In one draft in Mason's handwriting, the following language appears: "That the people have a Right to mass & to bear arms; that a well regulated militia, composed of the Body of the people, trained to Arms, is the proper natural and safe Defense of a free State...."93 A right to "mass" with arms and bear them recalled the revolutionary days when the armed multitudes would descend upon British colonial officials. This term would be dropped for the more conservative term "keep," which connotes the quiet storage and possession of arms in the home, and which prohibits governmental seizure of arms.

Just after the Virginia convention began, the Virginia antifederalists sent copies of a declaration to antifederalists in the New York convention. George Mason, chairman of a "Committee of Opposition," wrote to John Lamb, chairman of the Federal Republican Committee of New York, on June 9, 1788,94 enclosing another draft (in Mason's handwriting) of a proposed declaration of "the essential and unalienable Rights of the People."95 It included: "That the People have a Right to keep and to bear Arms; that a well regulated Militia, composed of the Body of the People, trained to arms, is the proper, natural, and safe Defence of a free State...."96 William Grayson and Patrick Henry also wrote letters dated the same, enclosing the draft, to Lamb.97 As will be seen, the Virginia convention would adopt this language almost verbatim.

The Virginia ratifying convention met from June 2 through June 26, 1788. Edmund Pendleton, opponent of a bill of rights, weakly argued that abuse of power could be remedied by recalling the delegated powers in a convention.98 Patrick Henry shot back that the power to resist oppression rests upon the right to possess arms:

Guard with jealous attention the public liberty. Suspect every one who approaches that jewel. Unfortunately, nothing will preserve it but downright force. Whenever you give up that force, you are ruined.99

Henry sneered, "O sir, we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone....Did you ever read of any revolution in a nation...inflicted by those who had no power at all?"100

Since the Constitution had not been tested, Henry's arguments cannot be considered mere exaggerations. He queried, "of what service would militia be to you, when, most probably, you will not have a single musket in the state? for, as arms are to be provided by Congress, they may or may not furnish them."101 Quoting the militia clause of the Constitution, Henry continued: "By this, sir, you see that their control over our last and best defence is unlimited. If they neglect or refuse to discipline or arm our militia, they will be useless: the states can do neither_this power being exclusively given to Congress."102

James Madison responded that the militia provision was "an additional security to our liberty, without diminishing the power of states in any considerable degree....Congress ought to have the power to establish a uniform discipline throughout the states, and to provide for the execution of the laws, suppress insurrections, and repeal invasions: these are the only cases wherein they can interfere with the militia ...."103

In response to a suggestion that the militia would be made into an instrument of tyranny, Frances Corbin asked: "Who are the militia? Are we not militia? Shall we fight against ourselves?"104 The federalist line

was clear: an armed populace had no need of a written bill of rights.

Patrick Henry objected to the provision in Clause 17 for federal arms magazines in each state:

Are we at last brought to such an humiliating and debasing degradation, that we cannot be trusted with arms for our own defense? Where is the difference between having our arms in our own possession and under our own direction, and having them under the management of Congress. If our defence be the real object of having those arms, in whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?105

Similarly, Henry reiterated his objections to the militia clause: "We have not one fourth of the arms that would be sufficient to defend ourselves. The power of arming the militia, and the means of purchasing arms, are taken from the states by the paramount power of Congress. If Congress will not arm them, they will not be armed at all."106

John Randolph denied that the federal power was exclusive of the states. "Should Congress neglect to arm or discipline the militia, the states are fully possessed of the power of doing it; for they are restrained from it by no part of the Constitution."107 As will be seen, the convention would demand explicit recognition of this in an amendment to the Constitution.

George Mason agreed with Henry. Attacking the idea of a standing army, Mason argued: "The militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless_by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive right to arm them ...."108 "When, against a regular and disciplined army, yeomanry are the only defense,_yeomanry, unskillful and unarmed,_what chance is there for preserving freedom?"109 Mason recalled:

Forty years ago, when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised by an artful man [Sir William Keith], who was governor of Pennsylvania, to disarm the people; that it was the best and most effectual way to enslave them; but that they should not do it openly, but weaken them, and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed? The general government ought, at the same time, to have some such power. But we need not give them power to abolish our militia. If they neglect to arm them, and prescribe proper discipline, they will be of no use....I wish that, in case the general government should neglect to arm and discipline the militia, there should be an express declaration that the state governments might arm and discipline them.110

Mason undoubtedly quoted from a page of Sir William Keith's Collection of Papers and Other Tracts published in London in 1740. Colonial Pennsylvania Governor Keith violated every tenet of the whig-republican philosophy which so influenced the Americans with the following words:

A Militia in an arbitrary and tyrannical Government may possibly be of some Service to the governing Power; but we learn from Experience, that in a free Country it is of little use. The People in the Plantations are so few in Proportion to the Lands they Possess, that Servants being scarce, and Slaves so exceedingly dear, the men are generally under a Necessity to work hard themselves, in order to provide the common Necessaries of Life for their Families; so that they cannot spare a Day's Time without great Loss to their Interest; wherefore a Militia there would become more burdensome to the poor People, than it can be in any Part of Europe. Besides, it may be question'd how far it would be consistent with good Policy, to accustom all the able Men in the Colonies to be well exercised in Arms; it seems at present to be more advisable, to keep up a small regular Force in each Province, which on Occasion might be readily augmented; so that in Case of a War, or Rebellion, the whole of the regular Troops on the Continent, might without Loss of Time be united or distributed at Pleasure....111

Keith's fear of "accustom[ing] all the able Men in the Colonies to be well exercised in Arms" was directly related to his fear of "rebellion." He was the apologist of colonial imperialism par excellence, holding that "Every Act of a dependant Provincial Government therefore ought to terminate in the Advantage of the Mother State"112 and that none of the colonies "can with any Reason or good Sense pretend to claim an absolute legislative Power within themselves...."113

While Mason may not have referred to it in the above speech, in a 1767 publication Keith advocated resort to the stamp tax in order to support a "Body of Regular Troops" under the control of the Crown and independent of the colonial governors,114 and as if that addition of insult to injury was not enough, referred to the "loose, disorderly, and insignificant Militia."115 One purpose of the standing army would be conquest against the Indians for purposes of economic expansion.116

Mason had also made such arguments outside the convention. On May 26, Mason wrote to Thomas Jefferson:

There are many other things very objectionable in the proposed new Constitution; particularly the almost unlimited Authority over the Militia of the several States; whereby, under Colour of regulating, they may disarm, or render useless the Militia, the more easily to govern by a standing Army; or they may harass the Militia, by such rigid Regulations, and intolerable Burdens, as to make the People themselves desire it's Abolition.117

James Madison countered Mason's arguments and quotations from Keith with the assertion that the federal and state governments were "coequal sovereignties," adding: "I cannot conceive that this Constitution, by giving the general government the power of the arming the militia, takes it away from the state governments. The power is concurrent, not exclusive."118

Henry again denied that the power was concurrent, and in a single argument asserted both the individual right to have arms and the state power to encourage a militia consisting of the armed populace:

May we not discipline and arm them, as well as Congress, if the power be concurrent? So that our militia shall have two sets of arms, double sets of regimentals, & c.; and thus, at a very great cost, we shall be doubly armed. The great object is, that every man be armed. But can the people afford to pay for double sets of arms, & c.? Every one who is able may have a gun. But we have learned, by experience, that, necessary as it is to have arms, and though our Assembly has, by a succession of laws for many years, endeavored to have the militia completely armed, it is still far from being the case. When this power is given up to Congress without limitation or bounds, how will your militia be armed? You trust to chance; for sure I am that nation which shall trust its liberties in other hands cannot long exist. If gentlemen are serious when they suppose a concurrent power, where can be the impolicy to amend it? Or, in other words, to say that Congress shall not arm or discipline them, till the states shall have refused or neglected to do it?119

Again the federalists countered, with George Nicholas articulating more precisely why the militia power was not exclusive:

But it is said, the militia are to be disarmed. Will they be worse armed than they are now? Still, as my honorable friend said, the states would have power to arm them. The power of arming them is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise any power exclusively of the state governments, words of exclusion are particularly inserted....It is, therefore, not an absurdity to say, that Virginia may arm the militia, should Congress neglect to arm them after Congress had armed them, when it would be unnecessary 120

While not applied specifically to the right to have arms, the requirement that a license be obtained before exercise of a right was deemed to be infringement. George Nicholas argued: "The liberty of the press is

secured....In the time of King William, there passed an act for licensing the press. That was repealed....The people... will not consent to pass an act to infringe it...."121 The term "infringe" would, of course, be used in the Second Amendment.

William Grayson reasserted the exclusive power interpretation, warning that the militia "might be armed in one part of the Union, and totally neglected in another." He pointed out that England had an excellent militia law for itself, entailing "thirty thousand select militia," but neglected the militia of Scotland and Ireland.122

John Marshall examined in detail the reasons why all powers not exclusively delegated are retained, illustrating his point by reference to Article I, Section 10 of the Constitution, which provides that "no state shall engage in war" unless invaded.123 He continued:

But the worthy member fears, that in one part of the Union they will be regulated and disciplined, and in another neglected. This danger is enhanced by leaving this power to each state; for some states may attend to their militia, and others may neglect them. If Congress neglect our militia we can arm them ourselves. Cannot Virginia import arms? Cannot she put them into hands of her militia-men?

He then concluded by observing, that the power of governing the militia was not vested in the states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been.124

George Mason returned to the earlier remark by Francis Corbin, concerning "who are the militia, if they be not the people of this country... ? I ask, Who are the militia? They consist of now of the whole people, except a few public officers. But I cannot say who will be the militia of the future day. If that paper on the table gets no alteration, the militia of the future day may not consist of all classes, high and low, and rich and poor ...."125 The republican militia was the armed populace at large; to be avoided was a select militia or standing army.

In response, Nicholas detected a contradiction in the antifederalists, in that Grayson objected because there would be no select militia, while Mason objected that there would be. Mason replied that Grayson "had mentioned the propriety of having select militia, like those of Great Britain, who should be more thoroughly exercised than the militia at large could possibly be. But he, himself, had not spoken of a selection of militia, but of the exemption of the highest classes of the people from militia services ...."126 Grayson agreed, opining that "a well-regulated militia ought to be the defence of this country. In some of our constitutions it is said so."127 Article XIII of the Virginia Declaration of Rights, authored by George Mason, defined such a militia as "the body of the people, trained to arms."

Edmund Pendleton, president of the convention, got in the last word on the power of the state to have a militia. "The power of the general government to provide for arming and organizing the militia is to introduce a uniform system of discipline to pervade the United States of America....[T]hough Congress may provide for arming them,... there is nothing to preclude [the states] from arming and disciplining them, should Congress neglect to do it."128

Similarly, the final word on the individual right to have arms was by Zachariah Johnson, who argued that the new Constitution could never result in religious persecution or other oppression because "the people are not to be disarmed of their weapons. They are left in full possession of them."129

The Virginia convention resolved the above and other disputed provisions by ratifying the Constitution on June 25, 1788, subject to the stipulation that "every power, not granted thereby, remains with [the people of the United States], and at their will ...."130 On June 27, the convention recommended passage of a bill of rights and other amendments drafted by a committee (appointed two days before) which included Henry, Randolph, Mason, Nicholas, Grayson, Madison, John Marshall, and others.131

The recommended bill of rights asserting "the essential and unalienable rights of the people"132 included the following: "That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."133 George Mason simply added the first clause_the right to bear arms_to the rest of the provision he had drafted for the Virginia Declaration of Rights of 1776.134 As noted, Mason, Henry, and Grayson had sent copies of a declaration with essentially the same language to New York antifederalists at the beginning of the Virginia convention.135

The Virginia convention recommended an entirely different set of amendments to the text of the Constitution, including the provision: "That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same."136 This language was almost verbatim with that proposed by the Harrisburg Convention in Pennsylvania.137 It did not appear in the draft declaration Mason had authored before the convention. As will be seen, this and the other amendments clarifying the federal-state relationship would later fail in Congress altogether. Even so, the essence of some of these proposals would be ratified in the more general Tenth Amendment.

G. The New York Convention

The New York convention was preceded by serious antifederalist agitation. One "Common Sense" noted "that the chief power will be in the Congress, and that what is to be left of our government is plain, because a citizen may be deprived of the privilege of keeping arms for his own defence, he may have his property taken without a trial by jury ...."138

As noted, George Mason and other Virginia antifederalists sent letters and a draft declaration of rights to the New York antifederalists. Antifederalist newspaper editor Eleazer Oswald personally carried and delivered this correspondence to John Lamb, chairman of the Federal Republican Committee, on June 21. New York Governor George Clinton, also President of the New York convention, gave copies of the letters to a Special Committee of Correspondence.139

Robert Yates, chairman of the Special Committee, wrote to George Mason on June 21, thanking him for the proposed amendments, and enclosing a draft agreed to by many of the New York convention delegates.140 While this draft has not been located, the New York convention would adopt the Virginia language with a slight change in the militia clause.

Following Virginia by one month, New York ratified the Constitution on July 26, 1788. The convention predicated its ratification on the following interconnected propositions: "That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness....That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state."141

Explicit in this language are the two independent declarations that individuals have a right to be armed and that the militia is the armed people. The convention declared "that the rights aforesaid cannot be abridged or violated ...."142

New York also adopted an entirely separate list of amendments concerning the structure of government. While not including a state militia power like that of Virginia, the convention suggested the following: "That the militia of any state shall not be compelled to serve without the limits of the state, for a longer term than six weeks, without the consent of the legislature thereof."143

H. The North Carolina Convention

On August 1, 1788, the North Carolina convention demanded the adoption of a declaration of rights

securing "the unalienable rights of the people" and of other amendments concerning governmental powers before it would ratify the Constitution.144 Among the various rights antifederalists anticipated could be infringed was the right to have arms. Equating the militia with the people at large, William Lenoir argued that Congress "could disarm the militia. If they were armed, they would be a resource against great oppressions....If the laws of the Union were oppressive, they could not carry them into effect, if the people were possessed of proper means of defence."145

The declaration of rights included the following taken from Virginia's proposals:

That the people have a right to keep and bear arms; that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.146

A separate body of amendments dealt exclusively with the powers of the state and federal governments. Like the Harrisburg and Virginia conventions, the North Carolina convention proposed:

That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same; that the militia shall not be subject to martial law, except when in actual service in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.147

North Carolina refused to ratify the Constitution until November 21, 1789, several weeks after Congress passed the Bill of Rights and proposed it to the states.

I. The Armed Populace: Philosophical and Pre-Revolutionary Influences

While federalists and antifederalists differed on the need for a paper declaration, they were unified on the concept that an armed populace is necessary for a free state. As the ratification struggle ensued, prominent authors recalled philosophical influences and pre-Revolutionary experiences which linked the disarming of the people with oppression.

During 1787-1788, John Adams published his Defense of the Constitutions of Government of the United States of America, which became well known in the States and in Europe. Adams relied on classical sources, in the context of an analysis of quotations from Marchamont Nedham's The Right Constitution of a Commonwealth (1656), to vindicate a militia of all the people: "That the people be continually trained up in the exercise of arms, and the militia lodged only in the people's hands, or that part of them which are most firm to the interest of liberty, that so the power may rest fully in the disposition of their supreme assemblies." The limitation to "That part most firm to the interest of liberty," was inserted here, no doubt, to reserve the right of disarming all the friends of Charles Stuart, the nobles and bishops. Without stopping to inquire into the justice, policy, or necessity of this, the rule in general is excellent....One consequence was, according to [Nedham], "that nothing could at any time be imposed upon the people but by their consent....As Aristotle tells us, in his fourth book of Politics, the Grecian states ever had special care to place the use of and exercise of arms in the people, because the commonwealth is theirs who hold the arms; the sword and sovereignty ever walk hand in hand together." This is perfectly just. "Rome, and the territories about it, were trained up perpetually in arms, and the whole commonwealth, by this means, became one formal militia."148

After agreeing that all the continental European states achieved absolutism by following the Caesarian precedent of erecting "praetorian bands, instead of a public militia,"149 the aristocratic Adams recognized the individual right to use arms for personal protection but looked askance at the kind of armed protest exemplified in Shays' Rebellion: "To suppose arms in the hands of citizens, to be used at individual discretion, except in private self-defence, or by partial orders of towns...is a dissolution of the

government."150

For the more radical Thomas Jefferson, individual discretion was acceptable in the use of arms not simply for private but for public defense as well. Writing in 1787, Jefferson stressed the inexorable connection between the right to have and use arms and the right to revolution as follows:

God forbid we should ever be twenty years without such a rebellion....And what country can preserve its liberties, if its rulers are not warned from time to time, that this people preserve the spirit of resistance? Let them take arms....The tree of liberty must be refreshed from time to time, with the blood of patriots and tyrants.151

In 1789, Dr. David Ramsay published his History of the American Revolution. A prominent federalist, Ramsay wrote this work while he was a member of the Continental Congress in the 1780s.152 He also served as a delegate to the South Carolina ratification convention in 1788. Madison had served with Ramsey in the Continental Congress, and was aware of the book.153

Ramsey's account of grievances leading to the Revolution was apropos, because bills of rights were then being drafted to prevent a recurrence of infringements on rights such as keeping and bearing arms. Ramsey recalled General Gage's disarming of the inhabitants of Boston just after Lexington and Concord in 1775, the most significant infringement which would destine the Second Amendment's recognition of the right to "keep" arms, as follows:

To prevent the people within Boston from co-operating with their countrymen without in case of an assault which was now daily expected, General Gage agreed with a committee of the town, that upon the inhabitants lodging their arms in Faneuil-hall or any other convenient place, under the care of the selectmen, all such inhabitants as were inclined, might depart from the town, with their families and effects. In five days after the ratification of this agreement, the inhabitants had lodged 1778 fire arms, 634 pistols, 273 bayonets and 38 blunderbusses. The agreement was well observed in the beginning, but after a short time obstructions were thrown in the way of its final completion, on the plea that persons who went from Boston to bring in the goods of those who chose to continue within the town, were not properly treated. Congress remonstrated on the infraction of the agreement, but without effect.154

Specifically, in the Declaration of Causes of Taking Up Arms of 1775, the continental Congress decried Gage's seizure of the arms that had been surrendered with the assurances that the arms would be kept only temporarily by the selectmen, and that the inhabitants would be allowed to depart from Boston.155 Ramsey listed the specific types of arms seized_firearms (i.e. muskets and other long-barreled shoulder arms), pistols, bayonets, and blunderbusses, which are short-barreled shotguns.

It would be naive to believe that the inhabitants did not keep a substantial number of their arms. Ramsay noted Gage's skepticism as follows:

The select-men gave repeated assurances that the inhabitants had delivered up their arms, but as a cover for violating the agreement, general Gage issued a proclamation, in which he asserted that he had full proof to the contrary. A few might have secreted some favorite arms, but nearly all the training arms were delivered up.156

Evidently, the American tradition of civil disobedience to firearms prohibitions was well entrenched by 1775.

Ramsay also recalled King George's 1774 ban on importation of firearms into the colonies. "The provincials laboured under great inconveniences from the want of arms and ammunition. Very early in the contest, the king of Great-Britain, by proclamation, forbad the exportation of warlike forces to the colonies."157 This infringement on the right to keep arms was circumvented by domestic manufacture and smuggling.

Ramsay extolled the Americans' superiority in the bearing and use of arms. "All their military regulations were carried on by their militia, and under the old established laws of the land. For the defence of the colonies, the inhabitants had been, from their early years, enrolled in companies, and taught the use of arms."158 Ramsey noted: "Europeans, from their being generally unacquainted with fire arms are less easily taught the use of them than Americans, who are from their youth familiar with these instruments of war ...."159

Ramsay pointed out the close connection between a nation of hunters and target shooters and a well regulated militia. Of the Battle of Bunker Hill, he wrote: "None of the provincials in this engagement were riflemen, but they were all good marksmen. The whole of their previous military knowledge had been derived, from hunting, and the ordinary amusements of sportsmen. The dexterity which by long habit they had acquired in hitting beasts, birds, and marks, was fatally applied to the destruction of British officers."160

Due to the shortage of gunpowder, the Revolutionary leaders encouraged preservation of the article only for overthrow of tyranny. "The public rulers in Massachusetts issued a recommendation to the inhabitants, not to fire a gun at beast, bird or mark, in order that they might husband their little stock for the more necessary purpose of shooting men."161 But Ramsay remembered the difficulty of regimenting armed free thinkers: "The husbandmen who flew to arms were active, zealous, and of unquestionable courage, but to introduce discipline and subordination, among free men who were habituated to think for themselves, was an arduous labour."162

Ramsay aptly captured the Americans' perception of themselves in 1789 as free people who were entitled to speak their minds and to keep and bear arms. His account of British infringements on these rights must have been considered most timely by the architects and craftsmen of what became the Bill of Rights.

III. THE ADOPTION OF THE BILL OF RIGHTS

A. Madison's Proposed Amendments

In the first federal elections under the new Constitution, James Madison ran for a seat in the new House of Representatives against James Monroe, who championed the antifederalist cause. Departing from previous federalist positions, Madison championed a bill of rights, and won the election.163

In what is thought to be a speech he drafted to deliver to the House had he won the election, Monroe advocated a declaration of rights, stating:

The following appears to be the most important objects of such an instrument. It should more especially comprise a doctrine in favor of the equality of human rights; of the liberty of conscience in matters of religious faith, of speech and of the press; of the trial by jury of the vicinage in civil and criminal cases; of the benefit of the writ of habeas corpus; of the right to keep and bear arms....If these rights are well defined, and secured against encroachment, it is impossible that government should ever degenerate into tyranny.164

As fate would have it, Madison would give a similar speech. Madison had been keeping a scrapbook of newspaper clippings from around the country of proposed amendments, including those from the state conventions.165 In his notes for a speech introducing what became the Bill of Rights, Madison wrote: "They [the proposed amendments] relate first to private rights_fallacy on both sides-espec[iall]y as to English Decl[aratio]n. of Rights_1. mere act of parl[iamen]t. 2. no freedom of press_Conscience... attainders_arms to protest[an]ts."166

Thus, Madison stated that the rights he would propose, such as freedom of the press and keeping and bearing arms, were "private rights." The "fallacy" as to the English Declaration of Rights was that it was a "mere act of Parliament" which Parliament itself could repeal; by contrast, the American bill of rights would not, as part of the Constitution, be subject to repeal by Congress. Moreover, the English Declaration

either omitted or unreasonably limited fundamental rights. Freedom of the press was not recognized at all, and the right to keep and bear arms was limited to Protestants and further limited by class: "That the Subjects which are Protestants, may have Arms for their Defence suitable to their Condition, and as are allowed by Law."167

On June 8, 1789, in the House of Representatives, James Madison proposed his long-awaited bill of rights. Madison's draft contained both philosophical declarations and substantive restrictions. First, the Constitution would contain a new preamble with fundamental principles from the Virginia Declaration of Rights: "all power is originally vested in, and consequently derived from the people"; "government is instituted... for the benefit of the people"; and "the people have an indubitable, unalienable, and indefeasible right to reform or change their government ...."168 The ultimate power is in the people, who would thereby have the right to be armed.

Madison then proposed that the text of the Constitution be amended to limit the powers of Congress. Civil rights could not be abridged on account of religious belief, no national religion could be established, and the rights of conscience could not be "in any manner, or on any pretext infringed."169 "The people shall not be deprived or abridged of their right to speak," and a free press, "as one of the great bulwarks of liberty," would be inviolable.170 "The people shall not be restrained from peaceably assembling and consulting for their common good," and petitioning the legislature for redress of grievances.171 The next guarantee referred to the same entity with rights_"the people"_and interposed a philosophical declaration between two restrictions: "The right of the people to keep and bear arms shall not be infringed; a well armed, and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."172

This provision, which became the Second Amendment, began with a substantive guarantee in the nature of a command that the individual right to keep and bear arms shall not be infringed. Just as "keeping" arms referred to possession of arms by an individual, the terms "bear arms" meant simply to carry arms. Previously, Madison had sponsored a bill in the Virginia legislature under which a person who hunted deer illegally would be on probation for a year and could not "bear a gun out of his inclosed ground, unless whilst performing military duty...."173 The violator could bear a pistol, but not a shoulder arm except for militia duty.174

After the above command that the right shall not be infringed, Madison's proposal made the philosophical declaration that a well armed and regulated militia is the best security of a free country. This declaration did not limit the right, but gave the chief political reason for guaranteeing the right against governmental infringement. Keeping and bearing arms would be protected for all lawful purposes, but self-defense, hunting, shooting at the mark (i.e., target shooting), and other nonpolitical purposes had no place in a federal Constitution which delegated no power to regulate these activities. Since Congress could raise and support armies, the superiority of the militia in securing a "free" country must be declared. For the same reason, conscientious objectors could not be forced to bear arms in military service.

In contrast with the above substantive guarantees, most of the remainder of Madison's resolutions related to procedural guarantees such as double jeopardy, search and seizure, and other criminal matters. A longer version of what became the Ninth Amendment concluded the limitations on the power of Congress:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.175

To the existing prohibitions on state action, Madison would have provided that no state shall "violate" the equal rights of conscience or a free press.176 An amendment to the judiciary provisions of the Constitution would have asserted that in common law suits, "the trial by jury as one of the best securities to the rights of the people, ought to remain inviolate."177 Like the "well-regulated-militia" declaration to

the arms guarantee, this philosophical statement about "one of the best securities" of the peoples' rights was never intended as a limitation on the guarantee.

Toward the end of the Constitution, Madison would have inserted a version of what became the Tenth Amendment, absent recognition of power in "the people": "The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively."178

Throughout, Madison utilized consistent word choice: governments have "powers," while only "the people" as individuals have "rights," albeit the people also have "powers."179 At no point did Madison suggest that any of the bill of rights provisions were intended to protect state powers from federal intrusions, that "the people" really meant the state governments, that a state government had "rights" instead of "powers," or that the term "infringe" applied to anything other than governmental violation of individual rights. Madison conceptualized the rights he sought to guarantee as follows:

The people of many States have thought it necessary to raise barriers against power in all forms and departments of Government, and I am inclined to believe, if once bills of rights are established in all the States, as well as the federal constitution, we shall find that although some of them are rather unimportant yet, upon the whole, they will have a salutary tendency....

In some instances they assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. In other instances, they specify those positive rights, which may seem to result from the nature of the compact. Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature. In other instances, they lay down dogmatic maxims with respect to the construction of the Government; declaring that the legislative, executive, and judicial branches shall be kept separate and distinct....

But whatever may be the form which the several States have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.180

According to the above analysis, the press, arms and similar substantive guarantees would be "rights which are retained" and among "the pre-existent rights of nature." These are the areas in which the Government "ought not to act." Jury trial and other procedural rights start from the social compact. They specify that the government must "act only in a particular mode."

The bill of rights was conceived to deny exercise of power whether by direct infringement or indirectly through exercise of a delegated power. Opponents of a bill of rights pointed only to the lack of an explicit power over any of the proposed guarantees. For instance, Congressman James Jackson of Georgia argued: "The gentleman endeavors to secure the liberty of the press; pray how is this in danger? There is no power given Congress to regulate this subject as they can commerce, or peace, or war."181 Madison answered such arguments as follows:

The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for the purpose, as well as for some purposes which it was supposed at the framing of their constitutions the State Governments had in view? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.182

In other words, Congress has no delegated power to abridge freedom of the press or to infringe on the right to keep and bear arms. Nor may Congress exercise one of its delegated powers, such as taxation or regulation of commerce, in such way as to infringe on the right to posses arms or to violate the right against unreasonable search and seizure.

While he followed the recommendations of several state conventions that a declaration of rights be adopted, Madison did not offer extensive amendments concerning the structure of government. One such amendment Madison neglected was the power of the states to organize militias.

Madison's colleagues clearly understood the arms guarantee to be protective of individual rights. Representative Fisher Ames of Massachusetts wrote: "Mr. Madison has introduced his long expected amendments....It contains a bill of rights... the right of the people to bear arms."183 Ames wrote to another correspondent: "The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people."184 Senator William Grayson of Virginia informed Patrick Henry: "Last Monday a string of amendments were presented to the lower House; these altogether respected personal liberty ...."185 After reading the amendments which Madison sent him, Joseph Jones wrote to Madison that "they are calculated to secure the personal rights of the people ...."186

Ten days after the Bill of Rights was proposed in the House, Tench Coxe published his "Remarks on the First Part of the Amendments to the Federal Constitution," under the pen name "A Pennsylvanian," in the Philadelphia Federal Gazette.187 Probably the most complete exposition of the Bill of Rights to be published during its ratification period, the "Remarks" included the following: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms." In short, what is now the Second Amendment was designed to guarantee the right of the people to have "their private arms" to prevent tyranny and to overpower an abusive standing army or select militia.

Coxe sent a copy of his article to Madison along with a letter of the same date. "It has appeared to me that a few well tempered observations on these propositions might have a good effect....It may perhaps be of use in the present turn of the public opinions in New York state that they should be republished there."188 Madison wrote back, acknowledging "your favor of the 18th instant. The printed remarks inclosed in it are already I find in the Gazettes here [New York]." Madison endorsed Coxe's analysis_including that the amendment protected the possession and use of "private arms"_ with the comment that ratification of the amendments "will however be greatly favored by explanatory strictures of a healing tendency, and is therefore already indebted to the co-operation of your pen."189

Coxe's defense of the amendments was widely reprinted.190 A search of the literature of the time reveals that no writer disputed or contradicted Coxe's analysis that what became the Second Amendment protected the right of the people to keep and bear "their private arms." The only dispute was over whether a bill of rights was even necessary to protect such fundamental rights. "One of the People" replied to Coxe's article with a response called "On a Bill of Rights," which held "the very idea of a bill of rights" to be "a dishonorable one to freemen." "What should we think of a gentleman, who upon hiring a waiting-man, should say to him 'my friend, please take notice, before we come together, that I shall always claim the liberty of eating when and what I please, of fishing and hunting upon my own ground, of keeping as many horses and hounds as I can maintain, and of speaking and writing any sentiments upon all subjects." As a mere servant, the government had no power to interfere with individual liberties in any manner without a specific delegation. "[A] master reserves to himself...everything else which he has not committed to the care of those servants."191

Samuel Nasson, a member of the Massachusetts ratification convention who voted against the Constitution, explained the common understanding of the arms guarantee in letter dated July 9 to Representative George Thatcher, a Federalist from that state:

I find that Amendments are once again on the Carpet. I hope that such may take place as will be for the Best Interest of the whole. A Bill of rights well secured that we the people may know how far we may Proceed in Every Department. Then there will be no Dispute Between the people and rulers in that may be secured the right to keep arms for Common and Extraordinary Occasions such as to secure ourselves

against the wild Beast and also to amuse us by fowling and for our Defence against a Common Enemy. You know to learn the Use of arms is all that can Save us from a foreign foe that may attempt to subdue us, for if we keep up the Use of arms and become well acquainted with them, we Shall always be able to look them in the face that arise up against us. For it is impossible to Support a Standing army large Enough to Guard our Lengthy Sea Coast, and now Spare me on the subject of Standing armies in a time of Peace. They always were first or last the downfall of all free Governments. It was by their help Caesar made proud Rome Own a Tyrant and a Traitor for a Master.

Only think how fatal they were to the peace of this Country in 1770, what Confusion they Brought on the Fatal 5 of March [the Boston Massacre]. I think the remembrance of that Night is enough to make us Careful how we Introduce them in a free republican Government_I therefore hope they will be Discouraged, for I think the man that Enters as a Soldier in a time of peace only for a living is only a fit tool to enslave his fellows. For this purpose was a Standing Army first introduced in the World. Another that I hope will be Established in the bill is trials by Juries in all Causes Excepting where the parties agree to be without.192 (emphasis added).

The above is the only known correspondence from a constituent to a Congressman which explained the understanding of the proposal that became the Second Amendment. The right to keep arms exists for "common," i.e., ordinary, occasions and for "extraordinary" occasions, such as hunting beasts and fowl and protection from a common foe. The purpose was a citizenry with experience and knowledge in the use of arms which comes from regular possession of and practice with arms. Only an armed citizenry could prevent the oppression of a standing army.

B. Action by the House Select Committee

The House select committee to consider amendments appointed on July 21, 1789, included John Vining of Delaware as chairman, Madison, Roger Sherman of Connecticut, and a member from each of the other states.193 Sherman formulated his own draft of proposed amendments to the Constitution. Seven of the ten amendments in the Sherman draft declared rights of the people, while three concerned the structure and power of government. Sherman's rights guarantees were far more limited than those of Madison: the draft included no declaration of the rights of the people to keep and bear arms, against unreasonable search and seizure, to counsel and to due process of law, and no mandate on separation of church and state (hardly a surprise from a Connecticut representative).194

As noted, Virginia and North Carolina proposed (1) a bill of rights, including a guarantee of the right of the people to keep and bear arms, with a declaration that a well regulated militia is necessary for a free state; and (2) a separate body of amendments relating to powers of Congress, including clarification that each state may provide for organizing and arming its own militia when Congress neglects to act. The Pennsylvania antifederalists_including the Dissent of the Minority and the Harrisburg Convention_also proposed an arms-right guarantee and a militia-power clarification. While the Sherman draft deleted the former, it included the latter in the following language:

The militia shall be under the government of the laws of the respective states, when not in the actual service of the United States but such rules as may be prescribed by Congress for their uniform organization and discipline shall be observed in officering and training them; but military service shall not be required of persons religiously scrupulous of bearing arms.195

The last phrase concerning conscientious objectors had appeared in Madison's proposal guaranteeing the right of the people to keep and bear arms. Its placement in the Sherman draft with a state militia power was perhaps more logical, because it concerned not a "right" to bear arms, but an exemption from being "required" to bear arms in military service.

Although there is no record of the Select Committee's proceedings, Sherman's restrictive notions of freedom raised eyebrows. Senator Richard Henry Lee wrote to Samuel Adams as follows:

But so wonderfully are mens minds now changed upon the subject of liberty, that it would seem as if the sentiments which universally prevailed in 1774 were antediluvian visions, and not the solid reason of fifteen years ago! Among the many striking instances that daily occur, take the following, communicated to me by an honble. member of the H. of R. here. You well know our former respected, republican friend, old Mr. R-g-r-Sh-n [Roger Sherman] of Con. whose person, manners, and every sentiment appeared formerly to be perfectly republican. This very gentleman, our old republican friend opposed a motion for introducing into a bill of rights, an idea that the Military should be subordinate to the Civil power. His reason as stated was "that it would make the people insolent!" This was in a committee of the H. of R. for reporting amendments to the Constitution.196

While the Committee did not adopt the amendment, subordination of the military to the civil power was already implicit in the text of the Constitution. Nonetheless, Sherman's alleged comment is consistent with his restrictive concept of a bill of rights.

Sherman's draft was not adopted by the House select committee, which instead, on July 28, reported Madison's proposals as amended by the committee. Had the House committee intended to confirm a state militia power, Sherman's proposal or the comparable state proposals would have been appropriate. Instead, the committee reported the following: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."197

The select committee did not change Madison's words that "the right of the people to keep and bear arms shall not be infringed," although it moved the philosophical declaration about a well regulated militia to its position before, rather than after, the substantive guarantee. It also inserted, consistent with the phraseology of the Virginia, New York, and North Carolina convention demands, the definition of such a militia as "composed of the body of the people."

The select committee version used the term "infringed" in three other instances, including two instances in which Madison's original draft had used the terms "violated" or "inviolate."198 The equal rights of conscience, and the freedom of speech, press, assembly, and petition could not be "infringed,"199 and no state could "infringe" conscience, speech, press, or jury trial in criminal cases.200

Meanwhile, debate over the proposed amendments raged in the newspapers. The underlying fear against a government monopoly of arms was expressed thus: "Power should be widely diffused....The monopoly of power, is the most dangerous of all monopolies."201 The following reflects the understanding that the keeping and bearing of private arms contributed to a well-regulated militia:

A late writer...on the necessity and importance of maintaining a well regulated militia, makes the following remarks:_A citizen, as a militia man is to perform duties which are different from the usual transactions of civil society....[W]e consider the extreme importance of every military duty in time of war, and the necessity of acquiring an habitual exercise of them in time of peace....202

The Second Amendment was not intended to protect the citizens having arms only in their militia capacity. Rather, it originated in part from Samuel Adams's proposal (which contained no militia clause) that Congress could not disarm any peaceable citizens:

It may well be remembered, that the following "amendments" to the new constitution of these United States, were introduced to the convention of this commonwealth by... SAMUEL ADAMS...[E]very one of the intended alterations but one [i.e., proscription of standing armies] have been already reported by the committee of the House of Representatives, and most probably will be adopted by the federal legislature. In justice therefore for that long tried Republican, and his numerous friends, you gentlemen, are requested to republish his intended alterations, in the same paper, that exhibits to the public, the amendments which the committee have adopted, in order that they may be compared together...."And that the said constitution be never construed to authorize congress...to prevent the people of the United States, who are peaceable citizens, from keeping their own arms...."203

C. House Debate

On July 28, Chairman Vining presented the select committee report. The House Committee of the Whole debated the select committee's proposals for over a week.

Just as in the constitutional convention of 1787, Roger Sherman continued to object to Bill of Rights guarantees because Congress had no power over such areas. He thought the amendment that "no religion shall be established by law" to be "altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out."204

Once again, Madison responded that delegated powers could not be exercised to infringe on rights, and that explicit guarantees would prevent misconstruction:

Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make such laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.205

The amendments continued to be viewed as protective of individual rights. On August 9, Representative William L. Smith of South Carolina wrote to fellow federalist Edward Rutledge: "The Committee on amendmts. have reported some, which are thought inoffensive to the federalists & may do some good on the other side ....There appears to be a disposition in our house to agree to some, which will more effectually secure private rights, without affecting the structure of the Govt."206

The proposals resulting in the Second Amendment were discussed on August 17, 1789. The recorded debates do not include an explanation of the scope of the right to keep and bear arms or any objection to a declaration of that right. Unfortunately, analysis of debate on any of the Bill of Rights provisions must consider that the Annals of Congress reflect "the unreliable shorthand reports of one Thomas Lloyd, the incompetent, often inebriated stenographer who was supposed to have been recording the discussions in the House of Representatives."207

In any event, Lloyd's debates appear to reflect accurately the concern that an armed populace as militia contributes to a free state by reducing the need for and danger of a standing army, and the objection that Congress might rely on the conscientious objector clause as a ruse to disarm persons Congress decided are religiously scrupulous.

Elbridge Gerry clarified that the purpose of the amendment was protection from oppressive government,208 and thus the government should not be in a position to exclude the people from bearing arms:

This declaration of rights, I take it, is intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed. Now, I am apprehensive, sir, that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms.

What, sir, is the use of militia? It is to prevent the establishment of a standing army, the bane of liberty. Now, it must be evident, that, under this provision, together with their other powers, Congress could take such measures with respect to a militia, as to make a standing army necessary. Whenever Government mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins. This was actually done by Great Britain at the commencement of the late

revolution. They used every means in their power to prevent the establishment of an effective militia to the eastward. The Assembly of Massachusetts, seeing the rapid progress that administration were making to divest them of their inherent privileges, endeavored to counteract them by the organization of the militia; but they were always defeated by the influence of the Crown.209

Gerry argued that the federal government should have no authority to categorize any individual as unqualified under the amendment to bear arms. "Now, if we give a discretionary power to exclude those from militia duty who have religious scruples, we may as well make no provisions on this head."210 Gerry therefore moved that the conscientious-objector clause be limited to actual members of religions sects scrupulous of bearing arms.211 Keeping and bearing arms was a right of "the people," none of whom should thereby be disarmed under any pretense, such as the government's arbitrary determination that they are religiously scrupulous (or perhaps that they are not active members of a select militia).

In reply, James Jackson of Georgia "did not expect that all the people of the United States would turn Quakers or Moravians; consequently, one part would have to defend the other in case of invasion." The reference to "all the people" indicated again the centrality of the armed populace for defense against foreign attack. After further discussion, Gerry objected to the wording of the first part of the proposed amendment:

A well regulated militia being the best security of a free State, admitted an idea that a standing army was a secondary one. It ought to read, "a well regulated militia, trained to arms;" in which case it would become the duty of the Government to provide this security, and furnish a greater certainty of its being done.212

Gerry's words exhibit again the general sentiment that security rested on the armed populace as a whole, not on specialized bodies of armed men. The lack of a second to his proposal suggests that the keeping and bearing of arms by the citizens at large would constitute a sufficiently well regulated militia to secure a free state, and thus there was no need to make it, in Gerry's words, "the duty of the Government to provide this security."

Aedanus Burke of South Carolina then sought to add to the personal arms guarantee the long-standing antifederalist demand:

A standing army of regular troops in time of peace is dangerous to public liberty, and such shall not be raised or kept up in time of peace but from necessity, and for the security of the people, nor then without the consent of two-thirds of the members present of both Houses; and in all cases the military shall be subordinate to the civil authority.213

The motion was defeated,214 reflecting unanimity about the right of the people to keep and bear their private arms, but allowance for a limited army.

After further debate, the Committee of the Whole rose and submitted the select committee report to the House with minor changes. On August 20, the House considered what became the Second Amendment.

Debate on the exemption of religiously scrupulous persons from being compelled to bear arms highlights the sentiment that not only bearing, but also merely keeping of arms by the people was considered both a right and a duty to prevent standing armies. Thomas Scott of Pennsylvania objected that the exemption would mean that "a militia can never be depended upon. This would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army."215

"What justice can there be in compelling them to bear arms?" queried Elias Boudinot of New Jersey. "Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms."216 The proposed amendment was finally accepted after the insertion of the words "in person" at the end of the clause.217

Many of the proposed amendments were subjected to criticism. But the Second Amendment was apparently never attacked, aside from one editorial that argued the inefficiency of the militia clause, never questioning the right-to-bear-arms clause. After quoting the language of the proposal as it was approved by the House, the prominent antifederalist "Centinel" opined:

It is remarkable that this article only makes the observation, 'that a well regulated militia, composed of the body of the people, is the best security of a free state;' it does not ordain, or constitutionally provide for, the establishment of such a one. The absolute command vested by other sections in Congress over the militia, are not in the least abridged by this amendment. The militia may still be subjected to marital law..., may still be marched from state to state and made the unwilling instruments of crushing the last efforts of expiring liberty.218

"Centinel" was, of course, Samuel Bryan, author of the Pennsylvania Dissent of the Minority, which demanded recognition of the right to bear arms for defense of self, state, and country, and for hunting. By not objecting to lack of such a list of purposes in the Second Amendment, the antifederalists must have assumed that exercise of the right to keep and bear arms would extend to all lawful purposes. By the same token, Samuel Adams and the drafters of the New Hampshire proposal did not object to the lack of an explicit exclusion of criminals from the right to keep and bear arms, because this too was understood.

Centinel's observations indicate the understanding that the Second Amendment's militia clause was merely declaratory and did not protect state powers to maintain militias to any appreciable degree. That antifederalists never attacked the right-to-bear-arms clause demonstrates that it recognized a full and complete guarantee of individual rights to have and use private arms. Surely a storm of protest would have ensued had anyone hinted that the right only protected a government-armed select militia.

D. Senate Debate

"The lower house sent up amendments which held out a safeguard to personal liberty in great many instances, but this disgusted the Senate," Senator William Grayson wrote to Patrick Henry when the House transmitted its amendments to the Senate.219 The amendments were "treated contemptuously" by Senators Gouverneur Morris of New York, Ralph Izard of South Carolina, and John Langdon of New Hampshire, who tried but failed to postpone them until the next session.220

The 22-member Senate, which met in secret, began consideration of the amendments on September 3, 1789. It sliced out parts of what became the First Amendment, including the phrase "nor shall the rights of conscience be infringed," but rejected a motion to delete a version of First Amendment altogether.221 The next day the Senate passed a modified amendment protecting speech, press, and petition, and recognized "the right of the people peaceably to assemble and consult for their common good ...."222

The Senate then considered a motion to add the following clauses to the House version of what became the Second Amendment right to keep and bear arms:

That standing armies, in time of peace, being dangerous to liberty, should be avoided, as far as the circumstances and protection of the community will admit; and that in all cases the military should be under strict subordination to, and governed by, the civil power; that no standing army or regular troops shall be raised in time of peace, without the consent of two-thirds of the members present in both Houses; and that no soldier shall be enlisted for any longer term than the continuance of the war.223

This failed by a vote of six to nine. Those favoring the clauses included Virginia Senators Richard Henry Lee and William Grayson, and Senators Pierce Butler (South Carolina), James Gunn (Georgia), John Henry (Maryland), and Paine Wingate (New Hampshire). Association of this standing army prohibition with the right of the people to keep and bear arms did not detract from the personal nature of the right, but reflected Lee's premise that "to preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them ...."224 The individual right to keep and bear arms checks and prevents oppression from a standing army

The Senate's dim view of some amendments is reflected in a letter form Theodorick Bland Randolph to St. George Tucker, antifederalist Virginians and relatives of Congressmen. It stated:

The house of Representatives have been for some time past engaged on the subject of amendments to the constitution, though in my opinion they have not made one single material one. The senate are at present engaged on that subject; Mr. Richd. H. Lee told me that he proposed to strike out the standing army in time of peace but could not carry it. He also says that it has been proposed, and warmly favoured that, liberty of Speech and of the press may be stricken out, as they only tend to promote licenciousness.225

The members of the majority who killed the anti-standing-army propositions226 may have been concerned with its length as well as probably opposed the requirement that two-thirds of the Congress must authorize a standing army. However, the Senate went on to pass the individual guarantee proposed by the House but "amended to read as followeth: 'A well regulated militia, being the best security of a free state, the right of the people to keep and bear arms, shall not be infringed.'"227

In comparing the House version with this Senate version, the House redundantly mentions "the people" twice_once in defining "militia" as the "body of the people," and again as the entity with the right to keep and bear arms. The Senate more succinctly avoided repetition by deleting the well-recognized definition of the militia as "the body of the people."

The Senate also deleted the phrase that "no person religiously scrupulous shall be compelled to bear arms"_perhaps because the amendment depicts the keeping and bearing of arms as an individual "right" (and not as a duty) for both public and private purposes, and perhaps to preclude any constitutional authority of the government to "compel" individuals (even those without religious scruples) to bear arms for any purpose. Deletion of the clause also addressed Congressman Gerry's argument in the House that "this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."228

An additional day of debate resulted in an important phrase being added to the House version of what became the Tenth Amendment: "The powers not delegated to the state by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."229 While normally more conservative than the House, the Senate thereby made clear that "the people" have "powers" as well as "rights." By contrast, the state and federal governments have "powers" only and no "rights."230 Only individuals have "rights." Moreover, the Senate clearly distinguished between "the states" and "the people." "Rights" of "the people," such as keeping and bearing arms, could pertain only to individual persons, not states. Finally, "powers" are either "delegated" or "reserved," while individual "rights," whether of conscience or keeping arms, cannot be "infringed."

What "powers" do "the people" have in contradistinction to "rights?" Perhaps suffrage would be a power, as would resistance to oppression and armed overthrow of tyranny. The right to keep and bear arms, as the Revolution proved, was the basis for the ultimate exercise of "power" by the people, and would hopefully render exercise of this power of the people unnecessary in the new constitutional republic.

The next day, September 8, the Senate rejected a string of amendments from the Virginia Declaration of Rights,231 undoubtedly promoted by Lee and Grayson_the natural rights to life, liberty, and property; that "all power" is vested in "the people"; and that "the doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."232 Unlike the declaration of specific rights, such as the press and arms, these proposals were perceived perhaps as useless truisms or platitudes. The reservation of "power" in "the people" in the Tenth Amendment may have been intended to abbreviate some of the above principles.

Attention then turned toward amendments to limit the military power of the federal government. Renewed proposals to require two thirds of both Houses of Congress to consent to a standing army, and limits on the terms of enlistment of soldiers, again failed.233 The Senate then rejected an explicit reservation of the

state power to maintain militias incorporating the language of the Harrisburg, Virginia, and North Carolina conventions:

That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same; that the militia shall not be subject to martial law, except when in actual service, in time of war, invasion, or rebellion; and when not in the actual service of the United States, shall be subject only to such fines, penalties, and punishments, as shall be directed or inflicted by the laws of its own state.234

The above action highlights the clear distinction between the "right" of "the people" to keep and bear arms, and the "power" of the "state" to arm and provide for militias. Besides the linguistic differences, the individual right was considered with other individual rights, and the state power was considered with other governmental powers. The two were completely separate proposals. The Senate passed the former and rejected the latter. This demonstrates the absurdity of the argument invented in the twentieth century that by declaring the right of the people to keep and bear arms, Congress actually intended to declare the power of states to maintain militias_the very proposal Congress rejected.

John Randolph commented on the Senate action, apparently from information he received from Senator Richard Henry Lee, as follows: "A majority of the Senate were for not allowing the militia arms & if two thirds had agreed it would have been an amendment to the Constitution. They are afraid that the Citizens will stop their full career to Tyranny & Oppression."235 In other words, even the state power to provide for arming the militia translated into the encouragement by the states of private citizens arming themselves with standard military weapons. Proponents of this amendment feared that the federal government would neglect the militia and prevent the states from mandating that the people arm themselves, thereby achieving a federal monopoly of power.

On September 9, the Senate again took up what became the Bill of Rights. It passed a form of the First Amendment similar to the final version.236 The Senate then rejected a proposal to add "for the common defence" after "bear arms" in the Second Amendment.237 Had it succeeded, recognition of "the right of the people to keep and bear arms for the common defense" would have still been an individual right to have arms, but could have been interpreted as allowing arms to be kept only for common defense against foreign aggression or domestic tyranny, or that only military arms could be kept. Similarly, the earlier version of the right of the people to assemble "for their common good"238 could have limited that right to public purposes. Rejection of both expressed an intent that keeping and bearing arms and assembly include private, as well as public, lawful purpose, and that the citizens, not the government, have freedom to choose which arms to keep and for what purposes to assemble.

The Senate then made a change in the precatory clause of the Second Amendment. The declaration that a well regulated militia is "the best security of a free state" was neutralized or perhaps strengthened to state that a well regulated militia is "necessary to the security of a free state."239 This met the objection made in House debate that "a well regulated militia being the best security of a free State, admitted that a standing army was a secondary one."240 The Senate then passed its final version: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."241

On September 19 and 21, the House debated and agreed to the Senate amendments. A conference committee, including James Madison, Roger Sherman, and John Vining from the House, and Oliver Ellsworth, Charles Carroll, and William Paterson from the Senate, met and resolved final details.242

On September 25, 1789, the Senate agreed to the House resolution approving the final version of the Bill of Rights and recommended it to the states (including North Carolina and Rhode Island, which had not yet ratified the Constitution) with a preamble initiated in the Senate.243 It stated: "The conventions of a number of the states having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be

added ...."244 The Second Amendment (the fourth article of the amendments submitted to the states) as it finally passed Congress contained a declaratory clause followed by a restrictive clause: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The framers clearly distinguished between the "right[s]" of "the people" and the "powers" of the states. They also knew how to use the term "militia" when they intended to do so, and they did not in some mysterious sense mean only the "militia" when they used the term "the people." The Fifth Amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...." Thus, "the people" in the Second Amendment does not really mean only "the Militia, when in actual service," terms that appear in the Fifth Amendment. If keeping and bearing arms was a "right" only of "the militia, when in actual service," the framers certainly would have so stated.

The language of the state power to maintain militias is not the individual-rights vocabulary of the Second Amendment. Congress has "power" to provide for organizing and arming the Militia, "reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress...."245 (emphasis added). In other words, the "power" and "authority"_not "right"_is "reserved"_not "shall not be infringed"_to "the States respectively"_not "the people." Just as Congress has power "to raise and support armies," "to provide and maintain a navy," and "to provide for calling forth the militia,"246 the text of the Constitution also provides that "no state shall, without the consent of Congress,... keep troops, or ships of war in time of peace,... or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."247 The contrasting use of the word "keep" is revealing: no state shall "keep troops," but the people have a right to "keep... arms." The Second Amendment does not say that "the power of the states to keep militia troops is reserved."

The distinction between the states and the people is clearly made in the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The power to raise armies is delegated to the United States and prohibited to the states, while the power over the militia is reserved exclusively to the states, except as delegated to Congress in Article I, paragraph 8.

Finally, governmental powers are "delegated" or "reserved"; only rights retained by the people may not be "infringed." The words of the substantive guarantee of the Second Amendment apply only to individuals, never to state powers.

E. Ratification by the States

The adoption of the amendments by the states was by no means a foregone conclusion, and the ratification struggle ensued through 1791. Three positions emerged during the controversy: (1) the proposed amendments were adequate, (2) further guarantees were needed, and (3) freemen had no need of a bill of rights. None of the proponents of these three different positions ever called into question the basic, individual right of keeping and bearing arms. As it was commonly understood, the proposed Bill of Rights sought to guarantee personal and unalienable rights, but the people also retained unenumerated rights.248 Patrick Henry, Richard Henry Lee, and others were pleased with the Bill of Rights as far as it went, but they wanted guarantees against standing armies and direct taxes.249 Since these same prominent antifederalists were among the most vocal in calling for a guarantee that would recognize the individual right to have arms, it is inconceivable that they did not object to what become the Second Amendment if anyone understood it to fail to protect personal rights.

The view that the rights of freemen were too numerous to enumerate in a bill of rights was coupled with the argument that the ultimate protection of American liberty would be provided by the armed populace rather than by a paper bill of rights. The pro-amendment view held that both the existence of a bill of

rights and an armed populace to enforce it were necessary to provide complementary safeguards. The following editorial assumes that keeping and bearing arms would contribute to a well-regulated militia, and vice versa, that militia exercises would demonstrate the people's strength and dissuade the government from infringing upon the right to keep and bear arms:

The right of the people to keep and bear arms has been recognized by the General Government; but the best security of that right after all is, the military spirit, that taste for martial exercises, which has always distinguished the free citizens of these States; From various parts of the Continent the most pleasing accounts are published of reviews and parades in large and small assemblies of the militia....Such men form the best barrier to the Liberties of America.250

The debate over ratification of the Bill of Rights continued throughout 1790. One writer reiterated that no bill of rights could enumerate the rights of the peaceable citizen, "which are as numerous as sands upon the sea shore...."251 President Washington reminded members of the House of Representatives that "a free people ought not only to be armed, but disciplined...."252 Still, right-to-arms provisions were not necessarily associated with the citizen's militia but were also coupled with different provisions. For instance, a widely published proposed bill of rights for Pennsylvania included a militia clause in a separate article from the following: "That the right of the citizens to bear arms in defence of themselves and the State, and to assemble peaceably together. . . shall not be questioned."253

During the ratification period, the view prevailed that the armed citizenry would prevent tyranny. Theodorick Bland wrote Patrick Henry that "I have founded my hopes to the single object of securing (in terrorem) the great and essential rights of freemen from the encroachments of Power_so far as to authorize resistance when they should be either openly attacked or insidiously undermined."254 While the proposed amendments continued to be criticized for the lack of a provision on standing armies,255 no one questioned the right-to-bear-arms amendment.256

F. Rhode Island Assents

The Rhode Island Convention, which ratified the Constitution on May 29, 1790, declared: "That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free state...."257 The section also declared against standing armies and against the quartering of soldiers in houses.258

A separate body of amendments concerning the powers of the government did not mention the militia. However, it declared against federal conscription as follows: "that no person shall be compelled to military duty otherwise than by voluntary enlistment, except in cases of general invasion ...."259

Two days before Rhode Island ratified the Bill of Rights, newspapers in that state republished its declaration of natural rights, which had been included in its recent ratification of the Constitution, recognizing "that the people have a right to keep and bear arms" and "that a well-regulated militia, includ[es] the body of the people capable of bearing arms."260

As more states adopted the amendments and the great debate dwindled, the opponents of a standing-army prohibition conceded that an armed citizenry, constituted as a well-regulated militia, would prevent oppression from that quarter. As "A Framer" argued in a plea addressed "To The Yeomanry of Pennsylvania":

Under every government the dernier resort of the people, is an appeal to the sword; whether to defend themselves against the open attacks of a foreign enemy, or to check the insidious encroachments of domestic foes. Whenever a people... entrust the defence of their country to a regular, standing army, composed of mercenaries, the power of that country will remain under the direction of the most wealthy citizens....[Y]our liberties will be safe as long as you support a well regulated militia.261

IV. THE FEDERAL MILITIA ACT OF 1792

Following the example of state law, the federal Militia Act of May 8, 1792 required every "free able bodied white male citizen" aged 18 through 45 to "provide himself with a good musket or firelock," bayonet and ammunition. Horsemen were to equip themselves with a pair of pistols, ammunition, and sabre. The bill was originally introduced in the House on December 14, 1790.262 The debates on the bill explicate the nature of a well regulated militia at a time when the Bill of Rights was still being considered by the states.

House debate began on December 16. Congressman Josiah Parker of Virginia objected that the requirement that "every man in the United States shall 'provide himself' with military accoutrements would be found impracticable, as it must be well known that there are many persons who are so poor that it is impossible they should comply with the law."263 He proposed that the United States should pay the expense of arming such persons.

Several members doubted that every man should be a member of the active militia, but there was a consensus that every man be armed.264 "As far as the whole body of the people are necessary to the general defence, they ought to be armed," explained Thomas Fitzsimons of Pennsylvania.265 James Jackson of Georgia argued that "the people of America would never consent to be deprived of the privilege of carrying arms. Though it may prove burdensome to some individuals to be obliged to arm themselves, yet it would not be so considered when the advantages were justly estimated....In a Republic every man ought to be a soldier, and be prepared to resist tyranny and usurpation, as well as invasion, and to prevent the greatest of all evils_a standing army."266

The House then debated Parker's motion that the United States would provide arms for persons too poor to purchase them.267 Roger Sherman analyzed the militia clause of the Constitution in the same manner he had heard it explained in the convention of 1787:

What relates to arming and disciplining means nothing more than a general regulation in respect to the arms and accountrements. There are so few freemen in the United States who are not able to provide themselves with arms and accoutrements, that any provision on the part of the United States is unnecessary and improper. He had no doubt that the people, if left to themselves, would provide such arms as are necessary, without inconvenience or complaint; but if they are furnished by the United States, the public arsenals would soon be exhausted; and experience shows that public property of this kind, from the careless manner in which many persons use it, is soon lost.268

After a suggestion that the poor, minors, and apprentices be armed by the United States, the ultimate objection to this government-armed populace was expressed by Jeremiah Wadsworth of Connecticut: "Is there a man in this House who would wish to see so large a proportion of the community, perhaps one-third, armed by the United States, and liable to be disarmed by them?"269 Masters would assist apprentices, and "as to minors, their parents or guardians would prefer furnishing them with arms themselves, to depending on the United States when they knew they were liable to having them reclaimed."270 A vote was then taken, and Parker's motion failed.

Fitzsimons moved to strike the words "provide himself" and amend the bill to read that every citizen "shall be provided" with arms. James Madison and others objected that this "would leave it optional with the States, or individuals, whether the militia shall be armed or not."271 The motion lost.

Considerable debate ensured concerning persons who may be exempted from militia exercises. Under the Constitution, Hugh Williamson of North Carolina noted, "Congress are to provide for arming and disciplining the militia; but who are the militia? Such men, he presumed, as are declared so to be by the laws of the particular States, and on this principle he was led to suppose that the militia ought to consist of the whole body of citizens without exception."272

While the Senate met in secret and no debates were officially recorded, William Maclay's journal contains revealing portions of the debates on the bills for the military establishment and for regulating the militia.

Richard Henry Lee gave what must have been familiar speeches against standing armies.273 Senator Maclay believed that Alexander Hamilton and his faction were promoting war with the Indians and foreign powers as a "Pretext for rasing an Army meant to awe our Citizens into Submission."274 Army supporters accused the Spaniards of having "supplied the Indians with Arms and Ammunition,"275 but argued that "it was dangerous to put Arms into the hands of the Frontier People for their defense, least they should use them against the United States."276

Maclay protested these allegations as "subterfuges," and wrote:

The Constitution certainly never contemplated a Standing Army in time of peace. A Well regulated Militia to execute the laws of the Union, quell insurrections and repel Invasions, is the very language of the Constitution. General Knox offers a most exceptionable bill for a General Militia law which excites (as it is most probable he expected) a general Opposition. Thus the Business of the Militia stands still, and the military establishment bill which increases the standing Troops One half is pushed with all the Art & address of ministerial Management.277

Two anecdotes by Maclay illustrate the attitudes of the day toward personal arms. It seems that Alexander Hamilton made insulting remarks against the militia, giving rise in the House of Representatives to "a Violent personal Attack on Hamilton By Judge [Aedanus] Burk[e] of South Carolina which the Men of the blade say must produce a duel."278

July 4, 1790 in New York was celebrated a day late because it fell on a Sunday. When Congress adjourned, Maclay saw that "all the Town was in Arms ....the firing of cannon and small arms with beating of Drums kept all in uproar."279 The Senators went to President Washington's home for wine and cakes, and then to a reading of the Declaration of Independence.280

The United States in 1792 reflected the finalization of a unique period which began five years earlier. A constitution with limited, enumerated powers was proposed, but opponents would not allow its passage without a commitment to adopt a declaration of individual rights, including the right to keep and bear arms. This declaration was created and ratified, but attempts to pass amendments to the Constitution's provisions on state and federal governmental powers failed. While the Second Amendment or its equivalent was strongly demanded in state conventions and was then ratified by Congress and passed by the states, a totally separate provision about the right of states to maintain militias failed miserably. Nonetheless, Congress enacted legislation mandating that every man be armed.

CONCLUSION: SUPREME COURT JURISPRUDENCE

A. The Power of the States

From the earliest interpretations of the Constitution to the present, it has been consistently held that the states have a concurrent power over the militia with the United States and that each state may require its able-bodied citizens to provide themselves with and keep firearms, particularly militia weapons. The position argued by Madison and other federalists in the Virginia ratifying convention of 1788 has been vindicated, despite the failure of a proposed amendment explicitly recognizing the state power to maintain and provide for arming the militia.

In 1803, St. George Tucker cited Article I, paragraph 8, clause 16 and the Second Amendment in support of the proposition that "the power of arming the militia, not being prohibited to the states, respectively, by the constitution, is, consequently, reserved to them, concurrently with the federal government."281

The states passed militia laws in support of and to enforce the 1792 Act of Congress. For instance, Massachusetts required that every citizen "constantly keep himself furnished and provided with arms and equipments required by the laws of the United States ...."282 Persons were fined for not keeping the arms required by law.283 United States v. Miller (1939)284 analyzed early state militia laws and concluded:

The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia_civilians primarily, soldiers on occasion.

The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of the Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.285 (emphasis added).

The Supreme Court held in Houston v. Moore (1820)286 that the states have a reserved power to require all able-bodied males to provide themselves with standard military arms. Justice Washington noted that the federal Militia Act of 1792 declared "what arms and accoutrements the officers and privates shall provide themselves with ...."287 The Court added:

So long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state government. Congress has power to provide for organizing, arming, and disciplining them ....But as state militia the power of the state governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating upon the same subject.288

The court also stated that "if Congress had declined to exercise [its powers], it was competent to the state governments to provide for...arming...their respective militia, in such manner as they might think proper."289

In a separate opinion, Justice Story wrote:

Nor does it seem necessary to contend that the power "to provide for organizing, arming, and disciplining the militia" is exclusively vested in Congress....It would certainly seem reasonable, that in the absence of all interfering provisions by Congress on the subject, the states should have authority to organize, arm, and discipline their own militia....[W]hat would the militia be without...arms...290

Relying extensively on the above precedent, the Illinois Supreme Court case Dunne v. People (1879)291 cited the Tenth Amendment in support of the following: "The power of State governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States."292 The court also held:

"A well-regulated militia being necessary to the security of a free State," the States, by an amendment to the Constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the Constitution to call out the militia, "to execute the laws, suppress insurrection and repeal invasion." This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes. Unorganized, the militia would be of no practical aid to the executive in maintaining order and in protecting life and property within the limits of the State. These are duties that devolve on the State, and unless these rights are secured to the citizens, of what worth is the State government?293

Arising out of the same labor disturbance in Chicago as in Dunne, Presser v. Illinois (1885),294 decided by the United States Supreme Court, held that prohibitions on unlicensed military parades "do not infringe the right of the people to keep and bear arms," adding:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.295

By the same token, the United States may not prohibit the possession of militia arms, so as to deprive the states of their final resource for maintaining the public security, or prevent the people from performing their duty to the state governments.296

Justice Cardozo wrote in Babington v. Yellow Taxi Corp. (1928):297

The duty goes back to the days of hue and cry...To make pursuit effective, there were statutes in those early days whereby a man was subject to a duty to provide himself with instruments sufficient for the task. A typical illustration is the Statute of Winchester, 13 Edw. I, enacted in 1285....Thus, for fifteen pounds of lands and goods there shall be kept "an Hauberke [a Brestplate] of iron, a Sword, a Knife, and a Horse."...Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state...with whatever implements and facilities are convenient and at hand.298

Justice Cardozo recalled the above in showing "the duty of the able-bodied citizen to aid in suppressing crime" in his concurring opinion in Hamilton v. University of California (1934).299 The majority opinion upheld mandatory military training, including the use of automatic rifles, of students at a university based on the following:

Undoubtedly every State has authority to train its able-bodied male citizens of suitable age appropriately to develop fitness, should any such duty be laid upon them, to serve in the United States army or in state militia (always liable to be called forth by federal authority to execute the laws of the Union, suppress insurrection or repel invasion . . .) or as members of local constabulary forces or as officers needed effectively to police the State....So long as its action is within retained powers and not inconsistent with any exertion of the authority of the national government and transgresses no right safeguarded to the citizen by the Federal Constitution, the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these ends. Second Amendment.300

By statutory definition, the National Guard is "that part of the organized militia of the several States" that is "armed...wholly or partly at Federal expense" and "is federally recognized."301 "In addition to its National Guard, if any, a State...may, as provided by its laws, organize and maintain defense forces."302 The U.S. Government issues arms to the National Guard, but not to the states' defense forces.303 "So far as practicable, the same types of...arms as are issued to the Army shall be issued to the Army National Guard...."304

The availability of uniform arms to a portion of the state militias pursuant to the National Defense Act of 1916 greatly enhanced defense capabilities. As explained in Maryland for the Use of Levin v. United States (1965):305

From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces....Pursuant to power vested in Congress by the Constitution [Art. I, Section 8], the Guard was to be uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" by units, rather than by drafting individual soldiers. In return, Congress authorized the allocation of federal equipment to the Guard....306

The states are entitled to require members of their defense forces and reserve militias to provide themselves with the same arms which are used by the National Guard. The ideal of a uniformity of arms

for all militia members has been recognized since the Constitution was framed.

Based on the above, Congress has no power to prohibit possession of such militia arms as the states are entitled to require that its citizens or a part thereof furnish themselves with and keep in their homes. The states' concurrent power to organize and provide for arming their militias is a reserved power which federal legislation may not contradict.

B. The Right of the People

Traditionally, the Supreme Court has paid little attention to the Second Amendment. It noted in the Dred Scott case that recognition of African Americans as citizens would exempt them from "police regulations" (i.e., slave codes), and allow them "to keep and carry arms wherever they went."307 During Reconstruction, the Court stated that the rights of the people "peaceably to assemble for lawful purposes" and "of bearing arms for a lawful purpose" were not "granted" by the Constitution because they existed long before its adoption.308 A later opinion again recognized "the right of the people to keep and bear arms" and repeated that the Second Amendment is a limitation "upon the power of Congress and the National government...."309

At the turn of the century, the Court wrote of "the freedom of speech and of the press" and "the right of the people to keep and bear arms" that "the law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we inherited from our English ancestors...."310

Only in United States v. Miller (1939)311 has the high court addressed the Second Amendment, and even then only in rudimentary form. Absent evidence in the trial court that a sawed-off shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."312 The test was not whether the person in possession of the arm was a member of a formal militia unit, but whether the arm "at this time" is "ordinary military equipment" or its use "could" potentially assist in the common defense.

Referring to the militia clause of the Constitution, the Supreme Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made."313 The court then surveyed colonial and state militia laws to demonstrate that "the Militia comprised all males physically capable of acting in concert for the common defense" and that "these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."314

The philosophy behind the Second Amendment was well articulated in the commentaries of Justice Joseph Story and Judge Thomas M. Cooley, which Miller approvingly cites.315 Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."316 Miller's reference to Judge Cooley finds him stating:

Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms....The alternative to a standing army is 'a well-regulated militia'; but this cannot exist unless the people are trained to bearing arms. The federal and state constitutions therefore provide that the right of the people to bear arms shall not be infringed....317

While it has not discussed the Second Amendment in any detail since Miller, the Supreme Court has recently denied that some Bill of Rights freedoms "are in some way less 'fundamental' than" others. "Each establishes a norm of conduct which the Federal Government is bound to honor_to no greater or lesser

extent than any other inscribed in the Constitution. Moreover, we know of no principled basis on which to create a hierarchy of constitutional values...."318 The Supreme Court has also held that "when we do have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone."319

The two 1990 Supreme Court opinions analyzed at the beginning of this article should lay to rest any lingering doubts about the Second Amendment's applicability. First, the right to keep and bear arms belongs to "the people," the same individuals whose rights are protected by the First, Fourth, and Ninth Amendments. Second, the state power to maintain a militia is defined in the militia clause of the text of the Constitution, and is not substantively protected by the Second Amendment.

Every term in the Second Amendment's substantive guarantee_which is not negated by its philosophical declaration about a well regulated militia_demands an individual rights interpretation. The terms "right," "the people," "keep and bear," and "infringed" apply only to persons, not states. Moreover, the framers, supporters, and opponents of the original Constitution all agreed on the political ideal of an armed populace, and the unanimous interpretation of the Bill of Rights in Congress and by the public was that the Second Amendment guaranteed the right to keep and bear arms. Indeed, the very amendment which would have made explicit the state power to maintain a militia failed completely.

The language and historical intent of the Second Amendment mandates recognition of the individual right to keep and bear firearms and other personal weapons. Like those who oppose flag burning as symbolic protest, opponents of this right have the option of pressing for an amendment to a bill of rights no longer seen as worthwhile.

ENDNOTES

1. S. Levinson, The Embarrassing Second Amendment, 99 YALE L.J. 637, 639-42 (1989).

2. Id. at 644-45.

3. As will be seen below, the Virginia ratifying convention proposed, and the United States Senate rejected, an amendment to the Constitution which would have stated: "That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same." 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 660 (1836); JOURNAL OF THE FIRST SESSION OF THE SENATE 75 (1820).

4. Article II, Sec. 2 provides: "The President shall be the commander in chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States...." This provision makes clear that there is no national militia, but only a "Militia of the several States." Similarly, the Fifth Amendment provides for grand jury indictment "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...." Thus, the militia of the several states always retains its status as such, even though it may be called in the "actual service" of the United States for specified domestic purposes.

5. United States v. Verdugo-Urquidez, 494 U.S.-, 108 L.Ed.2d 222, 232-33, 110 S.Ct. 1056, 1060-61 (1990) (holding the Fourth Amendment warrant requirement inapplicable to the search of a home in a foreign country).

6. 108 L.Ed.2d at 247.

7. Id. at 248.

8. Id. at 2429. "[The Constitution left] under the sway of the states undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power raise armies." Id. at 2430 n.29, quoting Selective Draft Law Cases, 245 U.S. 366, 383 (1918).

9. J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 172 (1845).

10. Id. at 440.

11. Id.

12. Id. at 443.

13. Id.

14. Id.

15. Id.

16. Id. at 444.

17. Id.

18. Id.

19. Id.

20. Id. at 445.

21. Id.

22. Id. at 464.

23. Id. at 464-65.

24. Id. at 465.

25. Id.

26. S. HALBROOK, A RIGHT TO BEAR ARMS 26, 32, 46 (1989).

27. J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 466 (1845).

28. Id. at 466-67.

29. Id. at 538.

30. Id.

31. Id.

32. Id.

33. Id. at 544.

34. Id. at 545.

35. Id.

36. Id.

37. R. ROLLINS, THE LONG JOURNEY OF NOAH WEBSTER 52-53 (1980).

38. 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 405-406 (1981).

39. N. Webster, AN EXAMINATION OF THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 43 (Philadelphia 1787).

40. Coxe, "An American Citizen IV" (Oct. 21, 1787), in 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 433 (1981).

41. Id. at 435.

42. R. Lee, Letters of a Federal Farmer, 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 38-39 (1983).

43. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATES CONVENTIONS 521 (1836).

44. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 509 (1976).

45. Id. at 336.

46. 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 617 (1976).

47. Id. at 623-24.

48. See S. HALBROOK, A RIGHT TO BEAR ARMS 22 (1989).

49. Id. at 23-25. Accordingly, the very next proposal of the "Dissent of the Minority" was as follows:

The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.

2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 624 (1976).

50. Id.

51. Id. at 638.

52. Independent Gazetteer, Feb. 11, 1788, 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 1695 (1976).

53. 2 J. Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 545 (1836).

54. Id. at 545-46.

55. 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 230 (1986).

56. Id. at 492.

57. Id. at 493.

58. Pennsylvania Gazette, Feb. 20, 1788, in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 439 (1976).

59. Pennsylvania Gazette, Feb. 20, 1788, in 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) at 1778-1780 (1976).

60. Independent Chronicle (Boston), Oct. 25, 1787, 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 523 (1981).

61. THE ANTIFEDERALIST PAPERS 75 (M. Borden ed. 1965).

62. Id.

63. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 74 (1836).

64. Id. at 97.

65. S. HALBROOK, A RIGHT TO BEAR ARMS 1-7 (1989).

66. DEBATES OF THE MASSACHUSETTS CONVENTION OF 1788 at 86-87, 266 (Boston, 1856).

67. See S. HALBROOK, A RIGHT TO BEAR ARMS 1-16, 39-41 (1989).

68. From the Boston Independent Chronicle, Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

69. Id.

70. 1 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 326 (1836). "The right to bear arms, going back to the English Bill of Rights, received recognition in the Second Amendment to the Constitution....Counting this article, seven out of twelve of New Hampshire's proposals were ultimately accepted." E. Dumbauld, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 21 n.37 (1957).

71. S. HALBROOK, A RIGHT TO BEAR ARMS 75 (1989).

72. "Remarks," No. II, Federal Gazette (Philadelphia), Oct. 24, 1788.

73. No. IV, Fayetteville Gazette (N.C.), Oct. 12, 1789, at 1 col. 2-3 and 2, col. 1-2.

74. No. VIII, Federal Gazette, Nov. 14, 1788.

75. Id.

76. No. XI, id., Nov. 28, 1788.

77. Id. Collin also opposed amendments guaranteeing a free press and jury trial, a prohibition on general warrants and cruel and unusual punishment, and all other proposed amendments. No. XII, id., Dec. 2, 1788 and No. XXVIII, id., Feb. 16, 1789.

78. 8 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 401 (1988).

79. Winchester Gazette (Virginia), February 22, 1788, in id. at 404.

80. Id.

81. Id. at 404-05.

82. Id. at 402.

83. 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 654-55 (1836).

84. 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 769-70 (1990).

85. Virginia Independent Chronicle, April 30, 1788, in id. at 773-74.

86. R. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 53 (1788).

87. Id. at 169.

88. Id. at 170 (Emphasis added).

89. "A Slave," Oct. 6, 1787, 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 345 (1981).

90. The Government of Nature Delineated (1788), 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) 2524 (1976).

91. Id. at 2526.

92. State Gazette (Charleston), Sept. 8, 1788.

93. F. MONAGHAN, HERITAGE OF FREEDOM 58 (1947).

94. DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 813 (1990).

95. Id. at 819.

96. Id. 821.

97. Id. at 813.

98. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 37 (1836).

99. Id. at 45.

100. Id. at 51.

101. Id. at 51-52.

102. Id. at 52 (quoting U.S. Const., Art. 1, paragraph 8, cl. 16).

103. Id. at 90.

104. Id. at 112.

105. Id. at 168-69 (referring to Art 1, paragraph 8, cl. 17).

106. Id. at 169 (referring to Art. 1, paragraph 8, cl. 18).

107. Id. at 206.

108. Id. at 379.

109. Id. at 380.

110. Id.

111. SIR WILLIAM KEITH, A COLLECTION OF PAPERS AND OTHER TRACTS 180 (London 1740)

112. Id. at 170.

113. Id. at 175.

114. SIR WILLIAM KEITH, TWO PAPERS ON THE SUBJECT OF TAXING THE BRITISH COLONIES IN AMERICA 9 (London 1767).

115. Id. at 8.

116. Id.

117. 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 883 (1990).

118. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 381 (1836).

119. Id. at 386 (emphasis added).

120. Id. at 391.

121. Id. at 247.

122. Id. at 418.

123. Id. at 419-20.

124. Id. at 421.

125. Id. at 425-46.

126. Id. at 428.

127. Id. at 430.

128. Id. at 440.

129. Id. at 646.

130. Id. at 656.

131. Id.

132. Id. at 657.

133. Id. at 659.

134. 3 MASON, PAPERS 1068-71 (1970).

135. 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 821 (1990).

136. 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 660 (1836).

137. Id., 2, at 545-46.

138. New York Journal and Daily Advertiser, April 21, 1788, at 2, col. 2.

139. 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 813 (1990).

140. Id. at 825.

141. J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 327-28 (1836).

142. Id. at 329.

143. Id. at 331.

144. 4 J. ELLIOT, DEBATES in the SEVERAL STATE CONVENTION 242 (1836).

145. Id. at 203.

146. Id. at 244.

147. Id. at 245.

148. 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 471-72 (1787-88). Newspapers of the time alluded to Rome's disarming of conquered peoples. The Massachusetts Centinel, April 11, 1787 recalled "the old Roman Senator, who after his country subdued the commonwealth of Carthage, had made them deliver up...their arms...and rendered them unable to protect themselves...." 13 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 79 (Kaminski and Saladino eds. 1981).

149. 3 J. ADAMS, A DEFENSE OF THE CONSTITUTIONS, 474 (1787-88).

150. Id. at 475.

151. Letter to Wm. S. Smith, 1787, in JEFFERSON, ON DEMOCRACY 20 (S. Padover ed. 1939). In his influential Letter of 1788, Luther Martin stated: "By the principles of the American revolution arbitrary power may, and ought to be, resisted even by arms, if necessary." 1 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 382 (1836). See New York Journal, Aug. 14, 1788, at 2, col. 4 (the people will resist arbitrary power). A writer in the Pennsylvania Gazette, April 23, 1788, in DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Mfm. Supp.) at 2483 (Jensen ed. 1976), criticized "the loyalists in the beginning of the late war, who objected to associating, arming and fighting, in defense of our liberties, because these measures were not constitutional. A free people should always be left...with every possible power to promote their own happiness."

152. 1 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION xliii (Liberty Classics ed. 1990).

153. 13 PAPERS OF JAMES MADISON 233 (1981).

154. 1 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 176 (1990).

155. Connecticut Courant, July 17, 1775, at 2, col. 1.

156. 1 D. RAMSAY, THE HISTORY OF THE AMERICAN REVOLUTION 177 (1990). Gage's proclamation, issued on June 19, 1775, stated:

Whereas notwithstanding the repeated assurances of the selectmen and others, that all the inhabitants of the town of Boston had bona fide delivered their fire arms unto the persons appointed to receive them,

though I had advices at the same time of the contrary, and whereas I have since had full proof that many had been perfidious in this respect, and have secreted great numbers: I have though fit to issue this proclamation, to require of all persons who have yet fire arms in their possession immediately to surrender them at the court house, to such persons as shall be authorized to receive them; and hereby declare that all persons in whose possession any fire arms may hereafter be found, will be deemed enemies to his majesty's government.

New York Journal, Aug. 31, 1775, at 1, col. 4.

157. Id. at 243.

158. Id. at 178.

159. Id. at 181.

160. Id. at 190.

161. Id at 207.

162. Id.

163. R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 196 (1962).

164. James Monroe Papers, New York Public Library, Miscellaneous Papers and Undated Letters.

165. R. RUTLAND, JAMES MADISON: THE FOUNDING FATHER 59-60 (1987).

166. Madison, Notes for Speech in Congress, June 8, 1789, 12 MADISON PAPERS 193-94 (Rutland ed. 1979). In a letter to Edmund Pendleton, Oct. 20, 1788, Madison referred to proposed amendments as "those further guards for private rights...." 4 MADISON PAPERS 60.

167. An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c.2 (1689).

168. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 9-10 (1986).

169. Id. at 10.

170. Id.

171. Id.

172. Id.

173. Bill for Preservation of Deer (1785), 2 JEFFERSON, PAPERS 443-44 (Boyd ed. 1951).

174. "One species of fire-arm, the pistol, is never called a gun." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("gun). Webster, a prominent federalist from 1787, also defined "bear" as "to carry" or "to wear...as, to bear a sword, a badge, a name; to bear arms in a coat." Id.

175. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 11 (1986).

176. Id.

177. Id.

178. Id. at 12.

179. As stated in R. Caplan, The History and Meaning of the Ninth Amendment, in THE RIGHTS RETAINED BY THE PEOPLE 278-79 & n.142 (1989):

Madison's distinction between powers and rights assumed a sharply definable boundary between governmental and individual discretion. For Madison, a power was a delegated capacity allowing the government to perform certain kinds of acts....It is Madison's consistent usage, which eliminated the ambiguous concept of state rights as referring to both governmental and personal rights, replacing it with the clearer power/right dichotomy, that was adopted with the Bill of Rights.

180. 1 ANNALS OF CONGRESS 436-37 (1834).

181. Id. at 442.

182. Id. at 438.

183. Ames to Thomas Dwight, June 11, 1789, 1 WORKS OF FISHER AMES 52-53 (1854).

184. Ames to F.R. Minoe, June 12, 1789, id. at 53-54.

185. June 12, 1789, in 3 PATRICK HENRY 391 (1951). And see Joseph Jones to Madison, June 24, 1789, 12 MADISON PAPERS 258 (1978) (the amendments are "calculated to secure the personal rights of the people...."); William L. Smith to Edward Rutledge, Aug. 9, 1789, 79 SOUTH CAROLINA HISTORICAL MAGAZINE 14 (1968) (the amendments "will effectually secure private rights....").

186. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, ed. H. Veit et al., 253 (1991).

187. Federal Gazette, June 18, 1789, at 2, col. 1. Madison's proposals had been published two days before in the same paper. Federal Gazette, June 16, 1789, at 2, col. 2-3.

188. Coxe to Madison, June 18, 1789, 12 MADISON PAPERS 239-40 (1978).

189. Madison to Coxe, June 24, 1789, id. at 257.

190. E.g., New York Packet, June 23, 1789 at 2, col. 1-2; Massachusetts Centinel (Boston), July 4, 1789, at 1, col. 2. Coxe's "Remarks on the Second Part of the Amendments," which appeared in the Federal Gazette, June 30, 1789, at 2 col. 1-2, exposited what is now the Ninth Amendment as follows:

It has been argued by many against a bill of rights, that the omission of some in making the detail would one day draw into question those that should not be particularized. It is therefore provided, that no inference of that kind shall be made, so as to diminish, much less to alienate an ancient tho' unnoticed right, nor shall either of the branches of the Federal Government argue from such omission any increase or extension of their powers.

Three decades later, Coxe referred to "the right to own and use arms and consequently of self-defense and of the public militia power ...." Democratic Press (Philadelphia), Jan. 23, 1823, at 2, col. 2. "Arms" included muskets, rifles, pistols, and swords. E.g., Democratic Press, Feb. 2, 1811, at 2.

191. Federal Gazette, July 2, 1789, at 2, col. 1.

192. CREATING THE BILL OF RIGHTS, ed. H. Veit et al., 260-61 (1991) (Emphasis added). Spelling and punctuation corrected. For Nasson's earlier correspondence with Thatcher, see id. at 251.

193. The other members included Abrahim Baldwin, Aedanus Burke, Nicolas Gilman, George Clymer,

Egbert Benson, Benjamin Goodhue, Elias Boudinot, and George Gale. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 4 (1986).

194. J. Hutson, The Bill of Rights: The Roger Sherman Draft, THIS CONSTITUTION, No. 18, at 36 (Spring/Summer 1988). The draft was discovered in 1987.

195. Id.

196. Letter dated August 8, 1789. CREATING THE BILL OF RIGHTS, ed. H. Veit, 272 (1991).

197. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 28 (1986).

198. Compare id. at 10-11 with 28-29.

199. Id. at 28.

200. Id. at 29.

201. Political Maxims, New York Daily Advertiser, Aug. 15, 1789, at 2, col. 1. And see Patrick Henry to Richard Henry Lee, Aug. 28, 1789, 3 PATRICK HENRY 398 (1951): "For Rights, without having power and might is but a shadow."

202. Independent Gazetteer (Philadelphia), Aug. 18, 1789, at 3, col. 1.

203. From the Boston Independent Chronicle, Independent Gazetteer, Aug. 20, 1789, at 2, col. 2.

204. 1 ANNALS OF CONGRESS 729-30 (1834).

205. Id. at 730.

206 CREATING THE BILL OF RIGHTS, ed. H. Veit et al., 272-73 (1991).

207. J. Hutson, The Bill of Rights, THIS CONSTITUTION, No. 18, at 36 (Spring/Summer 1988).

208. Concerning the proposed preamble phrase, "government being intended for the benefit of the people," Gerry responded:

This holds up an idea that all the Governments of the earth are intended for the benefit of the people. Now, I am so far from being of this opinion, that I do not believe that one out of fifty is intended for any such purpose. I believe the establishment of most Governments is to gratify the ambition of an individual, who, by fraud, force, or accident, had made himself master of the people. If we contemplate the history of nations, ancient or modern, we shall find they originated either in fraud or force, or both. If this is demonstrable, how can we pretend to say that Governments are intended for the benefit of those who are oppressed by them.

1 ANNALS OF CONGRESS 717-18 (1834). Given this political realism, the right of the people to keep and bear arms was considered by the founders as necessary to check oppressive government.

209. 1 ANNALS OF CONGRESS 749-50 (1834).

210. Id. at 750.

211. Id.

212. Id. at 750-51.

213. Id. at 751.

214. Id. at 752.

215. Id. at 766-67.

216. Id. at 767. Actually, the opposite may be inferred by the eventual deletion of this part of the amendment, the purpose of which was to guarantee the individual "right" to keep and bear arms rather than to create a "duty" to do so. Arguably, this deletion was meant to preclude any constitutional power of the government to compel any person to bear arms rather than to exempt only the religiously scrupulous. See J. GRAHAM, A CONSTITUTIONAL HISTORY OF THE MILITARY DRAFT 45-50 (1971) (compulsory military service confined to the militia; individual right to keep and bear arms prevents military despotism).

217. 1 ANNALS OF CONGRESS 767 (1834).

218. Centinel Revived, No. xxix, Independent Gazetteer, Sept. 9, 1789, at 2, col. 2.

219. Grayson to Henry, Sept. 29, 1789, 3 PATRICK HENRY 406 (1951).

220. THE DIARY OF WILLIAM MACLAY 133 (1988).

221. JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (Washington, D.C. 1820).

222. Id. at 71.

223. Id.

224. R. Lee, ADDITIONAL LETTERS FROM THE FEDERAL FARMER 170 (1788).

225. Letter dated Sept. 9, 1789 (spelling corrected). CREATING THE BILL OF RIGHTS, ed. Veit et al., 293 (1991).

226. Those voting against the clauses included Senators Carroll, Dalton, Ellsworth, Elmer, Johnson, King, Paterson, Read, and Schuyler. JOURNAL OF THE FIRST SESSION OF THE SENATE 71 (1820).

227. Id.

228. 1 ANNALS OF CONGRESS 750 (Aug. 17, 1789).

229. JOURNAL OF THE FIRST SESSION OF THE SENATE 73 (1820). Actually, the House voted to insert "or to the people" in the same place, but for some reason the phrase was not included in the final House resolution. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 31 n.34 (1986).

230. E.g., U.S. Const., Art. I, paragraph 8 ("the Congress shall have power"); Art. II, paragraph 1 ("the executive power"); Art. III, paragraph 1 ("the judicial power").

231. The Virginia Declaration of Rights (1776) declared the "inherent rights" of individuals to life, liberty, and property (paragraph 1), and that "all power is vested in, and consequently derived from, the people" (paragraph 2).

232. JOURNAL OF THE FIRST SESSION OF THE SENATE 74 (1820).

233. Id. at 75.

234. Id.

235. John Randolph to St. George Tucker, Sept. 11, 1789. CREATING THE BILL OF RIGHTS, ed. H. Veit, 293 (1991). Attribution of this information to Lee is suggested in K. BOWLING, "A TUB TO THE WHALE": THE FOUNDING FATHERS AND ADOPTION OF THE FEDERAL BILL OF RIGHTS 12 (Va. Com. on Bicent. of U.S. Const., n.d.).

236. JOURNAL OF THE FIRST SESSION OF THE SENATE 77.

237. Id. While the minutes do not reflect the makers of motions, and no recorded vote was taken on the above, a recorded vote on another matter the same day reveals the following Senators present: Bassett, Carroll, Dalton, Ellsworth, Grayson, Gunn, Henry, Johnson, Izard, King, Lee, Morris, Paterson, Read, Schuyler, and Wingate.

238. Id. at 71.

239. Id. at 77.

240. ANNALS OF CONGRESS 751 (Aug. 17, 1789) (Congressman Gerry).

241. JOURNAL OF THE FIRST SESSION OF THE SENATE 77 (1820).

242. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 8 (1986).

243. Id. at 43.

244. Id. at 45.

245. U.S. Const., Art. I, paragraph 8, Cl. 16.

246. Id., Clauses 12, 13, and 15.

247. Id., paragraph 100, Cl. 3.

248. "The whole of that Bill [of Rights] is a declaration of the right of the people at large or considered as individuals....[I]t establishes some rights of the individual as unalienable and which consequently, no majority has a right to deprive them of." (Emphasis added.) Albert Gallatin to Alexander Addison, Oct. 7, 1789, MS. in N.Y. Hist. Soc. _A.G. Papers, 2.

"But there are some rights too essential to be delegated_too sacred to be infringed. These each individual reserves to himself; in the free enjoyment of these the whole society engages to protect him....All these essential and sacred rights, it would be difficult if not impossible, to recount, but some, in every social compact, it is proper to enumerate, as specimens of many others...." An Idea of a Constitution, Independent Gazetteer, Dec. 28, 1789, at 3, col. 3.

And see The Scheme of Amendments, Independent Gazetteer, March 23, 1789, at 2, col. 1: "The project of muffling the press, which was publicly vindicated in this town [Boston], so far as to compel the writers against the government, to leave their names for publication, cannot be too warmly condemned." Registration of persons for exercise of basic freedoms was considered to be infringement.

249. Patrick Henry "is pleased with some of the proposed amendments; but still asks for the great desideratum, the destruction of direct taxes." Edmund Randolph to James Madison, Aug. 18, 1789, 12 MADISON PAPERS 345 (1978). Jefferson was dissatisfied with the Bill of Rights, but did not object to the arms-bearing provision. Jefferson to Madison, id. at 363-64. The Bill of Rights was "short of some essentials, as Election interference & Standing Army & C...." Richard Henry Lee to Charles Lee, Aug. 28, 1789, 2 LETTERS OF RICHARD HENRY LEE 499 (1914). Most of those in the Virginia House who

opposed the adoption of the amendments "are not dissatisfied with the amendments as far as they go" but wanted delay to prompt an amendment on direct taxes. Hardin Burnley to Madison, Nov. 5, 1789, 12 MADISON PAPERS 460.

In the Virginia Senate, there was extensive criticism of the proposed free speech guarantee and other amendments as too narrow, but no one questioned the right to bear arms provision. Objections to Articles, VA. SEN. J. 61-65 (Dec. 12, 1789). Virginia forestalled adoption of the Bill of Rights until the end of 1791. Nor did the Massachusetts General Court, which rejected the Bill of Rights, object to the arms-bearing provision in its verbose Report of the Committee of the General Court on Further Amendments of early 1790. However, the report urged an amendment which would have recognized a state power to veto Congressional action establishing a "system for forming the militia" or making an "establishment of troops in a time of peace." MASSACHUSETTS AND THE FIRST TEN AMENDMENTS 28 (D. Myers ed. 1936).

250. Gazette of the United States, Oct. 14, 1789, at 211, col. 2.

251. "A bill of rights for freemen appears to be a contradiction in terms....[I]n a free country, every right of human nature, which are as numerous as sands upon the sea shore, belong to the quiet, peaceable citizen." Federal Gazette, Jan. 5, 1790, at 2, col. 3.

"The absurdity of attempting by a bill of rights to secure to freemen what they never parted with, must be self-evident. No enumeration of rights can secure to the people all their privileges...." Federal Gazette, Jan. 15, 1790, at 3, col.3. This article ridiculed a bill of rights as analogous to conveying a house and lot but excepting out of the grant an enumeration of other houses and lots retained by the seller.

252. Speech of Jan. 7, 1790, Independent Chronicle (Boston), Jan. 14, 1790, at 3.

253. Providence Gazette & Country Journal, Jan. 30, 1790, at 1.

254. March 19, 1790. 3 PATRICK HENRY 417-18 (1951).

255. "A Well regulated militia is the best defence to a free people, a standing army in time of peace are not equal to a well regulated militia." Political Maxims, Independent Gazetteer, July 24, 1790, at 2, col. 1. "Where a standing army is established, the inclinations of the people are but little regarded." Political Maxims, Independent Gazetteer, July 31, 1790, at 2, col. 2.

256. E.g., Summary of the Principal Amendments Proposed to the Constitution, post May 29, 1790 MSS, College of W. & M., Tucker-Coleman coll., Box 39b notebooks, Notebook VI, at 212-22.

257. J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 335 (1836).

258. Id.

259. Id. at 336.

260. Providence Gazette and Country Journal, June 5, 1790, at 23.

261. Independent Gazetteer, Jan. 29, 1791, at 2, col. 3.

262. See 5 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1458-59 (1986).

263. 2 ANNALS OF CONGRESS 1804 (Dec. 16, 1790)

264. Id. at 1805-06

265. Id. at 1806.

266. Id. at 1806.

267. Id. at 1807-08.

268. Id. at 1808.

269. Id. at 1809.

270. Id.

271. Id.

272. Id. at 1821-22 (Dec. 22, 1790).

273. THE DIARY OF WILLIAM MACLAY 243,250 (1988).

274. Id. at 385, 395.

275. Id. at 245.

276. Id. at 246.

277. Id. at 246-47.

278. Id. at 101 n.7, 231.

279. Id. at 312.

280. Id.

281. 1 Tucker, BLACKSTONE'S COMMENTARIES, App., 273 (1803).

282. Act of Massachusetts, 1809, c. 108.

283. E.g., Commonwealth v. Annis, 9 Mass. 31 (1812). See Militia, 34 Am. Dig. Cent. Ed. at 2878 ("Arms and Equipments").

284. 307 U.S. 174, 178-182.

285. Id. at 178-179 (emphasis added).

286. 18 U.S. 1.

287. Id. at 14.

288. Id. at 16-17.

289. Id. at 21.

290. Id. at 51-52.

291 94 Ill. 123, 34 Am. Dec. 213, 216.

292. Also relying on Houston v. Moore for the same proposition is People v. Hill, 126 N.Y. 497, 27 N.E. 789, 790 (1891). See State v. Johnson, 170 Wis. 218, 175 N.W. 589, 597 (1919) (state constitution allowing legislature to define the militia and federal Second Amendment indicate that "certain military

policy is reserved to the states.")

293. 34 Am. Dec. at 222.

294. 116 U.S. 252, 264-65.

295. Id. at 265.

296. Local authorities have a traditional power to require citizens to arm themselves and assist in law enforcement. In United States v. Fenwick, 25 Fed. Cas. 1062, 1964 (Cir. Ct. D.C. 1836) the court instructed the jury "that the marshal has a right to take the posse, and to call on all citizens to aid him in arresting the rioters, and that the citizens had a right to arm themselves."

State law may require any person to arm and assist in law enforcement. "The militia are composed of men of military age, whereas the posse comitatus is composed of all able-bodied persons of sound mind and of sufficient ability to assist the sheriff, and may be younger or older than the military age." Worth v. Craven County Com'rs., 24 S.E. 778, 779 (N.C. 1896).

Chapin v. Ferry, 3 Wash. 386, 28 P. 754, 757 (1891) found that a statute authorizing the sheriff or other officials to call out "an armed force" to suppress rioters referred to the posse comitatus and not the National Guard. The court noted that the statute

is merely the reenactment of the common law....It has always been the duty of magistrates and peace officers to preserve the public peace, even to the extent of calling to their aid every person within their jurisdiction ....That the force thus called out should be armed in some way would seem to go without saying....

Id. at 756.

297. 250 N.Y. 14, 164 N.E. 726, 727.

298. Id.

299. 293 U.S. 245, 265n.1.

300. Id. Besides the Second Amendment, the court cited as authority Houston v. Moore, 18 U.S. 1, 16-17 (1820), Dunne v. People, 94 Ill. 120, 129, 34 Am. Rep. 213 (1879), and Presser v. Illinois, 116 U.S. 252 (1885).

301. 32 U.S.C. Section 101(4), (6).

302. 32 U.S.C. Section 109(c).

303. 32 U.S.C. Section 702.

304. 32 U.S.C. Section 701.

305. 381 U.S. 41.

306. Id. at 46-47.

307. Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857).

308. United States v. Cruikshank, 92 U.S. 542, 551, 553 (1876).

309. Presser v. Illinois, 116 U.S. 252, 265 (1886). Miller v. Texas, 153 U.S. 535, 538 (1894) repeats that

"the restriction of" the Second and Fourth Amendments operate "upon the Federal power." In Cruikshank, Presser, and Miller, the Court refused to find First, Second, or Fourth Amendment protection against private conspiracies or state action, but did not consider whether the guarantees are incorporated into the Fourteenth Amendment so as to limit state action.

310. Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897).

311. 307 U.S. 174 (1939).

312. 307 U.S. at 178. Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses, the Court did not consider whether the tax and related registration requirements of the National Firearms Act violated the Second Amendment. However, the Court has held of a newspaper tax: "It is a license tax_a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution." Murdock v. Pennsylvania, 319 U.S. 106, 113 (1943). See Thomas v. Collins, 323 U.S. 527, 538-40 (1944) (state may not require registration of persons who exercise First Amendment rights); Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575 (1983) (special tax on only a few newspapers invalid).

313. 307 U.S. at 178.

314. Id. at 179.

315. 307 U.S. at 183 n.3.

316. 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891). "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people, and making it an offense to keep arms...." J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1893).

317. T. Cooley, CONSTITUTIONAL LIMITATIONS 729. T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-282 (2d ed. 1891) states further:

The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.

The right is General_It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent....But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.

318. Valley Forge College v. Americans United, 454 U.S. 464, 484 (1982). The Court stated in Ullman v. United States, 350 U.S. 422, 426-29 (1956):

This constitutional protection must not be interpreted in a hostile or niggardly spirit....Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States....

As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion....To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

319. Minneapolis Star v. Minnesota Comm. of Rev., 460 U.S. 575, 583-84 n.6 (1983).

The Tragedy at Waco

Paul H. Blackman

Twenty-five children and scores of adults died as a result of the United States governments assault on a Seventh-Day Adventist sect near Waco, Texas, in 1993. This article examines the government surveillance and search warrant that led to the attack, and finds that the warrant fell far short of proper Constitutional standards. After the deaths of most persons in the Branch Davidian compound in the April 19, 1993, inferno, the Department of the Treasury and the Department of Justice conducted their own internal reviews of governmental actions during the initial attack, the siege, and the final assault on the compound. This article discusses what is revealed, and what is deliberately obscured, in the governmental reports. Finally, the article proposes reforms to avoid future tragedies. The article is written by Dr. Paul H. Blackman, Research Coordinator with the National Rifle Association Institute for Legislative Action. Dr. Blackman received his Ph.D. in Government in 1970 from the University of Virginia, and taught at the University of North Dakota and the University of Maryland before joining the NRA in 1977.

Introduction

On February 28, 1993, based on search and arrest warrants which were obtained based on the affidavit of Bureau of Alcohol, Tobacco & Firearms (generally referred to as BATF, although the agency prefers ATF) agent Davy Aguilera, 76 BATF agents stormed Mount Carmel Center, near Waco, Texas.1 (Labaton, 1993d; U.S. Department of the Treasury, 1993) The Center was also known as Ranch Apocalypse and better known as the Branch Davidian Compound because it housed the Branch Davidian2 followers of David Koresh (né Vernon Wayne Howell). Although it is unclear whether Koresh and his followers or the BATF agents fired first, four BATF agents were killed and 14-28 others wounded_some probably struck by "friendly fire"_as were some Branch Davidians.

The incident was followed by a 51-day standoff led by the Federal Bureau of Investigation (FBI), including negotiations, the release of some of the adult and child residents of Mount Carmel Center, and psychological warfare efforts by the FBI, including bombardment with loud music and other unpleasant noises. Then, having grown impatient, the FBI, on April 19, 1993, began ramming holes into the structure in order to pump in CS gas, purportedly because of threats to the 25 children remaining in the compound. Eventually a fire broke out, killing most of the estimated 75 persons remaining in the compound, although Koresh and some of his followers were killed by gunshots rather than fire. (U.S. Department of Justice, 1993b:7) The government reports that the fire was started by Koresh and his followers. Nonetheless, the siege ended with most of the children who were held hostage for all of the 51 days dead in an effort to protect the children from alleged child abuse.

Civil libertarians ought to have been outraged by the government's activities in Waco_and, to be sure, some were. However, for the vast majority of the American public, Attorney General Janet Reno approached political beatification for having the nerve to accept responsibility for saving from abuse 25 children in religious fanatic David Koresh's compound by torturing them with tear gas until they could die in a fire_a willingness to take responsibility for the killing of innocents more commonly associated with Middle Eastern terrorists than with American politicians.

Generally ignored in the aftermath is the fact that the affidavit, which served as the supporting document for the search and arrest warrant, was flawed in a number of significant ways. Furthermore, while it is unclear who initiated the violence between Koresh and his followers and the BATF agents_which may have rendered the killings of the four agents non-criminal_there has been much discussion in the news media regarding the extent to which BATF erred by continuing the assault once they had lost the element of surprise. Next to no one has noted that, for the most part, search and arrest warrants are not supposed to be served with "surprise," but with a formal announcement; "no-knock" is the exception, not the rule. (18 U.S.C.paragraph 31093) In the case of Koresh, there is evidence not merely that the affidavit for the search and arrest warrants was inadequate_failing to establish probable cause that a federal crime had been

committed_but that no warrant was needed to investigate Koresh or his house.

The affidavit of BATF agent Davy Aguilera did establish that Koresh owned a large number of semi-automatic firearms, mostly rifles_but not that they were at the compound rather than at the "Mag Bag," a commercial garage rented by Koresh, located miles away from Mount Carmel Center, used to work on and to store his car collection, and the place to which most firearms-related shipments were actually delivered_with over 100 acquired during 1992. With inadequate evidence gathered between June and December 1992 to justify a search or arrest warrant, it is also clear that greater efforts were made to justify a massive raid in late February 1993. The key apparent reason for wishing to stage such a raid is generally assumed: BATF Director Stephen Higgins was scheduled to testify at congressional appropriations hearings on March 10, 1993, and a media-publicized raid, resulting in the confiscation of hundreds of guns, would have made the agency look impressive at those hearings. (Wattenberg, 1993:39)

As importantly, the arrest and seizure of such an "arsenal" might have deflected any questions spurred by the January 12th "60 Minutes" episode indicating sexual harassment in the agency. Although the expose was not aired until January, BATF personnel had first been contacted by CBS in mid-November, shortly after the election of a new President of the United States, who might look askance at sexual harassment in BATF (Wattenberg, 1993:39), particularly coming on the heels of complaints by black BATF agents in October of discrimination in assignments within the agency. (Labaton, 1993) Coincidentally, the BATF investigation into Koresh, apparently moribund after June-July 1992, perked up in mid-November (Aguilera, 1993), with BATF planning for the raid on the compound beginning by early December. (U.S. Dept. of Treasury, 1993:32, 37)

Certain things appear clear, and would have been clear to BATF prior to the massive raid: (1) Koresh held unpopular religious views; (2) Koresh owned large numbers of guns and inert grenades, and may have had the capability of illegally converting or fabricating parts so some of the rifles could have full-auto capability, and of manufacturing "destructive devices"; (3) Koresh may have physically or sexually abused some of the children living at his house, which would have constituted a state, not a federal, offense; (4) Koresh posed no immediate danger to anyone off of his property. It was also abundantly clear to BATF that the raid would get massive publicity since, distinguishing the case from the service of most search and arrest warrants: "The Office of the Assistant Secretary for Enforcement was provided with a one page advisory. The purpose of the advisory was to keep the front office from being surprised should ATF's execution of search and arrest warrants near Waco, Texas receive public attention that would reach the office of the Assistant Secretary for Enforcement." (Noble, 1993:2)

Following the FBI's final assault on Mount Carmel Center, congressional interest in investigating a thoroughly botched operation first by the BATF and then by the FBI faded when public opinion surveys began to show massive blame of Koresh for the outcome of the standoff and praise for General Reno for taking responsibility. The Fourth Amendment protection against unreasonable searches and seizures, requiring the government to have some evidence of wrongdoing before storming a person's house or arresting him, is one of the fundamental freedoms in America. This is especially important in view of the fact that, if Koresh and his followers had broken the law, they were technical violations_victimless crimes_with no intention of resorting to violence unless the government or personal enemies invaded Koresh's property; the arrest and search warrants were obtained with an affidavit which failed to establish probable cause and, if served properly, might thus have resulted in any evidence being found inadmissible in criminal proceedings. The massive raid was unnecessary and unwarranted, and the immediate deaths and injuries of BATF agents and Koresh's Branch Davidian followers were largely the result of BATF's wanting impressive testimony at congressional hearings. The FBI's cleanup operation was similarly bungled and unjustified, and may have been influenced by judicial proceedings following another botched FBI operation in Idaho, involving white separatist Randall ("Randy") Weaver, his family, and friend and co-defendant, Kevin Harris.

Among lessons to be learned are that BATF cannot be trusted objectively and honestly to investigate gun owners, particularly if the gun owners have lots of firearms and hold unpopular religious or political

views, that neither the Justice Department nor the courts exercise adequate oversight over affidavits for warrants to search or arrest, with the judicial evaluation of applications for search and arrest warrants being inadequate in the face of agents either ignorant of law and facts or willing deliberately to mislead a judge or magistrate in an effort to obtain a search or arrest warrant. The special fear for those concerned with constitutional liberties should be the apparent willingness of Congress, the news media, and the public, to accept violations of constitutional rights protecting oddball or obnoxious religious or political views if the constitutional right to keep and bear arms is also being infringed.

I. The Unnecessary Warrant

In June 1992, BATF began an investigation of possible violations of federal firearms laws by David Koresh and a few of his close associates. The justification for the initial investigation was that a United Parcel Service (UPS) driver reported to the McLennan County sheriff's office several deliveries of firearms components and explosives which the driver found suspicious.

The driver found it suspicious that some deliveries to a place known as the Mag Bag in Waco, to Mike Schroeder, Woodrow Kendrick, or David Koresh, resulted in his being instructed actually to deliver them to Koresh's residence at Mount Carmel Center, near Waco. (Aguilera, 1993:1-2) One fairly simple explanation was hinted at in the warrant: the deliveries not accepted at the Mag Bag were Cash on Delivery (C.O.D.). Firearms components, ordered in quantity, cost money. The safer place to keep money for which to pay for a delivery which might come at any time was at Mount Carmel Center, which was populated and possibly guarded, rather than at the Mag Bag, which was just a rented garage.

The UPS driver's suspicions heightened when boxes, reportedly accidentally, broke open and he could tell their contents were inert hand grenade hulls and a quantity of blackpowder_legal and largely unregulated items. (U.S. Dept. of Treasury, 1993:17, 74) A competent investigation spurred by the UPS driver's report would have found that Koresh, Schroeder, and Kendrick frequently went to gun shows where, among other things, they sold inert hand grenade hulls, having first made them into paperweights and the like. Koresh had a number of schemes for raising money for the Branch Davidians, and mounting inert grenade hulls as plaques and selling them at gun shows was one of their biggest moneymakers. (Washington Post, May 19, 1993:A19) Koresh also used gun shows as a way to make a profit on surplus meals-ready-to-eat (MREs), among other things. Two of the reasons he purchased guns and gun parts involved money-making: he put parts together to sell guns through a licensed dealer in the hope of profit, and he purchased military-style semi-automatics as an investment, assuming that an anti-gun President would act in such a way as to dramatically increase their value, as President George Bush's ban on the imports of such rifles increased their value in 19894. (McMahon and Kilpatrick, 1993:26, 108-109; Pate, 1993e:38) BATF knew that Koresh and some of his followers attended gun shows (Aguilera, 1993:13; Dunagan, 1993c:5); it might have inquired what they did there.

A. Initial Investigation

BATF began its investigation in June 1992, spurred by the large number of guns and parts being purchased by Koresh and two of his colleagues. To make sure that, had they owned machineguns, they might still be acting within the law, BATF checked to determine whether Vernon Howell (but not, apparently, David Koresh) or Paul Fatta, a close associate, had arms regulated under Title II of the Gun Control Act, generally known as NFA (National Firearms Act) weapons, registered to them. BATF also attempted to determine whether Mag Bag, Howell, Koresh, David Jones, or Fatta were federally-licensed firearms dealers. (Aguilera, 1993:5) They were not, but that accounted for only three persons in Mount Carmel Center, and did not include one of the regular recipients of UPS packages, Mike Schroeder. In its official cover-up of the BATF investigation, the Treasury Department misleadingly suggested that Aguilera checked lots of names_"neither Koresh nor any of his known followers owned such a registered weapon"_whereas he apparently knew few names and did not check them all. (U.S. Dept. of Treasury, 1993:24)

The investigation quickly led to Henry McMahon, doing business as Hewitt Handguns, Koresh's favorite gun dealer. Aguilera listed in his affidavit for the search and arrest warrants all of the relatively recent purchases by Koresh, including flare launchers, over 100 rifles, an M-76 grenade launcher, various kits, cardboard tubes, blackpowder, practice grenades, etc. (Aguilera, 1993:6) Two points are worth noting regarding the items purchased: (1) All, so far as anyone knows, were lawfully purchased, and may be lawfully owned; (2) none established probable cause that Koresh or his followers had violated or were planning to violate any federal law.

B. Invitation to Mount Carmel Center

More important is the part left out of the affidavit. An interview of McMahon (McMahon and Kilpatrick, 1993:75-76) concerning an inspection of his records and inventory in July 1992 confirmed reports elsewhere (Lee, 1993a:24; Pate, 1993e:37):

While [agents] Skinner and Aguilera pored through McMahon's records, the dealer excused himself and telephoned Koresh. "I told him there were ATF agents at my house asking a lot of questions about him," McMahon said. "He said, 'If there's a problem, tell them to come out here. If they want to see my guns, they're more than welcome.'"

"So I walked back in the room, holding the cordless phone and said, 'I've got [Koresh] on the phone. If you'd like to go out there and see those guns, you're more than welcome to.' They looked at each other and Aguilera got real paranoid, shaking his head and whispering, "No, no!'" so I went back to the phone and told David they wouldn't be coming out.'" (Pate, 1993e:37)

On its face, such an invitation suggests (1) no warrant was needed, nor was an assault with 76 BATF agents; (2) Koresh either was in compliance with federal gun laws, believed he was in compliance, or believed he could hide any violations from invited guests. It has been suggested that accepting such invitations violates normal investigative techniques. There are, however, a few arguments against that explanation.

First, although BATF was investigating Koresh, not McMahon, the pretense was that it was an ordinary compliance inspection of a licensed gun dealer5. (U.S. Dept. of Treasury, 1993:26, 286) Such inspections involve checking to see if inventory is accounted for or properly logged out. There were 65 lower receivers in Koresh's custody but not yet recorded out of inventory, presumably because Koresh was going to make them into complete guns before having McMahon sell them and splitting the profits. Under the circumstances, the offer to show where and what was being done with the guns would not be totally out of line. In addition, in asserting that the igniter cord Koresh had was an explosive regulated by federal law, requiring proper storage (U.S. Dept. of Treasury, 1993:124)6, BATF was, in effect, suggesting a reason for visiting the house, to see if the storage was in compliance with federal requirements.

Second, the Treasury report on the BATF investigation did not explain away such a visit, as one might have expected were there a valid law-enforcement explanation. Most of the other commonly-made criticisms of the investigation and affidavit were explained, convincingly or not, in the report. The invitation was not mentioned when the investigation of McMahon was mentioned. (U.S. Dept. of Treasury, 1993:26, 186) The closest that report comes to anything of the sort is praise of Aguilera for attempting "to keep his investigation a secret from Koresh and his followers in order to ensure strategic and tactical flexibility in case search or arrest warrants needed to be served." (U.S. Dept. of Treasury, 1993:123) The effort was a failure, but even if the invitation should have been ignored, the fact of its offer may be significant in evaluating the need for either a siege or an assault in serving the warrants.

Was Koresh's invitation valid? Would he have cooperated with federal agents without a warrant? Or, later, could a warrant have been served without massive violence by both sides? The indications are that Koresh was sincere, and that there was no need for violence, even if Koresh were in violation of federal gun laws. He had, after all, submitted without incident to an earlier arrest and seizure of guns for attempted murder in 1987. The district attorney at the time "recalled, 'We had no problems' with arresting the Davidians. The

sheriff and a deputy simply called Koresh and told him that charges were pending and that he and his associates would have to turn themselves in and surrender their weapons. Deputies went to the compound and the suspects readily complied." (Lee, 1993a:23)

The Treasury cover-up essentially denies any such cooperation occurred, noting that the initial arrest was at the incident, and asserting: "There was, in fact, no evidence that Koresh was prepared to submit to law enforcement authorities or that he had done so in the past." (U.S. Dept. of Treasury, 1993:135) The chronology provided with that report, however, notes that Koresh visited the Waco social services agency on request regarding allegations of unlawful child abuse (U.S. Dept. of Treasury, 1993:Appendix D-3 and D-4); in addition, he was visited at least twice in 1992, and continued to have telephone contact with the investigator.

Instead of learning from these incidents that massive force was not needed, BATF cited his only arrest as evidence BATF agents "were keenly aware of the dangerous nature of the search warrant to be executed. Several years ago, Howell and others, many of whom are still with the group, were involved in a fierce gun battle at the area of the compound with a former or rival cult member." (Dunagan, 1993b:2) Ignored in that follow-up affidavit supporting a broader search warrant are the facts that: (a) the shootout, involving one minor injury to one participant, was determined by a jury to be self-defense, (b) the shootout did not involve law enforcement officers, but, indeed, occurred in part because law enforcement refused to intervene in response to Koresh's expressed concerns about possible violations of the law until Koresh could provide more evidence (Nossiter, 1993), and (c) the shootout resulted in an arrest warrant, including the seizure of firearms, being served without resistance.

Koresh had also submitted to a warrantless investigation by Joyce Sparks, of the Texas Department of Human Services, who went to the compound on at least two occasions to investigate possible child sexual abuse charges against Koresh. On the second visit, on April 6, 1992, he reportedly escorted her through the compound and showed her some of his guns, and where he did some target shooting. (Aguilera, 1993:7-9) Earlier, in compliance with a Michigan court order, he had allowed a child to be removed from the compound.7 (Wattenberg, 1993:32)

In addition, after a neighboring farmer, Robert L. Cervenka, complained to the sheriff's office that he had heard machinegun fire in January and February 1992 (Aguilera, 1993:4), the sheriff's office investigated the incidents. "He [Koresh] escorted local sheriff's deputies...through the compound after they had called beforehand to say they were coming. Koresh even invited one of the deputy sheriffs to come back and fish in their lake, according to McLennan County Sheriff Jack Harwell." (Wattenberg, 1993:32) Koresh showed the sheriff that he was using something similar to the Hellfire device, which allows a semi-automatic to be fired in a manner almost replicating in speed and regularity a machinegun burst. Koresh and the Branch Davidians checked with the sheriff to make sure that the devices were legal and did not require registration or federal tax payment. (McMahon and Kilpatrick, 1993:58-59; Pate, 1993c:47) As the Christian Science Monitor noted: "In the past, upon learning that local authorities were concerned about the types of weapons the Branch Davidians might possess, sect members elected to take samples in for examination to prove the weapons were legal." (Pendleton, 1993; Hinds, 1993:8)

After the BATF raid, during the early negotiations, Koresh insisted that there was no need for the raid. He was quoted as having said: "It would have been better if you just called me up or talked to me....Then you could have come in and done your work." (Washington Times, May 26, 1993:A3) Previous activities would suggest that he was being honest, and that there was no need for the raid, and no need for any deaths of either Branch Davidians or BATF agents.

From Koresh's standpoint, violence may have appeared inevitable based upon how BATF proceeded. Koresh knew that he had always cooperated with the authorities before, and knew that he had made it clear to BATF when they visited McMahon's gun shop that they could investigate without hassle. He presumably also knew of instances where government raids began with violence regardless of the likely actions or reactions of the persons being investigated, from the shooting of gun and inert grenade hull

owner Kenyon Ballew in 1971 (Sherrill, 1975:274-278) to the raid on white separatist Randy Weaver by the FBI in 1992. It would not necessarily be unreasonable to conclude that if 76 armed men and women, including land and air vehicles, storm your home_after you have made it clear you cooperate with investigations and knowing that the normal service of warrants involves notice _their intentions are not peaceable and self-defense may be rational, even legal, as a jury eventually found it to be in the case of Randy Weaver. Koresh's apparent perception on being informed that the raid was about to begin, was that BATF and the National Guard were coming to get him. (Dunagan, 1993c:8)

Warrant or not, indications are that Koresh tended to cooperate with authorities, had expressly offered to cooperate with BATF's investigation, and there was no reason to conclude he would not have continued to do so. Instead, BATF obtained a warrant, but there was no probable cause justifying a magistrate to issue a warrant, and, based upon the deliberate distortions, prevarications, and misleading accounts in the affidavit, BATF probably knew it had no basis for a warrant.

C. Inadequacy of Affidavit for a Warrant

In testimony before the House Judiciary Committee on April 28, 1993, the week after the final FBI assault on Ranch Apocalypse, BATF Director Stephen Higgins noted that the warrant was not served earlier because analysis of the investigation in December indicated that, at that time, there was no probable cause. According to Higgins's testimony: "We had a review in here at headquarters office in December with respect to whether we had probable cause. We decided at that point that we did not, and we continued to gather information. We brought people in from Australia; we got the undercover agent in; we interviewed any number of people." When asked by Rep. William Hughes: "When did you determine that you had probable cause?" the response was "I think it was mid-February." According to an informal source, a memorandum from the FBI's San Antonio office dated five days prior to the BATF raid noted that "ATF intends to execute a warrant on 3/18....to date no information has been developed to verify the allegations." (Pate, 1993a:63)

The Treasury review of the BATF investigation sees things differently, and, appropriate for a self-serving investigation, asserts probable cause existed much earlier. Assistant U.S. Attorney Bill Johnston determined that the threshold of probable cause had been met by late November. (U.S. Dept. of Treasury, 1993:37) On the other hand, by January, Aguilera had been seeking additional evidence "to establish probable cause" in early January, leading to the decision to establish undercover surveillance (U.S. Dept. of Treasury, 1993:44), and a reporter, perhaps to prevent media interference with the attack on the compound, was told by one of Aguilera's superiors in February that "he had not yet obtained warrants and was not sure he would be able to get any." (U.S. Dept. of Treasury, 1993:71)

The official Treasury Department chronology would suggest probable cause was not believed to exist in December, when Aguilera was told to concentrate on establishing it, and a firearms expert told Aguilera the gun parts and accessories Koresh had obtained appeared lawful. In early January, an explosives expert reportedly opined that Koresh was purchasing chemicals and explosive materials for illegal use, although the chronology does not explain the basis for that belief. (U.S. Dept. of Treasury, 1993:Appendix D-5-8)

Parts of the affidavit relating the investigation should be read with the clear lack of probable cause at least until January in mind; much of agent Aguilera's affidavit is clearly intended to convey a dislike and suspicion of Koresh and his followers without actually asserting that anything unlawful had been done. Some irony in the effort to condemn Koresh regardless of what he did appears in the final paragraph of the affidavit, where it is asserted both that persons engaged in violating the gun laws "employ surreptitious methods and means," and "maintain records of receipt and ownership." (Aguilera, 1993:15)

D. Misleading the Magistrate

The affidavit is filled with assertions which are dishonest, inadequate, or_probably deliberately_misleading, with flaws which should not have occurred in an affidavit prepared with the aid of two assistant U.S. attorneys. (U.S. Dept. of Treasury, 1993:73) Its acceptance by a federal magistrate_as

the basis for a warrant to arrest Koresh and another warrant to search the entire 77-acre compound and the entire house, including the living quarters of roughly 100 persons not mentioned in the affidavit_may be partly due to the fact that it was presented to a relatively inexperienced magistrate judge, Dennis G. Green, much of whose legal career was as a prosecutor, giving him a pro-prosecution bias. 9(Brownson, 1991:701-702) Nonetheless, the job of the magistrate is to "perform his_'neutral and detached' function and not serve merely as a rubber stamp for the police." (Aguilar v. Texas, 378 U.S. 108 at 111 [1964])

The fact that Aguilera deliberately misled the magistrate, who neglected to perform the job expected of him by the Constitution, might not have invalidated the search and arrest warrants, but Aguilera could certainly be held responsible for his wrongdoing, based upon BATF requirements. According to the official BATF orders on Searches and Examinations (ATF 0 3240.1A, 1981), p. 4: "The special agent is liable if he/she exceeds his/her authority while executing a search warrant and must be sure that a search warrant is sufficient on its face, even when issued by the magistrate."

If nothing else, Magistrate Green should have noted the staleness of the material. A key requirement of warrant applications is that they give some indication that the evidence is fresh. (United States v. Ruff, 984 F.2d 635 [5th Cir., 1993]) Most of the Aguilera affidavit involves an investigation conducted in June and July 1992. Most of the portions of the investigation conducted in December 1992 and January 1993 involved activities reported to have occurred between 1988 and June 1992. Even such key issues as whether Koresh or his followers had machineguns or "destructive devices" registered to them_and it is only the unregistered possession which constitutes a crime_was determined only in June 1992_and regarding only two of the persons residing at Mount Carmel Center. Indeed, there was apparently never a check to determine whether David Koresh had destructive devices registered to him under his legal name, only under his birth name, Vernon Howell. (Aguilera, 1993:5) It would have been perfectly lawful for Koresh to acquire items in the first half of 1992, which might be made into destructive devices, if the actual manufacture did not occur until after an appropriate federal license had been acquired or registration occurred. The federal government apparently made no effort to determine whether that might have occurred between June 1992 and February 1993.

More importantly, in a warrant affidavit filled with information irrelevant to the question of whether Koresh and his followers had violated any federal firearms or related tax laws, most of the information was misleading regarding the law, guns, gun parts, gun publications, what Koresh and his followers had bought or not bought, and what would or would not constitute a violation of federal laws.

E. Ignorance of the Law and of Firearms

The arrest and search warrant applications misapplied the law even before Aguilera's affidavit in support of those applications had begun. The search warrant alleged violation of two federal statutes, but the arrest warrant alleged only that Koresh had violated paragraph 5845(f) of Title 26 of the U.S. Code. (Aguilera, 1993) That provision does not establish anything as a crime against the United States; it merely defines"destructive device"; it does not say that it is lawful or unlawful to manufacture, possess, use, or anything else with relation to destructive devices. A different provision (paragraph 5861) establishes unlawful activities related to destructive devices. It is a minor point; such an error would not invalidate a warrant. But it does indicate Aguilera's general ignorance of the law and/or carelessness, and set the stage for more misleading statements to a rubberstamp magistrate. The error also indicates that Magistrate Green did not so much as check the U.S. Code to determine whether BATF had asserted an offense had been committed by Koresh.

Aguilera goes on with similarly misleading statements indicating a misunderstanding of firearms and explosives, confusing explosives (defined in Chapter 40 of Title 18 of the Code) with explosive devices (unknown in federal law). The items to be searched for (Aguilera, 1993:Attachment D) includes "machinegun conversion parts, which, when assembled, would be classified as machineguns," and items "which, when assembled, would be classified as destructive devices," but lists no actual machineguns or destructive devices among the items to be searched for except for "sten guns" and "pipe bombs." But the

affidavit does not allege the existence of pipe bombs, and the only allegation of a sten gun was on "an Auto Cad Computer located at the residence building at the compound. The computer has the capability of displaying a three dimensional rendering of objects on a computer monitor screen." (Aguilera, 1993:13-14)

Further misunderstanding or, at any rate, misstating the law, the affidavit, immediately upon asserting that Aguilera was familiar with federal laws, asserted that a "machinegun conversion kit" was a combination of parts "either designed or intended" to convert a firearm into a machinegun, whereas federal law says it is a combination of parts designed and intended to convert_with the designed or intended language applicable only to destructive devices. (Aguilera, 1993:1; 26 U.S.C. paragraph 5845) However, while the affidavit makes numerous statements suggesting Koresh's interest in machineguns, there is no suggestion he intended or had an interest in making destructive devices from the various parts which_with some additional parts and some machining_could have been used in that way.

As an agent seeking a warrant used, eventually, to kill about 85 persons, Aguilera also asserted a knowledge of firearms. He then went on to note that Koresh had ordered M16 "EZ kits" (Aguilera, 1993:5), without noting that E2_not "EZ"_kits were equally usable in semi-automatic Colt AR-15 Sporters, and, when combined with the (regulated) receivers purchased elsewhere, would allow the manufacture of a complete E2 model AR-15; it was a parts kit, not a conversion kit, and is not regulated by federal law. Further indicating a lack of knowledge about guns, or an indifference as to accuracy, Aguilera noted both that the AR-15 is a .223 caliber firearm (1993:3) and that Koresh ordered barrels for it in "various calibers"(1993:4).

Aguilera (1993:3) also asserted that, in unrelated cases, persons have quickly and easily converted AR-15 rifles into machineguns, often using milling machines and lathes_thus confusing the fabrication of a machinegun from a semi-automatic_a difficult machining process requiring expertise _and the installation of a conversion kit, which requires assembly only. Aguilera generally and consistently misdescribed the fabrication process; and none of the machinegun parts actually alleged to have been delivered to Koresh were conversion kits.

Indeed, even the expert opinions of firearms experts reprinted in the whitewashing Treasury Department report on the investigation10, while assuming that Koresh was making machineguns, noted that: "None of the many pieces of information available to me is sufficient, by itself, to answer the question as to whether Koresh and his followers inside the compound were engaged in assembling automatic weapons in violation of the National Firearms Act," noting that the various parts he ordered "do not convert the rifle to automatic fire, except in combination with an automatic sear. There is no automatic sear listed in the accounting...." (U.S. Dept. of Treasury, 1993:Appendix B-164-165) "The material made available does not indicate that the Branch Davidians received shipments containing automatic sears.."_going on to indicate they could have been readily manufactured or the lower receivers modified unlawfully. (U.S. Dept. of Treasury, 1993:Appendix B-182)

To suggest that Koresh was intending to convert AR-15s and semi-automatic imitations of the AK-47 into machineguns, Aguilera's affidavit asserted that Koresh made purchases from a South Carolina company which had all the necessary parts to "convert AR-15 rifles and semi-automatic AK-47 rifles into machineguns if their customers had the upper and lower receivers of those firearms....I know that Howell possesses the upper and lower receivers for the firearms which he is apparently trying to convert to fully automatic." (Aguilera, 1993:13) Aguilera here is merely hinting that Koresh may have purchased the parts, not asserting it, since there is no allegation that those necessary parts were purchased from the South Carolina firm.

In addition, Aguilera, knowingly or unknowingly, suggested that AK-47s have upper and lower receivers, whereas the AK-47 has a single receiver, not an upper and lower receiver.11

References to M16 and AR-15 parts kits misleadingly suggested the parts kits were for conversions,

whereas they were simply parts which would fit either semi-automatics or machineguns; and suggesting that the kits included all parts necessary to have a machinegun except the lower receiver (Aguilera, 1993:5) is highly misleading.

Following the raid, Aguilera supplemented his affidavit with more details found out about purchases from South Carolina, with shipment not to the Center but to the Mag Bag. Unfortunately, he also, due to ignorance or deceit, falsely asserted that the bolt carriers, M16 selector, and M16 full auto sears and pins, are "used to convert an AR-15 semi-automatic rifle into a M-16 machinegun rifle." (Dunagan and Aguilera, 1993:17) In fact, those are all replacement parts, and have nothing to do with conversion. One would have to first convert the AR-15 receiver to an M16 receiver before some of the replacement parts would fit, but that conversion would constitute the manufacture of a machinegun, not the follow-up substitution of a replacement part.

The only time the investigation reached the point where it might have found that Koresh had purchased parts really capable of converting a semi-automatic into a machinegun, the investigation, amazingly, was not followed through: "Because of the sensitivity of this investigation, these vendors have not been contacted by me for copies of invoices indicating the exact items shipped to the Mag-Bag," (Aguilera, 1993:7) Curiously, that lack of thorough investigating was praised by the Treasury Department, which noted he "sharply circumscribed his inquiries about Koresh to third parties, including arms dealers..., for fear of alerting the Branch Davidians that they were under scrutiny." (U.S. Dept. of Treasury, 1993:123) It is hard legally to establish probable cause when the only source which might supply it is not pursued; and probable cause cannot constitutionally be inferred. If items purchased might have been lawful and might have been unlawful, some reason has to be given for presuming the items to have been unlawful. BATF did not even investigate that, either in June-July 1992, or in 1993, after the agency had determined that Aguilera's investigation had not as yet established probable cause.

Aguilera also suggested that there was something suspicious in Koresh's acquisition of blackpowder, quoting a BATF expert as asserting that blackpowder is routinely used when making grenades and pipe bombs. (Aguilera, 1993:11-12) The statement is not totally false, since BATF's Explosives Incidents System's analysis of 1991 pipe bombings notes blackpowder as the filler material in 41% of the investigations reported. On the other hand, 48% involved smokeless powder, the gunpowder used in most modern ammunition, and most persons recognize ammunition as the routine use of smokeless powder.

As it happens, the most widespread and routine use of blackpowder is as gunpowder for antique and replica firearms, mostly muzzleloading, which do not use commercially-manufactured ammunition. While a tiny percentage is criminally misused, there is nothing suspicious about the acquisition of blackpowder, which is largely unregulated by the federal government. Aguilera's affidavit is deliberately skewed to mislead the magistrate into thinking such ownership unusual except in association with criminal manufacture of destructive devices. Because blackpowder firearms are not "firearms" under federal or Texas state regulations concerning the transfer of firearms, there would not necessarily have been any records available to BATF indicating whether and how many blackpowder firearms Koresh and his followers may have purchased or owned.

F. Widely-Available "Clandestine" Publications

The affidavit also created bias in indicating as evidence of some wrongdoing with firearms that a witness interviewed in January 1993, after having been at the compound from March-June 1992, had "observed at the compound published magazines such as, the 'Shotgun News' and other related clandestine magazines." (Aguilera, 1993:14) Shotgun News is listed in the Gale Directory of Publications and Broadcast Media as being a tri-monthly publication, with a reported circulation of about 165,000. Published by Snell Publishing Co. of Hastings, Nebraska, subscriptions are available by mail or telephone (1-800-345-6923); Visa and Mastercard are accepted. Since the nearly 200 pages of each issue consist largely of advertisements of firearms and accessories, including all types of other weaponry and collectibles_its dramatically understated self-description is as "The Trading Post for anything that shoots"_and the sales

by mail of such items are often restricted by federal law, BATF, at headquarters and its various field offices, has 65 subscriptions to the 47-year-old "Clandestine" publication. One of those subscriptions is by the Austin, Texas, office, out of which agent Aguilera works (Aguilera, 1993:1), and of which Earl Dunagan, author of most post-raid affidavits, served as Acting Resident Agent-in-Charge. None of the other "Clandestine" publications is identified12, although the witness reportedly heard talk of, but apparently saw no evidence of, the "Anarchist Cook Book."

According to the advertisement for The Anarchist Cookbook_available from Paladin Press in Boulder, Colorado, at 1-800-392-2400 or 1-800-872-4993; they, too, take Visa or Mastercard_it was "written in an era when 'turn on, burn down, blow up' were revolutionary slogans of the day." Other First Amendment-protected publications available from Paladin Press include information on building claymore mines, picking locks, turning "junk" into arsenal weaponry, constructing grenade launchers, defending the home, and conducting homicide investigations. (Paladin Press, 1993:19) With regard to some of the other portions of the catalogue, it is noted: "Warning: The books and videos in this section detail procedures and products that are extremely dangerous! They are presented for information [sic] purposes only." (Paladin Press, 1993:43) There was no allegation that Koresh possessed any of those other non-clandestine publications. And, clandestine or not, there was no reliable evidence that Koresh or anyone else in Mount Carmel Center actually owned a copy of The Anarchist Cookbook13; the testimony was that the witness had "heard extensive talk of the existence of the 'Anarchist Cook Book.'"14 (Aguilera, 1993:14) One possible reason one of the witnesses had heard talk of the "cook book" but had not seen it was that the witness, who had left the compound in 1989, is reportedly blind (Wattenberg, 1993:34) _although that was not mentioned by Aguilera, who noted that the witness "participated in physical training and firearm shooting exercises conducted by Howell. He stood guard armed with a loaded weapon." (Aguilera, 1993:12)

G. Unreliable and Ignorant Witnesses

One area where Aguilera's affidavit was not directly misleading, but provided information which was, dealt with the credibility of the witnesses he interviewed. In some ways, this flaw may reflect more ill on the assistant U.S. attorneys who helped him with the affidavit and on Magistrate Green than on agent Aguilera. Search and arrest warrants are supposed to be based upon reliable evidence; thus, government agents should assert something suggesting that the witness interviewed is reliable. The Supreme Court has noted that "an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report." (Illinois v. Gates, 462 U.S. 213, 230 [1983]) Even the Treasury review, which found probable cause, noted that it could be based on "any reliable evidence, including...hearsay from reliable sources.... " (U.S. Dept. of Treasury, 1993:122n) But there was no assertion that the sources were reliable.

Green should have been looking at least for a pro forma assertion that the people interviewed regarding the firearms and parts they had seen had some knowledge of firearms. Otherwise, every time the news media misidentified a gun as a machinegun, BATF could interview the reporter and get a warrant regarding the gun shop or sportsman on whom the report was made. Not only were assertions of expertise lacking, but much of the information suggested the witnesses were ignorant on the subjects for which their testimony was being used. Aside from the farmer who asserted knowledge that he would know machinegun fire when he heard it: "All other allegations that Mr. Koresh owned machine guns were made by persons who were clearly ignorant of firearms and could not reliably testify to whether the guns, or the pictures of guns, they saw were legal semiautomatic firearms or illegal machine guns. Amazingly, the magistrate apparently failed to notice that Mr. Aguilera had not sworn that his informants were knowledgeable or reliable." (Fiddleman and Kopel, 1993)

Aguilera attempted to establish that he believed one witness, Jeannine Bunds, was able to identify an AK-47, based on her descriptions, but he went on to assert: "She knew it was a machinegun because it functioned with a very rapid fire and would tear up the ground when Howell shot it." (1993:9) The description does not suggest expertise, although the similar assertion of more rapid fire than was more

commonly used in training, was the basis for another assertion that a machinegun was being fired, this time by Deborah Sue Bunds. (1993:10)

Others suggest even less expertise. Robyn Bunds noted that something was identified to her by her brother_whom she reported "has some knowledge of firearms"_as a conversion kit. But Aguilera did not interview the brother, assert that Robyn Bunds had any knowledge of firearms, nor did she assert that her brother was an expert. (1993:9) A more contemporary description of a firearm by one of Aguilera's witnesses not only failed to establish the witness's expertise, but disputed it: "Mr. Block told me that he observed a .50 caliber rifle mounted on a bi-pod along with .50 caliber ammunition. However, what Mr. Block described to ATF Agents, was a British Boys, .52 caliber anti-tank rifle (a destructive device).15"

In all likelihood, Aguilera impeached the veracity of his own witness in order to support the allegation of possession of destructive devices_the only charge against Koresh asserted in the application for an arrest warrant_since the affidavit goes on to assert that Block heard talk of additional .50 caliber rifles and the possibility of converting the .50 caliber and other rifles to machineguns. (1993:14) Although there may have been talk of such conversions, there is no allegation in the affidavit, from either reliable or unreliable sources, that any such conversion occurred. Regarding BATF's assumption that the .50 caliber firearm was really a destructive device, according to private statements by Koresh's gun dealer, McMahon, Koresh did not like bolt-action rifles, preferring semi-automatics, in which case Aguilera's assumption that the .50 caliber rifle described was actually a bolt-action "anti-tank" gun is probably inaccurate. In addition, "anti-tank" is somewhat misleading in this context; developed as an anti-tank gun_although all it would be expected to do was penetrate, with no damage beyond that_the bolt-action rifle was obsolete as such by about 1941.

Further undermining the credibility of BATF's Aguilera, the Boys rifle was initially produced in .55 caliber, not .52; it is unlikely there is such a version as the .52. (Hogg, 1978:94) And, with regard to BATF's effort to cite that firearm as evidence that Koresh possessed a firearm in a caliber larger than .50_thus a destructive device under federal law_when the Gun Control Act of 1968 was enacted so defining rifles of larger caliber, most guns like the Boys were rebarreled in .50 caliber to make them legal. Thus, if Koresh owned a Boys, there would be no reason, absent other evidence, to believe it to be an illegal version rather than the more readily available .50 caliber version_especially since that is how Aguilera's witness described it. To the extent BATF has any experts on firearms, they ought to have known that a Boys rifle owned by a private citizen was more apt to be .50 caliber than .55_and that the .55 caliber would be lawful if registered as a destructive device.

The Treasury investigation of BATF's activities, which blithely assumes probable cause existed, accidentally makes it clear that BATF and agent Aguilera should have known that some of his witnesses were unreliable or that their information was stale, either of which would have undermined the validity of their evidence as a basis for a search or arrest warrant. For example, the raid planners "concluded that neither armed guards nor sentries were posted at the Compound at any time...."16 (U.S. Dept. of Treasury, 1993:53) Two of the six key witnesses who had at some point lived in the compound mentioned 24-hour armed guards. (Aguilera, 1993:9, 12) Even if the raid planners were wrong, it means BATF had reason to doubt the reliability of the witnesses or the ongoing validity of their evidence.

It was only after the botched raid that supplemental affidavit information at least recognized the desirability of claiming a witness was reliable. Then Aguilera finally insisted that he had been able to independently corroborate some of the information received from his informant, that the information was extremely accurate and consistent with other evidence, and the like. Some of the information relates to items which are lawful to own, like MAC-10 and MAC-11 semi-automatic pistols, as well as the unlawful manufacture of silencers and live grenades, and the possession of machineguns. And the informant is still not described as an expert on firearms, with the information merely described as being consistent with the other information learned during the preceding year (Dunagan and Aguilera, 1993:16), which failed to establish probable cause.

H. Lack of Evidence of Illegal Weapons at Mount Carmel Center

Overall, most of the allegations made in the affidavit by BATF's Aguilera, especially regarding the initial investigation, focused on Koresh during June-July 1992, dealt with the possibility that Koresh might have enough items to make hand grenades or other destructive devices, and had an interest in owning machineguns, and had some_but apparently not all_of the parts needed for the conversion. Most of the affidavit's discussion of the acquisition of guns and parts suggested there was something wrong with the ownership of a large number of firearms per se, a view contrary to judicial decision (United States v. Anderson, 885 F.2d 1248 [5th Cir. 1989]) and federal statute (Firearms Owners' Protection Act of 1986, paragraph 1). Some of the firearms parts identified in the affidavit could have been used in either semi-automatic or full-auto firearms; some were clearly semi-automatic, and duly purchased from licensed dealers. The only identified hand grenades were inert, since they were only hulls. So far as the affidavit's identification, no item listed as having been purchased by Koresh or his associates was purchased unlawfully, nor was it necessarily to be used unlawfully.

Since the search warrant for machineguns named Mount Carmel Center, it is significant that most deliveries of gun parts went to the Mag Bag, not to the Center. (Aguilera, 1993:2, 4-6) Although some attempts at delivery to the Mag Bag led to actual delivery to the compound, there is no specification of any particular firearms parts being sent to the Center. The Mag Bag could have been searched rather easily, with little threat to others, since there were rarely many men there, and no reports of women or children. To the extent the affidavit established probable cause to search any place for machineguns, it was the Mag Bag and not Mount Carmel Center.17

For the most part, the affidavit indicated a belief that Koresh unlawfully converted firearms to full-auto because (a) he wanted machineguns, (b) had firearms which had been identified as machineguns by persons with no knowledge of firearms, and (c) had the capability of manufacturing destructive devices, although there is no allegation in the affidavit that Koresh wanted to make hand grenades.18 Significantly, there was virtually no effort made to determine whether machineguns or destructive devices might be lawfully owned. The only check of BATF registration records was conducted in June 1992 and included only two names, neither of which was that of "David Koresh." And there were dozens of other adults living at Ranch Apocalypse. It has been reported that "a computer check run on all known Branch Davidians revealed one male cultist had legally purchased a .50-caliber machinegun within the past two years from a Class III dealer [one federally licensed to deal in machineguns] in Tulsa, Oklahoma. The gun dealer reportedly told authorities the buyer was legitimate and had paid a $200 transfer tax required to purchase a Class III weapon." (Pate, 1993a:50) Another, related rumor, in law-enforcement circles, is that the machinegun was not at the compound, having been sent to Oklahoma for repairs, with_as required by federal law for interstate transportation_written permission from BATF. That the sources are not necessarily reliable does not alter the fact that apparently BATF ran no checks on most of the adults, and ran no name checks between June 1992 and the February 25, 1993, affidavit.

Much of the information was not only irrelevant and unreliable, but it came from biased sources, persons who had left the compound, often years before the BATF investigation began. As one hostile reviewer put it:

Let us suppose that you and your spouse had a horrible fight, characterized by fervent anger, ugly words and nasty accusations, resulting in your spouse moving out of the home. Let us suppose your spouse goes to the Bureau of Alcohol, Tobacco and Firearms and tells them that you are distilling alcohol without a proper license. The ATF checks with your supermarket and learns that you have over the past few years on numerous occasions purchased sugar and on a few occasions purchased yeast, and verifies with your local utility that you have purchased water. You have acquired all the ingredients needed to manufacture alcohol. The ATF also checks the Treasury's records and verifies that you have never acquired a license to make alcohol.

In every detail, this situation is identical to the Davidians': there is testimony from an angry former close

associate anxious to cause you trouble, there is evidence that you acquired the means to manufacture a product whose manufacture requires a license and there is evidence that you had not obtained the license. Is this evidence_"probable cause"_sufficient for you to lose your right to privacy in your home as guaranteed by the Fourth Amendment? (Bradford, 1993:31)

There are actually some differences, since a license is not needed to produce some alcohol for personal use. But the affidavit also included many items not especially relevant to the issue of whether Koresh and his followers had violated federal laws enforced by the BATF. Irrelevant issues abound.

I. Irrelevant, State Investigated, and Absurd Allegations Against Koresh

Among the more prominent irrelevant issues are reports involving possible child_particularly child sexual_abuse by Koresh. Whether the allegations were valid or not, they do not involve the federal government. However, in the affidavit of BATF's Aguilera, the investigation is not only prominent, but there is no mention of the fact that the Texas state investigation of possible child abuse had ended April 30, 1992 (Wattenberg, 1993:37), nearly ten months before the assault on Mount Carmel Center. Other allegations were even less supported, such as an allegation by someone who had left the compound in 1989 that Koresh had falsely imprisoned a woman in June 1991. (Aguilera, 1993:10-11)

Following the assault, Aguilera voyeuristically returned to the case of alleged child sexual abuse, going into some detail of an incident alleged by the social worker to have occurred, but with no time frame given. From the Justice Department review, it appears that the social worker's interview occurred on February 22, 1993 (U.S. Dept. of Justice, 1993b:219), and it may have been related to an effort to lure Koresh off of his property by having local charges of child abuse brought, since that effort was given up on February 22, when a female minor told a state prosecutor she would not testify against Koresh. (U.S. Dept. of Treasury, 1993:App.D-12) Clearly, Aguilera, even after a massive shootout, was still concerned with possible violations of Texas state law found in an investigation which had been closed over nine months before his interview. (Dunagan and Aguilera, 1993:18-19)

Perhaps the social worker, who had been unable to convince her superiors that she had made a case against Koresh, was envious of Aguilera's less stringent supervision; perhaps Aguilera thought he could make a better case against Koresh for child sexual abuse than for firearms law violations. The Treasury Department review explains focusing on the child abuse investigation: "While reports that Koresh was permitted to sexually and physically abuse children were not eveidence that firearms or explosives violations were occurring, they showed Koresh to have set up a world of his own where legal prohibitions were disregarded freely." (U.S. Dept. of Treasury, 1993.27) Such a theory would allow law enforcement agencies to allow any allegations of any serious criminal activity to help to establish probable cause that all other criminal activities were also being engaged in. In law, the theory is currently indefensible.

The Texas investigation of child abuse, however, led to the only bit of information which could possibly be interpreted as suggesting that Koresh represented a danger to anyone except those in his compound. On the other hand, that investigation also produced evidence which was contrary to other conclusions, since that investigation included Koresh's assertion that few of the persons in the compound knew of the firearms, and that there were few firearms and they were generally locked up (Koresh was, after all, trying to reassure a social worker that the children were safe). Since Aguilera thought that there were large numbers of firearms in the Branch Davidian compound, the reliability of his witness probably might have been doubted: however honest she may have been, Koresh may not have been honest with her.

In fact, Koresh's statement that there were few guns in the compound and few persons knew about them, and the fact that he owned over 200 firearms could both, in a sense, be true. According to his gun dealer (McMahon and Kilpatrick, 1993:105-106), Koresh was concerned about a possible attack from George Roden, the person with whom Koresh and his followers had had a shootout in 1987, and from other persons who regularly sent hate mail to Koresh. Some of the firearms were practiced with for possible protective use. But most of the firearms were purchased as investments, kept boxed to enhance resale

value, and never fired. And it is possible that he kept some or many of those investment firearms stored at the Mag Bag. Statements in Aguilera's affidavit suggesting firearms training could have been referring to the single occasion when McMahon attempted a general firearms safety course, with only a few persons getting hands-on instruction before McMahon decided one-on-one would be the only safe way to teach so many persons, and that actual firearms training could have involved only a small percentage of the adults living at Ranch Apocalypse. This idea is supported by the Treasury Department's reporting that some of Aguilera's witnesses noted that McMahon "had participated in some of the shooting exercises." (U.S. Dept. of Treasury, 1993:28) This would also be supported by the allegation, yet to be proven, that most Branch Davidians killed in the initial shootout with BATF were unarmed_and known by BATF shooters to be unarmed. (Pate, 1993d:74)

It is Koresh's statements to the social worker_expressly identified as having been made on April 6, 1992_which suggest he might have envisioned violent use of the firearms. It is worth noting that the social worker was not interviewed until December, several months after BATF declined an invitation to visit Koresh's home to see his guns, and apparently after BATF began planning and preparing for a massive raid on Mount Carmel Center. Reportedly, Koresh "told her that he was the 'Messenger' from God, that the world was coming to an end, and that when he 'reveals' himself the riots in Los Angeles would pale in comparison to what was going to happen in Waco, Texas. Koresh stated that it would be a 'military type operation' and that all the 'non-believers' would have to suffer." (Aguilera, 1993:9) The statement was allegedly made some 3.5 weeks prior to the start of the Los Angeles riots.19 Even if the statement were made later, the error in the allegation suggests neither competency in reporting on an investigation by Aguilera or review of his affidavit by the Justice Department attorneys or the federal magistrate.

Had anyone bothered to check out this stale information, it would have been clear that the affidavit was inaccurate. Had persons checked on the way Koresh talked, they would have found that he did talk that way about the apocalypse, in the Book of Revelations, but the destruction he described was normally attributed to God rather than to David Koresh. The closest Koresh came to perceiving himself as Christ-like, according to his gun dealer, with whom he was on fairly friendly terms, was that he expected, like Jesus, to be killed by the government when he was 33 years old. (McMahon and Kilpatrick, 1993:284-85) But he expected the initiative for his death to come from the government, not from Koresh.20

In addition to the filler regarding firearms and destructive devices, and the terminated sexual abuse investigation, one person purported to know machinegun fire when he heard it was cited as having heard it in 1992. A farmer, with property near the Koresh compound, stated that he had heard machinegun fire in January and February, and again in November. He also offered law enforcement authorities his residence to be used as a surveillance post. (Aguilera, 1993:4) What the BATF agent did not note was that the firing had been reported to the sheriff's office, which had investigated it and found that the supposed machinegun fire actually involved something similar to the Hellfire device. BATF's affidavit also failed to note that the farmer was hostile toward Koresh, having been involved _which may have been part of the reason he offered BATF so much assistance. Credibility and reliability of witnesses is also dependent upon motivation, and BATF did not question the local farmer's.

Another deputy sheriff reportedly had heard an explosion in the area of Mount Carmel Center in November 1992, and saw grey smoke near the north end of the property. (Aguilera, 1993:7) This, as BATF recognized in December, does not establish probable cause for unlawful possession of destructive devices, since explosives are lawful, and the Branch Davidians were working to construct a swimming pool near the house.

J. Stale Witnesses to Establish Recognized Lack of "Probable Cause"

Despite a mass of material relating to possibly legal and possibly illegal activities involving explosives and firearms, and masses of irrelevant information regarding Koresh's peculiar religious views and possible violations of Texas state laws regarding minors, BATF recognized that it lacked probable cause in December. The agency therefore undertook to improve their knowledge, using an undercover agent and

additional interviews.

Most of the BATF investigation of Koresh from December 1992 on, however, focused on persons whose knowledge was even more stale than that obtained in June and July_and from persons with clearer anti-Koresh biases, being, for the most part, disenchanted former followers. Three Bunds, who had left the compound before 1992, were interviewed, and described events occurring around 1989-91. The three women were not knowledgeable about firearms and identified firearms mostly by pictures and how rapidly they fired. All of the information from the Bunds, and from a woman from New Zealand, was old (Aguilera, 1993:9-11), and would no more have established probable cause than the June-July 1992 investigation. The information added staleness to unreliability.21

The closest item to new information was that one of the Bunds reported having found some gun parts in her parents' Los Angeles, California, home, noted that her brother_"who has some knowledge of firearms" (Aguilera, 1993:9)_identified it as a machinegun conversion kit, and that three members of Koresh's cult eventually came to pick it up. No reason is given for not having interviewed the brother, David Bunds_son of one former Branch Davidian, brother of another, husband of a third, but not listed as having been involved with Koresh at the time of the BATF raid (New York Times, April 22, 1993:B12).

Nor is there clear evidence that the conversion kit, if it was one, was taken to Mount Carmel Center, as opposed to the Mag Bag or any other place in the United States. After all, although Aguilera did not mention it in his initial application for search and arrest warrants, Koresh also owned a house with garage in La Verne, California, a suburb of Los Angeles_which he visited from time to time (Pate, 1993e:38) and where materials showing a "predisposition toward violence" and "components for improvised explosives" were also found. (Dunagan and Aguilera, 1993:17-18) Probable cause was, once again, not established, even for a single conversion kit_although the information might have suggested a reason for further investigation. No information had been obtained by a reliable source with any knowledge of firearms_and talk about machineguns, even about the desire for them, is not the same as unlawful possession of them or unlawful conversion of semi-automatics to full-auto capability.

Another witness, David Block, noted that he had been in the compound during the spring of 1992, and had attended gun shows with Koresh, McMahon (Koresh's gun dealer), and others from the compound. According to McMahon, Block was anti-gun, unfamiliar with and uncomfortable around guns, and it was the gun activities which caused him to leave the compound in June of 1992. (McMahon and Kilpatrick, 1993:50-52) But the only allegation of illegal activities was rendering a gun on a computer monitor screen, which is no more a crime than playing with destructive devices on videogames. No evidence asserted that it went beyond the designing stage. (Aguilera, 1993:13-14) Block also reportedly heard talk about the "Anarchist Cook Book" and saw "'Shotgun News' and other related [but unidentified] clandestine magazines." And Block observed a .50 caliber rifle, which BATF misidentified as a Boys .52 caliber anti-tank rifle, and a person visiting the compound who was supposed to be a firearms and explosives expert. No probable cause was established by these inquiries.

One witness interviewed, Marc Breault, did indicate that Koresh thought "gun control laws were ludicrous, because an individual could easily acquire a firearm and the necessary parts to convert it to a machinegun, but if a person had the gun and the parts together they would be in violation of the law." (Aguilera, 1993:12) Koresh was not quoted as having confessed to any such confluence of events. Interestingly, in its efforts to learn about Koresh and the Branch Davidians, the FBI determined that "he [Breault] had no current reliable information." (U.S. Dept. of Justice, 1993b:192) But BATF agents are less concerned with about staleness or reliability when there is serious criticism of firearms laws, and that seemed to lead to the only pieces of evidence which would establish, in BATF's view, probable cause in February 1993 which was lacking in December 1992.

K. Exercising First Amendment Rights as "Probable Cause"

BATF had an undercover agent, Robert Rodriguez, inside Ranch Apocalypse. His was, apparently, the

only information obtained during the month of February, all of the other interviews in the revived investigation having been completed by January 25th. (Aguilera, 1993; U.S. Dept. of Treasury, 1993:App.D) In a meeting three days before the warrant was issued, Koresh played the guitar for Rodriguez, read from the Bible, and invited him to take training preparatory to joining the group. Koresh warned Rodriguez that if he joined, he "would be disliked because the Government did not consider the group religious and that he (Koresh) did not pay taxes or local taxes because he felt he did not have to."22 (Aguilera 1993:14-15) Aguilera went on to explain what seems to many to have been the basis for BATF's belief that probable cause existed:

David Koresh told Special Agent Rodriguez that he believed in the right to bear arms but that the U.S. Government was going to take away that right. David Koresh asked Special Agent Rodriguez if he knew that if he (Rodriguez) purchased a drop-in-Sear for an AR-15 rifle it would not be illegal, but if he (Rodriguez) had an AR-15 rifle with the Sear that it would be against the law.23 David Koresh stated that the Sear could be purchased legally. David Koresh stated that the Bible gave him the right to bear arms. David Koresh then advised Special Agent Rodriguez that he had something he wanted Special Agent Rodriguez to see. At that point he showed Special Agent Rodriguez a video tape on ATF which was made by the Gun Owners Association (G.O.A.)24. This film portrayed the ATF as an agency who violated the rights of Gun Owners by threats and lies. (Aguilera, 1993:15)

Based on the rambling 15-page affidavit climaxed by the report of agent Rodriguez, Aguilera announced (1993:15) that "I believe that Vernon Howell, also known as David Koresh and/or his followers...are unlawfully manufacturing and possessing machineguns and explosive devices,25" Magistrate Green agreed and, on February 25, 1993, issued a search warrant for machineguns and destructive devices (among other things) and an arrest warrant for Vernon Howell a/k/a David Koresh for possession of destructive devices. The following day, Assistant U.S. Attorney William W. Johnston, chief of the Waco Division, who had assisted Aguilera in his preparation of the affidavit, on behalf of U.S. Attorney Ronald Ederer, obtained an order to seal the complaint against Koresh "to ensure the integrity of an ongoing criminal investigation....It is believed that evidence may be altered or destroyed should the direction of the investigation become evident.26"

Nine days after the initial assault, Magistrate Green later issued a similarly sealed warrant dramatically expanding the items to be searched for at Mount Carmel Center. Some of the expansion was to items relevant to investigation of the possible charges related to the Branch Davidian resistance to the BATF's serving of the first warrant, looking for spent cartridges, bullets, bullet holes, blood, and the like, but including video and audio tapes which would indicate criticism "of firearms law enforcement and particularly the Bureau of Alcohol, Tobacco and Firearms (ATF)," as "evidence Howell or other cult members' motive for wanting to shoot and kill ATF agents." Some, however, dealt with finding more evidence to prove the initial suspicions of unlawfully possessed machineguns and destructive devices, including a search for photographs, because "I know that often times persons who violate firearms laws take or cause to be taken photographs of themselves displaying their weapons...." (Dunagan, 1993b:4)

What BATF agent Dunagan neglected to note to the never-vigilant Magistrate Green was that photographs of inert grenade hulls look identical to those of live grenades, and that photographs of semi-automatic firearms generally look identical to photographs of semi-automatic firearms unlawfully converted to full-auto capability. And, while the assertion that persons who violate gun laws have photographs taken of themselves with their firearms_certainly true of criminals who misuse firearms, including "Billy the Kid" and Lee Harvey Oswald, who were never accused of violating the sorts of gun laws enforced by BATF_the statement is also true of children posing with their cap guns in hand or holster, of successful hunters and target shooters, and of politicians seeking the votes of sportsmen. In a popular biography of the young Theodore Roosevelt, one-third of the photographs of T.R. show him wearing or carrying a firearm. (McCullough, 1981) The figure was about one-sixth in a collage of T.R. photos inside the front cover of the Theodore Roosevelt Cyclopedia. (Hart and Ferleger, 1941)

While Koresh may well have converted semi-automatic rifles into machineguns and made some inert

grenade hulls into live grenades, no probable cause was established by the evidence presented in the affidavit. And the key evidence in BATF Director Higgins's mind_based on his testimony before the House Judiciary Committee_appears to have been Koresh's religious views, pro-gun rights views, criticism of federal gun laws, and hostility toward the BATF, all of which are protected by the First Amendment_based on the fact that Higgins testified that the necessary probable cause was not obtained until mid-February and the only evidence after January involved religious and political views expressed or displayed by Koresh. The applications for the search and arrest warrants, based on identical affidavits by Aguilera, were rubberstamped by a federal magistrate and the U.S. Attorney's office, either with or without reading the affidavit to notice the lack of probable cause for anything beyond the clear expression of First Amendment rights.

Neither the affidavit nor the arrest or search warrants make any reference to dangers Koresh might pose to arresting officers. Even post-raid affidavits indicating a "predisposition toward violence" (Dunagan and Aguilera, 1993:17) apparently referred to violent movies_especially war movies_a partiality which would put Koresh in the same camp as John Wayne, Oliver Stone, and the Academy of Motion Picture Arts and Sciences.

In the review by the Treasury Department, while there are frequent assertions of Koresh's hatred of law enforcement and a tendency toward violence, reasons to expect violence in response to a search or arrest warrant are weak. BATF apparently expected Koresh to respond violently to the expose which began in the Waco newspaper the day before the raid. BATF seemed surprised that "The article had not caused the cult to arm itself," but did not infer from that that their perceptions of his violence might have been exaggerated. (U.S. Dept. of Treasury, 1993:10-11) Similarly, although one former cult member said Koresh would remind them that they might have to resist a confrontation with local or federal authorities_with no indication the Branch Davidians would seek out such a confrontation_"as far as the former cult members knew, Koresh had not specifically trained his followers to repulse law enforcement officers or other visitors perceived to be hostile." (U.S. Dept. of Treasury, 1993:45)

Neither the arrest or search warrants indicated that Koresh rarely left the compound, since there was at least one reference to Koresh's attending gun shows. The affidavit repeatedly noted armed guards protecting the Ranch Apocalypse, which, if true, would render complete surprise unlikely. And the only reference to possible destruction of evidence was to seal the complaint, not to justify a "no-knock" raid. How to serve the warrants was largely left to BATF. Was it an affidavit to arrest, search and seize, or an affidavit to kill?

II. Executing a Warrant or a Cult?

When BATF gathered its 76 agents to storm Koresh's property, they were met with armed resistance. In the ensuing shootout, four BATF agents were killed with another 14-28 injured; some Branch Davidians were also killed or wounded, including Koresh himself.27 BATF (Dunagan, 1993c:12), the Departments of the Treasury (1993:100) and Justice (1993b:209), and NBC called the Branch Davidians' response an "ambush" of BATF. One might similarly have noted that when Hitler's troops invaded Poland, they were "ambushed" by Polish military units. The word "ambush" would normally refer to lying in wait, hiding, for an opportunity to attack.

The Branch Davidians were not sneakily lying in wait; they were at home, a home with lots of firearms. The news media have "almost invariably characterized the Davidian arms cache as breathtakingly large. But that is a matter of interpretation." (Wattenberg, 1993:32) According to BATF claims after the standoff ended, there were 237 firearms recovered (Letter from BATF Deputy Director Daniel Hartnett to U.S. Rep. John Kyl, June 29, 1993). Assuming about 40-60 legally-qualified adults, that would work out to about 4-6 firearms per gun-owning adult_assuming all adults lawfully allowed to own firearms were considered gun owners in the compound. That is somewhat, but not dramatically, higher than the national, or even Texas, average. On the other hand, Koresh was a gun collector_not an especially sophisticated one, but a collector, nonetheless. And ownership of 50-500 guns by collectors is not uncommon.

And BATF knew there were lots of firearms, and knew the residents were awake. Part of the dispute after the botched assault on the compound dealt with the questions of whether BATF should have attempted to arrest Koresh when he was alone, or almost alone, outside of the compound. BATF's response is to assert that it was difficult to find Koresh off the grounds of Mount Carmel Center: "In January 1993, ATF initiated a surveillance of the compound. Koresh was never seen leaving the property by ATF. Additionally, an undercover operation by ATF indicated that Koresh had no intention of leaving the compound." (Letter from Hartnett to Kyl) The two sources for the allegation that he rarely left the compound were the social worker, Joyce Sparks, and a former cult member who said Koresh feared arrest by the sheriff's department. (U.S. Dept. of Treasury, 1993:43, 51) There is no indication BATF asked the sheriffs department if they found the statement credible.

If the assertion is true, BATF seemed uniquely unable to find Koresh outside Ranch Apocalypse. The Waco Tribune-Herald, which was preparing an expose of Koresh, noted that Koresh had been out of the compound as recently as February 22, when he went to an auto repair shop. (Pate, 1993a:63) He had also been seen twice at the Chelsea Street Pub during 1993, according to the manager, had been seen at another nightspot in January, and a businessman who wished to remain anonymous showed the newspaper a sales slip indicating Koresh had been in his shop as recently as January 5, 1993. (Pate, 1993a:63) And his jogging, alone or with associates, has been reported regularly. And he also went shopping, to music stores, gun shows, or auto parts shops (Wattenberg, 1993:38; U.S. Dept. of Treasury, 1993:App.D-10)_Mag Bag was also a garage leased and used by the Branch Davidians. And he reportedly attended a gun show in Waco during February. (McMahon and Kilpatrick, 1993:171) One of the active Branch Davidians, Paul Fatta, stated that on several occasions in the weeks leading up to the raid, he, Koresh, and others had gone jogging almost three miles down the road. (Lee, 1993a:24)

Arresting Koresh on such occasions would not only have left the compound in an easier position to search because of the absence of its leader, but would also have reduced the risk that Fatta or another leader/jogger might have spurred resistance. Eventually, BATF admitted it did not keep close tabs on Koresh and did not know whether or how often he left the compound. (Labaton and Verhovek, 1993:20) Yet BATF's only effort to arrest Koresh off the compound involved trying to talk Texas authorities into issuing an arrest warrant for child abuse (U.S. Dept. of Treasury, 1993:App. D-11-12)_and assuming he would cooperate with that warrant. Aside from that, the Treasury review indicates that the only two options seriously considered for arresting Koresh were an assault on the compound and a siege of the compound. And the Treasury review merely found it unclear whether BATF's decision to assault rather than lay siege was well founded. (U.S. Dept. of Treasury, 1993:134)

Rather than try to isolate Koresh, BATF managed, with almost complete success, to consolidate the Branch Davidians. They did this by selecting Sunday rather than a weekday for the raid. On the weekday originally selected for the raid, the men in the compound, with the day jobs many of them had, would have been off the grounds of Mount Carmel Center. (Hinds, 1993:8) And the children who attended school would have been in school, minimizing the threat to them from any possible shootout. If BATF were really observing the activities at Ranch Apocalypse, they should have known that many of the men left during the day for work, and that a school bus stopped there regularly to pick up at least one of the children.

A. Why an Element of "Surprise"?

BATF was supposed to be serving a warrant to arrest Koresh and search the 77-acre compound and all structures there and to seize rifles, conversion parts, metal lathes and milling machines, grenade launchers, various chemicals, pipe bombs, destructive devices, computer hardware and software, etc. (Aguilera, 1993:Attachment D) Unless there is fear that the property might be destroyed while police identify themselves and give notice of why they are at a particular place, warrants are not supposed to be served with "surprise," In this case, the crimes alleged were all non-violent offenses _felonies with the cumulative potential of decades of prison time, but generally crimes in and of themselves victimless. Even anti-gun columnist Jimmy Breslin sneered that "The case against Koresh was for simple gun possession,

which in Texas is the same thing as keeping Kit-Kat bars. I began to wonder why the ATF agents would go into training for a couple of months so they could assault religious fanatics over failure to answer a cheap warrant."

In fact, of course, the fanatics had not initially failed to answer a cheap warrant. What one Justice Department reviewer found unique in the eventual confrontation the FBI had to deal with was that "an assault by law enforcement had preceded negotiations with heavily armed cult members who had planned for a confrontation." (U.S. Dept. of Justice, 1993b:119n) The assault was planned and begun before there was any evidence presented to a magistrate or judge that the warrant would be defied.

Under federal law, some force may be used by an officer to "execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." (U.S.Code, Title 18, paragraph 3109) A key question is whether the BATF agents identified themselves and their purpose, giving residents a reasonable opportunity to cooperate. There was nothing in the application for the warrants which indicated a concern that the guns would, or could, somehow be destroyed. There was nothing in the warrant applications indicating that Koresh or his followers posed any danger to federal agents. A follow-up affidavit by Agent Dunagan hypocritically asserted as evidence of danger the shootout in 1987, but that, of course, was followed by arrest and search-and-seize warrants served peacefully. There was no apparent reason for staging a "Surprise" raid.

By all accounts, however weird the Branch Davidians may have been, they lived peaceful lives, bothering no one. (Blum, 1993:31) Local law enforcement saw them as private and territorial but no threat to the surrounding community. (Wattenberg, 1993:32) And "There isn't a smidgen of evidence that Koresh and his followers ever intended or considered using anything they had or might make for anything other than to defend themselves and the Mount Carmel Center where they lived." (Knox, 1993) Even one of the FBI's consultants said "Koresh's use of religion seemed designed more to legitimize his thoughts and behavior and his desire to live apart from society than to form a basis for martyrdom." (U.S. Dept. of Treasury, 1993:170)

If BATF feared violence, there might have been a reason to attempt to achieve the element of surprise, but such fears are inconsistent with the minimal efforts to keep the news media away, both because the news media are not secretive in their actions and because government agencies are not in the business of endangering the lives of reporters. (Labaton and Verhovek, 1993:20; Danish, 1993:3 and 72; Bradford, 1993:30) If they were not expecting violence, a massive raid would produce good television and other media coverage, but be a poor justification for a massive show of force. (Danish, 1993:72)

Aside from fearing violence, the other reason for an element of surprise would be the possibility that evidence might be destroyed. Neither firearms, nor conversion equipment such as were mentioned in the affidavit (lathes, etc.), are easy to destroy. The most common evidence subject to destruction is drugs. The only allegation of drugs in the affidavit of Aguilera was the report that one person associated with the Branch Davidians had formerly used, and been convicted of using, drugs, and was paroled to McLennan County (Waco), Texas (1993:7).

BATF did allege possible drug law violations to obtain use of Texas National Guard helicopters, which otherwise would not have been used for law enforcement purposes. (Labaton and Verhovek, 1993:20; Pate, 1993c:48) But there was nothing in the initial affidavit regarding drug law violations, nor in the later affidavit filed in March by another BATF agent. Some have asserted that BATF "fabricated the allegation to defend their use of state-controlled aircraft." (Pate, 1993c:48) In fact, BATF used three minimal ties to establish possible drug law violations_which the Treasury Department review found neither misleading nor misrepresentative: the possible continued existence of parts of an amphetamine lab from several years before, and despite a change in control of the compound, and the destruction of most of the houses previously on the land; the presence of a drug-violation parolee; and that ten others had been arrested or at least investigated for some "drug activity"_apparently with no convictions. (U.S. Dept. of Treasury,

1993:16, 212) But those allegations were really merely for the purpose of obtaining use of the helicopters, not for pretending any need to prevent destruction of evidence.

BATF is left with the insufficient explanation offered by BATF spokesman Jack Killorin: "The warrant is for an imminent threat to the life and safety of everybody in that compound. The warrant is for the illicit manufacture of explosives and explosive devices which right away is an immediate threat to the life and safety of every person in there." (Wattenberg, 1993:38)

B. What Element of "Surprise"?

It is hard to know why BATF thought it could have achieved an element of surprise, when the affidavit indicated there were armed guards on patrol 24 hours per day. Certainly daytime hours would have made surprise harder to achieve_as, in fact, did the National Guard helicopters. But BATF never had the element of surprise. Part of that was not clear to BATF, but the agency's undercover operations are not especially secretive. It was clear that the farmhouse used for observation, ostensibly by students, was manned by persons too old to be students_the leader, Rodriguez, was over 40, but he and the others were chosen for their youthful appearances (U.S. Dept. of Treasury, 1993:51)_with one pretending to be a foreman in charge of cows whose ignorance of cows led Koresh's gun dealer to warn him that he needed to watch out, so that Koresh and cult members assumed them to be law enforcement agents. (Labaton and Verhovek, 1993:20; McMahon and Kilpatrick, 1993:258; Pate, 1993e:39) It is generally agreed that Koresh knew that agent Rodriguez was an undercover operative. He knew of other efforts to spy on his compound, where a BATF agent posed as a trainee with a UPS delivery truck, and Koresh made it clear to the driver that he knew he was being watched, and complained about the undercover effort to the sheriff's department. (U.S. Dept. of Treasury, 1993:188)

And BATF scheduled its raid_on a 77-acre property with an observation tower (Aguilera, 1993:Attachment D) and "several manned observation posts [where it was] believed that the observers were armed"(Aguilera, 1993:2)_for daylight,28 when everyone inside would be expected to be awake, on open plains, with numerous vehicles and 76 agents.29 The news media were known to be present, if they were not actually invited.

C. Was Koresh Expected to Resist?

There are two possibilities regarding BATF's expectations of Koresh's response to the search and arrest warrants, neither of which justified BATF's approach to the compound. Either they expected resistance or compliance. If compliance was expected, they did not need 76 agents, armed and armored, accompanied by helicopters, and plans for a quick assault on the compound_which is what they apparently had in mind. A telephone call had been used in the past. If nothing else, such a call might have clarified what Koresh's response would be. If resistance was expected, the news media should not have been allowed at a potentially dangerous location. But when a reporter met one of Koresh's followers outside the compound, the reporter said "The action was likely to be a raid of some type and that there might be shooting." (U.S. Dept. of Treasury, 1993:85)

The most likely explanation for BATF's behavior is that serious resistance was not expected but that the massive show of force was for the media_even if not invited to film the raid themselves, the news media would have had BATF's videotaping made available_so that the arrest of numerous Branch Davidians, possibly with some cultist casualties, and the gathering and photographing of hundreds of firearms and paraphernalia_which would be photographically just as impressive an "arsenal" whether eventually determined to be entirely legal or partially illegal_would afford BATF appropriate national news media coverage. No other explanation seems to cover both the careful planning of a massive raid with the poor arming and training for the agents along with at least some notice to the news media.

At any rate, the assault by BATF was in the planning stages for over two months. Drilling had been done so that some of the timing was down to the second_so long as the Branch Davidians did not interfere with the BATF scripting. As quoted in the Houston Chronicle, "We had practiced to where it took seven

seconds for us to get out of the tarp-covered cattle trailers we rolled up in, and 12 seconds to reach the front door." (Lee, 1993a:23) Full control of the compound was to be achieved within 60 seconds. (Wattenberg, 1993:32) It is unclear how much time, if any, was allocated for the statutory obligation of BATF to identify its authority and purpose and to be refused admittance. Perhaps BATF mistakenly believed that Koresh's being tipped off to the raid settled the notice and refusal requirements.

Some of the planning was weak. The layout of the house, which was subject to constant expansion, was not known to BATF except by its undercover agent and by a former cult member who had left in 1989. (Pate, 1993a:62; Aguilera, 1993:12) Both of those persons were males, and men were generally restricted to the first level of the house, with only women and children allowed upstairs (McMahon and Kilpatrick, 1993:174-75; U.S. Dept. of Treasury, 1993:46), where part of the initial assault by BATF was planned to occur (Dunagan, 1993b:2-3)_enhancing the likelihood of confronting unarmed Branch Davidians, since the early-morning paramilitary drills were for males. (U.S. Dept. of Justice, 1993b:209) This information was supplemented, after the raid had failed, by one of the women who previously lived in the compound (U.S. Dept. of Justice, 1993b:203) and by another released from the compound, who was asked to provide agents with a floor plan, leading to the exaggerated complaint that: "They had launched a major assault, weapons drawn with the intent to kill, without having any knowledge of their objective site including entrances, exits, obstacles, hides [sic], passageways, etc." (Lesmeister, 1993:22)

In addition, considering BATF's Killorin's insistence that the possession of explosives threatened the lives of everyone, and the fact that the Ranch Apocalypse was known to house numerous firearms, and the agents were going in armed with guns drawn, planning oddly failed to include a doctor or dispensary to treat wounded agents, a common practice for the FBI. Nor were agents prepared for return fire.30 (Labaton and Verhovek, 1993:20) There was one ambulance available, but it was kept away because BATF could not guarantee the driver's safety. (U.S. Dept. of Treasury, 1993:106)

D. Who Started the Shooting?

It is unlikely that the question of who started the shooting will ever be answered satisfactorily. Most participants on both sides probably did not know for certain, and most of those inside the compound are in no position to express their opinions; surviving BATF agents' recollections might be self-serving, or they might not really have witnessed the first shots.31 BATF's obligation was to knock, identify itself, and give Koresh the opportunity to cooperate. Koresh and his supporters insisted that BATF started shooting before Koresh could either cooperate or defy, indeed, that the helicopters began firing on the compound before any knocking had been done. BATF and their supporters_and some of the news media witnessing the event32_insist that the shooting began from the inside, both at the helicopters and at the agents on the ground. (Pate, 1993a:51; Hedges and Seper, 1993; Dunagan, 1993b:2)

Psychiatrist Robert Cancro, one of the independent experts reviewing both BATF's and the FBI's actions for the Justice Department, suggested that it might not matter who fired first: "Certainly an armed assault by 100 agents had to be seen as an attack independent of who fired the first shot. If an armed individual enters your home by force and you have reason to believe that person represents a mortal threat, you are allowed to fire a weapon in self-defense in most states. The law does not usually allow the potential attacker to fire first before a response can be called self-defense. (Cancro: 3, in U.S. Dept. of Justice, 1993a)

There are actually five general scenarios, three of which would not conflict with the fact that news media witnesses located far from the house believed the first shots were fired by Koresh's supporters. The conflicting scenario is that the shooting began with shots fired from the helicopters, claimed by some surviving Branch Davidians, although some BATF agents insist the gunfire began with Branch Davidians firing at the helicopter. (Pate, 1993a:49-50; Pate, 1993b:41) The second scenario is that BATF knocked on the door to give notice, and that Koresh opened the door and he and/or his people began firing before BATF had the opportunity to identify themselves and their purpose. (Pate, 1993a:51) The third is that when Koresh opened the door, he was shot and wounded by an assigned BATF agent, whose gun was

equipped with a silencer, after which the Branch Davidians responded with their firearms. (Pate, 1993a:51) The first shot, then, would have been fired by BATF but not heard by the witnessing media. A fourth scenario is that one of the BATF agents accidentally shot himself as he unholstered his gun, shouting that he was hit, and leading both sides to begin shooting. (Pate, 1993a:51) One modification of the now generally discounted fourth scenario, is that an agent on a ladder slipped, and BATF agents assumed Davidian gunfire was the cause and responded. The fifth is that the Branch Davidians' dogs, which were supposed to be kept under control with fire extinguishers, but with firearms as back-up, were shot at, leading each side to assume the other had begun firing and respond appropriately.

Most of the evidence has been destroyed_or is on videotapes which a judge has ordered to be preserved, but which have not been released. Supporting the BATF claim that Koresh started the shooting are his reported remarks on learning of the impending raid. According to agent Rodriguez, as revealed in agent Earl Dunagan's affidavit_a later affidavit filed by BATF in support of its continuing interest in Koresh_Koresh said, "Neither ATF or the National Guard will ever get me. They got me once, and they will never get me again. They are coming; the time has come."33 (Dunagan, 1993c:8) Why he would have thought the National Guard was coming is unclear, unless he identified the helicopters before their arrival. Even more unclear is why he would say the National Guard and BATF had gotten him before, when there is no record of any such event, and anyone listening to him_except Rodriguez_would presumably have known no such event had occurred. One possibility, of course, is that he did not make the statement, or that his statement was embellished by time and events in the minds of Rodriguez and Dunagan.

As Koresh told the story to his attorney, Dick DeGuerin, the BATF agents arrived in their cattle trailers, screaming like Marines storming a beach, not identifying themselves or asserting a search or arrest. Koresh opened the door, and suggested talking since there was otherwise a threat to women and children; then, according to Koresh, after BATF started shooting, Koresh's people got their guns and responded. (Wattenberg, 1993:40)

Supporting Koresh's version, which might otherwise simply be a nice afterthought, is the assertion of massive bullet damage reported to the front door of the house from the outside, whereas a BATF response to gunfire from within would have been more at sources of such gunfire. (Pate, 1993d:100-101) After all, BATF's follow-up affidavit asserted that agents at the scene claimed firing initiated by Koresh's followers coming from "every window of the compound building." (Dunagan, 1993b:2)

Also supporting Koresh's claims are the tapes from the telephone calls Koresh and his aide made to "911" a minute after the shooting started (U.S. Dept. of Treasury, 1993:App.D-17), in the heat of battle, with the gunfight still in progress with the result unclear. His aide called on the sheriff's office to get them to stop shooting, stating that "There are children and women in here." Koresh's telephone call, also to Sheriff's Lieutenant Larry Lynch_a last name Koresh found funny under the circumstances_included the assertion: "We told you we wanted to talk. No. How come you guys try to be ATF agents? How come you try to be so big all the time." (Wattenberg, 1993:40; Thomas, 1993) The tapes would indicate tapes that Koresh believed the Sheriff's office was responsible for the raid, lending additional support to the suggestion that BATF agents did not begin by identifying themselves as required by law, or at least did not identify themselves clearly and precisely. Additional support for that theory came from an explanation by an FBI spokesman as to why BATF would not have identified themselves first: "You don't want to give these guys a chance to get to their guns. In Waco, there was no announcement of who was there and the fact they're there for the lawful purpose of executing a warrant."34 (Pendleton, 1993)

E. Was It Murder?

Intentional and unjustified killings of other human beings_murder_almost certainly occurred on February 28, 1993, at Mount Carmel Center near Waco. The real question is who committed murder and whether trials are likely. Koresh's second call to "911" included the assertions "I have a right to defend myself," and "They started firing first." (Wattenberg, 1993:40) According to an anonymous former BATF official, "Unless the occupants of a dwelling are made aware that the persons attempting to enter have legal

authority and a legal warrant to enter, the occupants have every right to defend themselves...." (Pate, 1993c:74)

The government will certainly act on the assumption that some Branch Davidians are guilty of murder or at least of being accomplices or otherwise culpable in murder. And it is highly unlikely that any of the killings by BATF agents will be treated as murder.35 To some, it would appear that a better case could be made that the BATF agents were guilty of murder than Koresh or his followers.

Storming a building believed to house at least 100 firearms, and housing dozens of women and children, to serve a search and arrest warrant certainly allows a charge that the ensuing deaths were foreseeable. And a case can be made that BATF has "no mandate to raid a compound of women and children with military force to find out if they are making illegal weapons." (Blum, 1993:31) If BATF was also using the armor-piercing Cyclone round as ammunition, that would show wilful disregard for the safety of noncombatants. One of the reasons most police departments prefer hollow-point rounds for normal use is that, in addition to increased stopping power, there is less danger of injuring bystanders either by ricochet or by the bullets penetrating walls. 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.36

While criminal cases against BATF are unlikely, civil suits for damage are beginning, and could prove successful. (Blum, 1993) And it is unclear how successful government prosecution of survivors will be. According to the attorney for Steve Schneider, one of the Branch Davidian leaders, Schneider was planning to come out of the compound, at least in part because "he would have had a very triable case." (Blum, 1993:31) If true of the leaders, it would be more true of the followers, most of whom were not mentioned in the Aguilera affidavit and were under suspicion for no crimes prior to BATF's attack.

Interestingly, just before the confrontation in Waco ended in conflagration, a trial began in Idaho where two men were charged with murder for the death of a U.S. Deputy Marshal during a siege in Boundary County. Again, a confrontation between a federal official attempting to serve a fugitive arrest warrant led to a shootout, there resulting in the death of the deputy and the fugitive's 13-year-old son_who was shot twice from behind by other deputy marshals as he ran from deputies who had killed his dog. (Seper, 1993a) The survivor of the shootout, Kevin Harris, was charged with murder, and the person sought on the warrant, Randy Weaver, with conspiracy in the murder of the deputy marshal.

As with Koresh, the government attempted to portray Weaver as a political and religious zealot who prophesied and then sought to create a holy war with federal agents, even though his clear goal had been to avoid government agents. (Sahagan and Conner, 1993) Weaver and Harris claimed self-defense, and that the government unjustifiably fired first. With no defense evidence even introduced, the jury acquitted the accused of all charges of criminal violence, which some saw as a possible lesson for what might happen in trials of the Branch Davidian survivors of the BATF assault on Mount Carmel Center. (Sahagan and Conner, 1993; Ingrassia, 1993; Egan, 1993)

There were clear differences. Although Weaver's original troubles began with BATF_after an undercover purchase of two shotguns which had been, on the buyer's insistence, sawed off to one-quarter inch below the legal limit, Weaver was offered the choice of cooperating in setting up some neo-Nazis or being charged, and he refused to cooperate_the siege and shootout involved other federal agencies, primarily the FBI. In the case of the Waco fiasco, BATF staged the February 28th raid alone (although some other agencies, like the Immigration and Naturalization Service, were tangentially involved). Following the disastrous and embarrassing loss of government agents, the FBI was brought in to serve the search and arrest warrants at Mount Carmel Center, and to make additional arrests for shooting BATF agents serving a valid warrant based upon an insupportable affidavit.

III. The FBI Standoff and Final Assault

Like the advertisement for two-bladed razors, after BATF set them up, the FBI cut them down. That was not the initial intention. The FBI was called in to add some professionalism to a law-enforcement disaster,

with the strategy of talking them out, no matter how long it took. (U.S. Dept. of Justice, 1993b:238) With up to 28 governmental casualties (over 35%) related to resistance from inside David Koresh's house and grounds, the majesty of the United States required a resolution, not a determination of whether BATF was responsible, or whether the affidavit justified a lawfully-issued warrant. According to Attorney General Reno:

From the start, the negotiation tactics focused on restricting the activities of those inside the compound, and depriving them of a comfortable environment so as to bring the matter to a conclusion without further violence. Those inside the compound were advised of the FBI's rules of engagement. Under those rules, agents would not use deadly force against any person except as necessary in self-defense or defense of another, when they had reason to believe that they or another were in danger of death or grievous bodily harm.

The FBI installed lights to illuminate the compound at night and loudspeakers to ensure that they could communicate with all members of the compound at once, rather than having to rely solely on the single telephone line available to speak to Koresh and those he permitted to talk on the phone. They also used the loudspeakers to disrupt their sleep, cut off their electricity, and sought to restrict communications of those within the compound to the hostage negotiators. Additionally, they sent in letters from family members, and made other good faith efforts designed to encourage surrender by those who wished to leave the compound. In particular, the negotiators made repeated efforts to secure the release of children. (Reno, 1993:3-4)

There is some inconsistency regarding the rules of engagement. In the smaller scale standoff in Idaho, in 1992, the rules of engagement were altered to allow FBI snipers to shoot any adult who was armed. Since virtually everyone went outside armed_in compliance with the laws of Idaho, and of most other states, since they were their own private property_everyone was a target outside the cabin. There, with the claim that the FBI's Hostage Rescue Team (HRT) snipers can hit a quarter size target at 200 meters, a sniper said he fired at a person outside the cabin whom he believed to be Kevin Harris, the man suspected of killing a deputy marshal, but he was actually firing at Weaver, a foot shorter and 20 years older, who was also outside the cabin, and succeeded in instantly killing Vicki Weaver, who was standing in the cabin doorway holding her infant daughter, with a bullet which then ricocheted into Harris, by then back inside the cabin. (Pate, 1993c:49; Spokesman-Review, 1993; Ingrassia, 1993) The same HRT, under the same leadership, served in both northern Idaho and Waco. (U.S. Dept. of Justice, 1993b:145; Seper, 1993c)

Attorney General Reno may have misstated the rules of engagement, at least as they were explained to David Koresh and his followers. They were warned that if FBI agents perceived any threat to themselves or others, they would shoot, and the rule was, "no one will be allowed to exit the building with a weapon." (U.S. Dept. of Justice, 1993b:42) This was amended after about ten days by prohibiting anyone's leaving the house without advance permission from the FBI. (U.S. Dept. of Justice, 1993b:62) The FBI used firecracker-like "flash bangs" fired at violators, to enforce the rule against leaving Koresh's house without permission. No one violated the more threatening rule.

One issue is whether the FBI would have been justified in using sniper fire to remove Koresh in an effort to end the confrontation with minimal additional bloodshed. While to kill generally violates the rules of engagement, the FBI insisted that the children in the compound were being held and used as hostages. FBI Deputy Director Floyd Clarke told the House Judiciary Committee that the Branch Davidians had used their children as human shields. (Lee, 1993a:26) In hostage situations, the suspect presumably is such a threat to the lives of others that the rules of engagement would allow sniper fire to remove a hostage holder. Richard J. Davis, one of the outside experts called in by the Justice Department to review the incident, suggested such a killing would only have been appropriate in a true hostage situation, where people were being held against their wills. (Davis:23, in U.S. Department of Justice, 1993a)

Since the FBI was largely treating the situation as a hostage situation, at least for some of the residents of the compound, it is unclear why the FBI was so restrained, although it may have been seeking to avoid a

repeat of the Idaho killing, widely perceived in northern Idaho as a murder by the FBI sniper involved. The excuse given for choosing the time for the final assault_concern for the children_would appear to have justified the theory that Koresh was endangering them, in which case sniper fire to save them might have been warranted.

Until the final assault, however, the actions by the FBI were not designed to make the children in the compound safe and comfortable. The psychological weapons used on the Branch Davidians to deprive them of sleep (Sessions, 1993:10-11)_floodlights, the sounds of loud music, Tibetan chants, previously recorded negotiations, squawking birds, dying rabbits, etc.37 (U.S. Dept. of Justice, 1993b:78, 82, 88; Dennis, 1993:45)_used contrary to the negotiators' advice (Dennis, 1993:45), would presumably have been at least as efficacious against the children's sleep, and, to the extent any child abuse might be aggravated if the adult is irritable, had the effect of increasing such a risk. Interestingly, having used extensive efforts to cause conditions in the compound to deteriorate by cutting off electricity and the FBI's sleep-deprivation efforts, the FBI concluded that, "The children were living in a deteriorating environment, and that the prospect of sexual or physical abuse was likely as the standoff continued." (U.S. Dept. of Justice, 1993b:226)

Since, in hostage situations, time is generally perceived to be on the side of the government (Potok and Davis, 1993), it is unclear why the final assault suddenly occurred. The perimeter could have been controlled with limited manpower during extended hostage-type negotiations. (Hedges and Seper, 1993) Indeed, during the three weeks prior to the final assault on the compound, the FBI was making it easier to control the perimeter by removing trucks and cars, putting wire around the perimeter, and using "flash bangs" to limit freedom of movement around Koresh's house or on its roof.

Others complained that the FBI even treated the matter like a hostage situation since it involved a cult whose members were there voluntarily, with most subject to arrest, and possible loss of custody of their children, not a celebration of liberation, when the standoff would end. (Goleman, 1993; Christian Science Monitor, 1993) Koresh, especially, was rumored to fear the treatment a suspected child sexual abuser might receive in prison. In addition, he was concerned that his children, by various "wives," not only would be taken from him, but custody by their mothers would also be denied; the children would, instead, be placed outside the family in foster care. (Washington Times, September 6, 1993:A2) One of the psychiatrists consulted by the FBI noted Koresh's profound fear of prison. (U.S. Dept. of Justice, 1993b:163)

On the other hand, it is not at all clear that even Koresh, and even less likely that many of his followers, would actually go to prison. And that, apparently, was known to Koresh and his followers. According to Koresh's attorney, he was confident he would be exonerated in court after the standoff ended (Bradford, 1993:29), as was one of his key associates. (Blum, 1993) Even the FBI Director emphasized that Koresh was thinking of the future, having been successful in court before, and considering the profits from book and movie rights. (Sessions, 1993:22) The model Koresh and his associate had to go on was that of Weaver and Harris.

The preliminary motions involving Weaver and Harris_charged with gun-law violations and with murder for a death which occurred when a fugitive warrant was served related to those gun-law violations_had begun before BATF's assault on the Branch Davidian household. And those preliminary motions were not helping the prosecution's case. (Spokesman-Review, 1993:A9) The actual trial began between when the FBI began formulating its plan to use tanks to insert tear gas into the compound and when that assault occurred. It is unknown_and will probably never be known_whether the publicity certain to come with the Weaver-Harris trial, and the probable outcome, played any role in encouraging some of the FBI visionaries to finish off the Waco standoff regardless of possible deaths to Koresh and other leaders, or especially if those deaths might prevent any similarly embarrassing trial in Texas as the FBI was facing in Idaho.

The possibility of Koresh and his followers winning freedom would certainly be an effective negotiating

tool. However, while the FBI was advised to note the possibility, and assured Koresh aF agents were killed and 14-28 others wounded_some probably struck by "friendly fire"_as were some Branch Davidians.

The incident was followed by a 51-day standoff led by the Federal Bureau of Investigation (FBI), including negotiations, the release of some of the adult and child residents of Mount Carmel Center, and psychological warfare efforts by the FBI, including bombardment with loud music and other unpleasant noises. Then, having grown impatient, the FBI, on April 19, 1993, began ramming holes intond his followers due process of law should they surrender to the authorities, the FBI also always told Koresh he would probably go to jail. (U.S. Dept. of Justice, 1993b:163-64) This was contrary to the advice of, among others (Dennis, 1993:49), psychiatrist Park Elliott Dietz, who was later relied upon to note the unlikelihood of a quick negotiated end to the standoff. He advised the FBI to distance itself from BATF "and express sympathy with Koresh's anti-BATF views. Dr. Dietz expressed the opinion that Koresh would choose death over losing power, and therefore the negotiation strategy should create the illusion that Koresh would not go to prison but would emerge with more followers than he had before." (Dennis, 1993:43) Some criticism of BATF could have been facilitated had overly-broad search warrant been released to the public, which would have raised questions about the basis for the raid, and made such a negotiation tactic more effective. The purpose of the sealing the search warrant ended when it was released to Koresh on March 19th (Dennis, 1993:15) and its release might have contributed to negotiations along the lines suggested by Dietz.

Despite the obvious possibility of using the Weaver-Harris trial for that end, the FBI did not use that tactic. Based on Deputy Attorney General Philip B. Heymann's remarks, such negotiation was unthinkable: "Certain peaceful negotiated outcomes, such as holding out the hope that some suspects might escape prosecution for serious offenses, were necessarily foreclosed. For David Koresh, surrender meant giving up everything, and possibly facing a death sentence. There was little for negotiators to offer him," (Heymann, 1993:4-5)

The official reason for escalating was that the HRT had been on the scene and was tiring, that there were no replacements, and that there was harm likely to the children from the deteriorating conditions in the house, if not from escalating abuse from David Koresh. (Sessions, 1993:20-22; U.S. Dept. of Justice, 1993b:247) There was apparently frustration and resentment by the HRT members that, while on duty, they suffered from poor weather conditions and the Branch Davidians were growing bolder and more comfortable in their house. (Isikoff and Thomas, 1993:A15) In fact, however, the FBI was curtailing any boldness by firing "flash bangs" and assuring lack of comfort in the house by shutting off the electricity. (U.S. Dept. of Justice, 1993b:98, 101, 140) If the HRT members were growing tired, however, that would have argued for reducing or ending the noisy psychological warfare against the compound, since such operations work on both sides, and effectiveness presumes fresher personnel than those at whom the warfare is aimed.

There was additional concern of risks to government personnel from accidents, exemplified by an FBI helicopter accident the week before the final assault. (Reno, 1993:7-8; Lee, 1993a:26) There are four areas of dispute regarding the FBI's actions. First is the issue of whether the FBI was justified in dramatically increasing pressure on Koresh due to the alleged uselessness of further negotiations. Second is the issue of whether the FBI was increasing pressure on Koresh or seeking to end the confrontation on the day of escalation. The third is the propriety of putting CS gas into the house. And the fourth is the issue of possible risks to innocents inside the house, particularly children, either from Koresh's response or as a result of accident.

A. Had Negotiations Reached a Dead-end?

The FBI's view was that negotiations were going nowhere, that Koresh never told the truth and would never come out. Therefore, it was necessary to go in, especially as the HRT men were tiring with tempers fraying. (U.S. Dept. of Justice, 1993b:71) The FBI saw increased threat to the perimeter they were maintaining from troublemakers on the outside and willingness to go outside the house by Branch

Davidians. (U.S. Dept. of Justice, 1993b:151-154)

The theory that Koresh was utterly refusing to negotiate in good faith was based on refusing to credit Koresh with releasing any hostages through negotiation. A leader of the FBI's efforts "was convinced that the FBI had not succeeded in getting anyone released from the compound through negotiation....he had never been in any previous situation in which he had experienced such a total impasse." (U.S. Dept. of Justice, 1993b:270) Thirty-five persons had been released over time in what looked like negotiation, and some of those results appeared to be followed by punishment, with the loud noises and lights of psychological warfare, shutting off electricity, and removing automobiles from the compound after several persons exited. (U.S. Dept. of Justice, 1993b:140)

The decision to escalate pressure reportedly followed a psychological analysis of two of Koresh's letters, showing that "Koresh was a possibly functioning, paranoid-type psychotic and that he had no intention of surrendering." However, "The FBI began to finish plans for inserting nonlethal Orthochlorobenzalmalononitrile (CS) tear gas into the compound" on April 9, the same day the letters were sent to the experts. (U.S. Dept. of Justice, 1993b:100-101) The analyses were not received until after the plans were nearing completion. Furthermore, the letters, which included much religious citations, were sent only to psychiatrists. "But there is no indication that its thoroughgoing religious content, worldview, and significance were analyzed by anyone competent in religious studies," who might have reached different_possibly more accurate_conclusions. 38(Lawrence E. Sullivan, Harvard University Center for the Study of World Religions:4-6, in U.S. Dept. of Justice, 1993a)

And the Justice Department's analysis of them is inexact. One of the experts said Koresh was unlikely to agree to leave anytime soon. But that conclusion was based partly on the fact that the FBI had not distanced itself from BATF and that negotiations were "repeatedly undermined by ancillary actions." Had his recommendations been followed, far from being pointless, negotiations might well have found their ideal time from mid-April and the time after would have been ideal for using the Weaver-Harris trial to suggest to Koresh the possibility of his going free and his power actually being enhanced. (Dennis, 1993:43,53; U.S. Dept. of Justice, 1993b:166).

The other expert the FBI said concluded that Koresh would never come out voiced the concern that Koresh "may have been planning to set his own trap for the FBI, including 'the destruction by fire and explosion' referred to in many of the scriptural references contained in the April 9 letter." (U.S. Dept. of Justice, 1993b:176-177) Indeed, when the FBI began to clear the area around the house on April 18, preparatory to the April 19 tear-gas attack, Koresh reportedly warned that "this could be the worst day in law enforcement history," and a sniper later reported that he had seen a sign in one of the windows reading "Flames Await." (U.S. Dept. of Justice, 1993b:283-84).

B. Escalating or Ending the Standoff?

The FBI supposedly was merely escalating pressure on Koresh when it began to ram Koresh's house with tanks to pump in CS gas. The plan was proposed a week before being put into effect, and was to allow some Branch Davidians to escape and to encourage serious negotiations with Koresh. (Isikoff and Thomas, 1993:A15) The official "plan was to insert gas periodically over a 48-hour period, to then withdraw, and then to wait as large numbers of people left the compound." (U.S. Dept. of Justice, 1993b:5) "It was not law enforcement's intent that this was to be 'D-Day.'" (U.S. Dept. of Justice, 1993b:267) That, at any rate, was the plan as approved by the Attorney General, and emphasized in her conversations with the President. (U.S. Dept. of Justice, 1993b:273)

She testified: "I directed that if at any point Koresh or his followers threatened to harm the children, the FBI should cease the action immediately. Likewise, if it appeared that, as a result of the initial use of teargas, Koresh was prepared to negotiate in good faith for his ultimate surrender, the FBI was to cease the operation." She further authorized return of fire, and praised their response, which was to escalate still further the tear gas pumping rather than returning fire. (Reno, 1993:6-7)

On the other hand, while the FBI at first used a telephone_promptly rendered ineffective by residents of the compound, ending all formal communications_and loudspeakers to insist the tear gas was just a slight increment in pressure, everything the FBI did and said to the Branch Davidians indicated the FBI personnel on the scene were treating April 19th as D-Day. As soon as the tanks began making holes in the house and inserting tear gas by tank and firing canisters through the windows, a loudspeaker system announced that everyone was under arrest and should come out immediately_"You are under arrest. This standoff is over." (U.S. Dept. of Justice, 1993b:110, 286) The loudspeaker also said anyone going to the tower, perhaps to escape the fumes, "will be considered to be in an act of aggression and will be dealt with accordingly," despite official rules of engagement, which require real threat to life before such actions are taken. (U.S. Dept. of Justice, 1993b:286)

By mid-morning, despite pleas from the Branch Davidians to reconnect the telephone_their life-line to the outside world_the FBI refused to reconnect the telephone unless the "Davidians clearly indicated they intended to use the phone to make surrender arrangements." (U.S. Dept. of Justice, 1993b:292)

As the tanks completed their breaching operations, the loudspeakers were used to taunt Koresh, who disliked being called Vernon, known to be possibly suicidal and eager to maintain power, in the manner of someone shouting "Jump, coward" to someone on a the ledge of a tall building. "David, we are facilitating you leaving the compound by enlarging the door. David, you have had your 15 minutes of fame....[ellipsis in original] Vernon is no longer the Messiah. Leave the building now." Six or seven minutes later, the fire started. (U.S. Dept. of Justice, 1993b:111, 294-295) .

Despite the fact that the FBI clearly tricked the Attorney General and the President into approving a plan intended by them instantly to end the standoff, and the result was the deaths of an estimated 75 persons, neither of those officials has criticized the FBI.

C. On the Use of CS Gas

The FBI also deceived the Attorney General, and the Justice Department report continues that deception, regarding the effects of the CS tear gas. Experts assured her that it produced short-term discomfort, but had no long term effects and posed no special threat to pregnant women, children, or others. It was, in short, merely to cause tears, coughing, sneezing, etc., and at worst a feeling of suffocation and mild burns in sensitive people. (U.S. Dept. of Justice, 1993b:105-106, 266-270, Appendix J) Apparently, she was not told those were not the only effects, particularly when the gas was used inappropriately_indoors.

There are a number of problems with the CS tear gas used against the Branch Davidians. It ceases to be relatively harmless for the young or when it is otherwise misused_as it apparently was at the Ranch Apocalypse. The U.S. Army manual on Civil Disturbances, for example, notes that although CS and other agents "will not seriously endanger health or cause death when used properly, their use in buildings or other closed areas requires caution to avoid producing excessive concentrations of the agent....The dispersers should not be used to introduce a riot control agent directly into a closed structure except under extreme circumstances." (U.S. Department of the Army, 1975:6-1 and 6-3)

With regard to the idea that the gas was supposed to drive the Branch Davidians out of their house: "Generally, persons reacting to CS are incapable of executing organized and concerted actions and excessive exposure to CS may make them incapable of vacating the area." (U.S. Department of the Army, 1975:6-3) In addition, the tanks crushed a stairwell sealing off "what the FBI had touted as the major escape route for children and women," according to the arson investigator chosen to review the inferno. (Crime Control Digest, September 6, 1993:9) That, of course, would make it even more difficult to escape from the house.

Others have noted that CS gas, inserted into enclosed places like buildings, may immobilize by causing nausea, vomiting and vertigo, that the gas itself may hamper movement of rioters because of severe onslaught of symptoms, that it should not be used "where innocent persons may be affected...[or] where

fires may start or asphyxiation may occur." (Lee, 1993b; Army Institute for Professional Development, n.d.:129) And there is evidence that by putting the gas "into enclosed areas such as rooms or small courtyards...such misuse of the gas can be harmful, especially to small children, the elderly, pregnant women and people suffering from heart or lung problems." (Frankel, 1985)

A study in the Journal of the American Medical Association noted that direct contact with the tear gas powder could cause sustained blistering skin burns, and although recovery is normally rapid (within minutes), side effects lasting up to weeks could include coughing and shortness of breath, and persons with asthma or chronic obstructive lung disease could require hospitalization. In addition to causing crying and temporary blindness, the CS can induce nausea, vomiting and possibly diarrhea_the compound lacked normal bathroom facilities_and headache. The authors questioned its further use "under any conditions." (Hu, et al., 1989)

The harm from CS gas, as the FBI knew, was in inverse proportion to the criminal culpability of those exposed to it in the Branch Davidian compound: children, women, older men would be the most affected, but the least culpable; young adult males the least affected and the most criminally culpable. And the government also knew, as an affidavit filed the previous day showed, gas masks were available (Dunagan, 1993c:6)ùat least to adults. One possibility is that the FBI hoped mask-wearing adults would be willing and able to escape to protect the unmasked children, the only ones expected to get the full brunt of the CS gas.

There was no fire equipment present or on call,39 despite the Attorney General's insistence that "I was concerned about intentional or accidental explosions and ordered that additional resources be provided to ensure that there was an adequate emergency response" (Reno, 1993:7), and FBI Director Sessions' insistence that there was a "fire contingency plan"_which expressly included determining that it would not be safe or useful to have fire trucks in the vicinity (Sessions, 1993:15, 18; U.S. Dept. of Justice, 1993b:302).

In fact, there was no effective plan, and any fire was likely to spread quickly in the brisk warm wind, and the FBI used tanks to alter the normal escape routes from the house. And the FBI was pumping in a gas which could disorient persons so they could not find an escape route, or could immobilize them by causing nausea, vomiting, and vertigo, into a tinderbox of a house, where hay was used for bullet resistance, and where lighting was achieved with kerosene lamps and heat with propane tanks. This was done to save the children, whose morning hours of government-supplied torture was completed with early-afternoon death. It is unclear whether fire equipment would have done any good, but it was not summoned until ten minutes after the fire began, and the firemen were held up by the FBI for 16 minutes after nearing Mount Carmel Center. (Pate, 1993b:41) According to the FBI, fire equipment had to be delayed "Because the exploding ammunition made it too dangerous" (Sessions, 1993:18), although when ammunition burns, it does not explode.

D. Predicting Koresh's Response

From early after the initial shootout between the Branch Davidians and the BATF, one widely discussed possibility was a mass suicide. (Lee, 1993a:29) One reason BATF adopted the assault method for serving the warrants rather than putting a siege into effect was the fear of suicide. (U.S. Dept. of Treasury, 1993:9) According to child psychologists who talked with the children released from Ranch Apocalypse, and who were consulted with by the FBI prior to the final assault on April 19th, children were taught how and that they might have to commit suicide. (Rimer and Verhovek, 1993:B11; NBC Evening News, May 4, 1993)

On April 19th and thereafter, the authorities expressed total surprise that Koresh may have ordered mass suicide through the burning of his compound, assisted by gunshots to limit the suffering of some of the Branch Davidians, including Koresh. FBI Director Sessions was quoted saying, "None of us expected them to commit suicide" (Pate, 1993b:39): "[E]very single analysis made of his writing, of what he had said, of what he had said to his lawyers, of what the behavioral science people said, what the

psychologists thought, the psycholinguists thought, what the psychiatrists believed, was that this man was not suicidal, that he would not take his life." (Lee, 1993a:29) Similarly, AG Reno noted that "experts had advised the Bureau that the chances of suicide were not likely." (Reno, 1993:7)

The FBI director was not telling the truth. One of the psychologists (Dr. Bruce D. Terry) told the FBI only that Koresh would not personally take his own life, but also advised that he would arrange "an abstract suicide_some way for everyone to die, like setting up a large-scale explosion." (Rimer and Verhovek, 1993:B11) Another, Park Dietz, thought Koresh might have a mass suicide. And the FBI's Behavioral Sciences Unit suggested Koresh might arrange a "suicide by cop," where someone arranges for law enforcement to take his life. (U.S. Dept. of Justice, 1993b:161, 184) At best, FBI experts were uncertain, seeing inconsistencies regarding Koresh and the likelihood of mass suicide. (U.S. Dept. of Justice, 1993b:50, 157, 210-214)

Curiously, the FBI was reassured that suicide_if that is what it wasùwas unlikely because David Koresh assured them that suicide would not occur_although the FBI's reason for bringing more pressure on Koresh was that he never told the truth and the FBI could thus no longer negotiate with him in good faith. (Isikoff and Thomas, 1993) The Justice Department review makes it clear that Koresh regularly denied plans for suicide (U.S. Dept. of Justice, 1993b:37, passim.) On the other hand, there were frequent suggestions by the Branch Davidians that fire (or explosion) might be planned. At least twice the Branch Davidians suggested the government might destroy the compound to destroy the evidence. (U.S. Dept. of Justice, 1993b:52-53, 68) And there were other references with less clarity as to cause regarding fire and explosions, including a sign in the window the day before the final FBI assault, reading, "Flames await." (U.S. Dept. of Justice, 1993b:109, 177, 283-84)

Left to be explained by the FBI is why the listening devices secreted in items carried inside the compound, which told the FBI it had no optimism for a resolution (Isikoff and Thomas, 1993:A15), did not tell them that Koresh planned to burn the house in a mass suicide in case of an attack on April 18, the day before the assault. (Baltimore Sun, May 7, 1993:A8) Also to be explained is why it was reported that Koresh gave instructions to spread flammable fuel "on learning of the FBI teargassing plan." (Skorneck, 1993)40

According to one FBI spokesman, Bob Ricks, Koresh actually planned his suicide to include murder of assaulting FBI personnel, and that when the tanks began to withdraw after Koresh had ordered the fires lighted, he attempted to abort the murder-suicide, shouting "Don't light it up," but it was too late. (Washington Post, August 26, 1993:A6) Ricks, of course, was not in nor especially near the compound; tanks do not travel silently; and his statement was not reported promptly. The statement is supported by a statement from one of the so-called "Mighty Men" (U.S. Dept. of Justice, 1993b:App.F-3)_one of the males in the compound who enforced the will of Koresh-_who survived the blaze. He reported hearing words like "start the fires," "Light the fire," and "Don't light the fire," He also denied any knowledge of any suicide pact, making it hard for that Mighty Man to help enforce the decision. (U.S. Dept. of Justice, 1993b:301)

If the FBI analyses of Koresh's reluctance to kill himself were accurate, the fire could have been started without Koresh's authority by others in the cult, or accidentally by the FBI. The Justice Department review finds accidental fire unlikely because the fires started after the tanks had withdrawn. That statement is not entirely true. The tanks withdrew around 12:08 p.m., seconds after the fire began. (U.S. Dept. of Justice, 1993b:294-295) That timing would certainly fit in with the theory that tank damage to kerosene lamps and propane tanks accidentally started the fire, and would partially conflict with the theory that Koresh tried to call off the fire because the tanks had left_although it is possible Koresh had seen some tanks pull back before the final one left after the fire began.

Somewhat undermining confidence that the fire was started deliberately by Koresh or his people is the fact that the "independent" arson investigator chosen to review the evidence, Paul Gray, is married to a BATF employee, socialized with his wife's colleagues, including one of the agents killed in the BATF assault on Mount Carmel Center, Steve Willis, whose funeral he attended. Additionally, Gray's office used to be in

BATF offices in Houston, and he carried a card identifying himself as a BATF special agent, whether because he was on the payroll or to inspire more cooperation with investigations being unclear. Asked Jack Zimmermann, attorney for Steve Schneider: "Out of all the independent fire examiners they have in these United States...why didn't they pick someone from Chicago, or Philadelphia, New York, Miami, California?...Why do they pick a guy from Houston who worked in the ATF office until three years ago, who's married to an ATF employee who, I understand, may have had something to do with typing the warrant? And then went to the funeral of one of the four guys who was killed. How much more partial can you be than that?" (Pate, 1993d:74-75)

In addition, even if one accepts the FBI and Justice Department case that the fire was not started by accident by the government, they nonetheless understate the government's contribution to the deadliness of the fire. It is possible that the spread of the fire might have been enhanced by spillage of flammables caused by the tanks, but that would have been minor. (Dennis, 1993:33)

"The arson team also concluded that the Davidians could have escaped the fire if they had wanted." (U.S. Dept. of Justice, 1993b:113) Another review asserted that all who died were there voluntarily, held against their will, or shot to prevent their escape. (Dennis, 1993:2) Those statements do not accurately reflect the report of the not-quite-independent fire investigator. For one thing, in making holes in the building to allow Branch Davidians to escape, the removal of walls and the high winds contributed to the fire's spread, although the inspector attempted to undermine the fire-fanning effects of oxygen with the suggestion that the oxygen would also have lowered the concentration of carbon monoxide, and increasing the time a person might have survived if trapped. (U.S. Dept. of Justice, 1993b:App.D-6) It is not entirely clear what the benefits are of surviving longer while trapped.

And trapped they were. While not agreeing that all Branch Davidians could have escaped if they wanted to, a "great many of the occupants could have escaped to the outside of the compound even as the building burned." (U.S. Dept. of Justice, 1993b:App.F-9) However, "It is also possible that the escape route planned included the...tunnel system accessible through an opening in the floor at the west end of the building. A significant amount of structural debris was found in this area indicating that the breaching operations could have caused this route to be blocked. (U.S. Dept. of Justice, 1993b:App.D-10) Thus, in addition to death from fire, smoke and carbon monoxide inhalation, gunshot wounds, blunt trauma, and stabbing, some were "buried alive and suffocated in the bunker." (U.S. Dept. of Justice, 1993:314-328)

Whether the fire was the result of intentional or accidental actions by the FBI or by the Branch Davidians, the FBI, acting under orders from the Attorney General, clearly facilitated the murder of dozens of innocent persons. The torture of adults, whose only offense was devotion to a man with unusual religious views, and of children, not necessarily even guilty of that, by tear gas was the FBI's plan and intention, and their death by fire was clearly foreseeable. The conflagration marked the culmination of an effort to serve search and arrest warrants involving victimless crimes and obtained with an affidavit demonstrating ignorance and deception rather than probable cause that a federal crime had been committed.

IV. The Cover-Up

The government immediately began a cover-up. To prevent its completion, on the motion of attorneys for David Koresh and Steven Schneider, U.S. District Judge Walter A. Smith, Jr., ordered that all BATF audiotapes and videotapes of the raid on Ranch Apocalypse be preserved, not trusting BATF, under the circumstances, to determine which were_and only to save those_exculpatory. (Order, April 20, U.S. v. Vernon Wayne Howell, U.S. District Court for the Western District of Texas, Waco Division) But BATF refused to make public the videotape it made of the episode. (Labaton and Verhovek, 1993:20)

The BATF approached Koresh's gun dealer, Henry McMahon, and his partner Karen Kilpatrick, on March 1. They were interviewed in Florida, and later kept away from home for about two weeks, constantly admonished not to talk to the press or to the FBI. (McMahon and Kilpatrick, 1993:193-199, 205; Pate, 1993e:39-40) While a review committee was named, it was initially told not to review the actions of April

19th (Labaton, 1993b), although that quickly changed. (Labaton, 1993c) And, of course, evidence was destroyed by the FBI as part of its conduct of the negotiations with Koresh, much to the chagrin of the Texas Rangers (U.S. Dept. of Justice, 1993b:228-230) and then the Branch Davidian compound was bulldozed once the Texas Rangers, FBI, and BATF had completed their clean-up operation. While ostensibly for reasons of health, a thorough study of evidence by unbiased parties was rendered moot.

Nevertheless, as the group reviewing BATF's actions neared completion of its task, the Treasury Department sought a proposed rule "to exempt a system of records, the Waco Administrative Review Group Investigation (DO/207) from certain provisions of the Privacy Act," (58 Federal Register 43312, 08/16/93) While some law enforcement records are thus exempt, the attempt to exempt these non-law enforcement records is clearly intended to hide material from Branch Davidians, their survivors, and the public. And the National Association of Medical Examiners barred the public and the news media from part of their conference discussion regarding the Branch Davidians on the grounds that some of the information revealed might have hindered the prosecution of surviving cult members. (Mahlburg, 1993)

The Treasury and Justice Department reviews of the actions, respectively, of the BATF and FBI, amounted to cover-ups, as might have been expected when a department reviews itself. The Treasury Department review claimed there was no evidence of religious bias in the investigation (1993:121), approved the stale and unconvincing allegations of a supposed drug nexus that justified the use of National Guard helicopters, merely suggesting that the criteria for using such helicopters be made more clear (1993:16, 212), and rhetorically referred to David Koresh's firetrap as a "fortress-like compound." (1993:9) Treasury also reported that the BATF assault was met with machinegun fire (1993:101), although firearms experts who have heard videotapes of the incident have heard no such regular rapid fire.

With no supporting evidence, and despite substantial evidence, the report ignored friendly relations between Koresh and law enforcement, Treasury repeatedly asserted Koresh had the overpowering hatred of law enforcement, particularly of BATF; no supporting documentation was ever provided. (1993:8, 172) Indeed, the Justice Department review noted: "Koresh's hatred of the government did not always seem apparent. The tapes of the negotiations between Koresh and the FBI contain many lighthearted moments, and many hours of calm, peaceful conversations between Koresh and the negotiators. Koresh even proclaimed his admiration for law enforcement during some of the conversations." (U.S. Dept. of Justice, 1993b:209)

Treasury falsely asserted that probable cause was obtained, and, indeed, obtained by December (1993:8, 122), in conflict with the chronology which makes it clear any probable cause was not found until 1993 (1993:App.D-3-6) It asserts that "Neither Koresh nor any of his followers were registered owners of any M-16 machineguns, indeed, of any machineguns at all" (1993:123), even though Aguilera (1993:5) made it clear he had checked very few names for possible registration.

Treasury accurately noted that of two explosives experts consulted, one said Koresh was clearly in violation of the law, and the other said otherwise. (1993:31, 124, App.D-7-8) The Treasury report failed to note that the one asserting a violation of law incorrectly asserted that the quantities of black powder and igniter cord possessed were explosives requiring proper registration and storage, which were lacking. (1993:31, 124) That amounted to a misstatement of the law, since the quantity of blackpowder was below that requiring conformance with any storage requirement, and neither requires registration. Similarly, the assertion that possession of the blackpowder and inert grenades constitutes an explosive grenade because it is possible to make one is misleading. Not only are more materials needed, along with machinery to drill and plug a hole, but without intent, there is no violation of the law. (1993:App.B-156) So BATF in conducting its investigation, and Treasury in conducting its cover-up, both misled about what constituted a violation of the law with regard to destructive devices.

Treasury further falsely asserted that Koresh had all the materials needed to convert semi-automatic rifles to full-auto capability (1993:22-24, App. B-156), a statement in conflict with the views of Treasury's own experts (1993:App. B-164-165, App. B-182) Oddly, considering BATF had been investigating possible

unlawful conversion of a semi-automatic rifle into a machinegun, one of BATF's experts opined that something should be done to inhibit the sale and conversion of semi-automatics into machineguns. (1993:App.B-113)

And, finally, although it is known that Koresh's gun dealer told the Treasury Department investigators about the invitation Koresh had issued for BATF to visit the compound_and that the head of the investigation, H. Geoffrey Moulton, Jr. (1993:218), knew about that detail (private communications), the fact is ignored in the Treasury Department review. Instead, Treasury_and at least one reviewer, Los Angeles Police Chief Willie Williams_note only that the dealer allegedly lied about some lower receivers Koresh possessed by referring to him sometimes as Koresh and other times by the name on his driver's license, Vernon Howell. (1993:26, 218, App. A-7) With allegations of some injury or death to BATF agents from "friendly fire," although the report denies the allegation, it fails to report any specifics with regard to the ammunition involved in the shootings of government agents on February 28th.

The Justice Department's cover-up was more limited, in the sense that the overall report included the various conflicting recommendations which were obtained over the 51 days of the standoff, with the conclusion that no one was to blame for anything which went wrong except for Koresh. (U.S. Dept. of Justice, 1993b) The short summary review accompanying the more detailed one included such false statements as: "The Attorney General was adequately briefed on the tear gassing plan, was fully informed of the options, and was given a realistic appraisal of the risks." (Dennis, 1993:4) Furthermore, an additional review by outside consultants included severe criticisms of the FBI's failures, including its refusal to consult religious experts who might perceive the statements of a religious fanatic differently than either law enforcement or the psychiatrists assisting them. (U.S. Dept. of Justice, 1993a) Nonetheless, the news media found the "no fault" review of the Justice Department more puzzling than the Treasury Department's review. After all, while the Treasury Department ignored questions regarding why the raid was planned, it did severely criticize how it was carried out and the apparent cover-up which followed. (U.S. Dept. of Treasury, 1993)

V. Policy Lessons

Policy lessons are easier to envision than their implementation. After all, Attorney General Reno told the ABC News program "20/20" in July that she would approve the same actions nearly three months later, that there is nothing she would do differently. (Washington Times, July 9, 1993:A2) And, although it is clear that the FBI misled their new attorney general while planning the fatal assault on the compound_accidentally, perhaps, regarding child abuse, but intentionally regarding the lack of negotiation progress, the risk of possible suicide, and the effect of CS tear gas in an enclosed space_she defended the Justice Department cover-up (U.S. Dept. of Justice, 1993b; Dennis, 1993; Heymann, 1993) at the press conference for its formal release, October 8, 1993. Even Henry Ruth, an outsider reviewing, and approving, the BATF cover-up, asserted that the Justice Department review produced "limited, disingenuous assessments that raise more questions than they answer," insisting that "law enforcement can be taught by civilian control that a child's life takes precedence over seizure of evidence, that a tactical enforcement plan must first consider that government shall not once again be the instrument to fulfill the prophecy of apocalyptic deaths." (Ruth, 1993)

While Reno may lack 20/20 hindsight, others in the FBI and BATF are appalled at the actions undertaken by their organizations. That is one of the reasons information is coming out, but it is also one of the reasons much of the information is coming from unusual sources, as agents speak (or leak) to friends who write for right-wing publications or the gun press, or work for pro-gun organizations.41

A. BATF as Gun Law Enforcer

Columnists like Richard Cohen and Molly Ivins concluded that the Waco shootout showed that more restrictive gun laws were needed. With the possibility that some of the guns owned by Koresh were prohibited under federal law, the Ivins (1993) approach would put millions of additional Americans in the

same situation of possessing outlawed items, with BATF encouraged to make arrests of such persons, who otherwise had harmed no one. This led columnists like Paul Craig Roberts to note that Waco "happened precisely because of federal laws regulating gun ownership. The Branch Davidians hadn't assaulted anything. They lived peacefully in the community. Except for the federal gun laws, they would all still be alive. It wasnÆt the state of Texas that provoked the confrontation....The liberals' premise that gun ownership should be illegal, or at least heavily regulated, has created the atmosphere in which the ATF, like an unthinking bully, feels compelled to increasingly and brazenly show its presence." (Washington Times, April 22, 1993)

One columnist responded to the BATF's long reputation of abusing rights by calling for the agency's abolition. (Reese, 1993) Others certainly noted that BATF abuse was not new (Lesmeister, 1993)_although nothing ever matched overkill like the raid on Mount Carmel Center based upon the affidavit by agent Aguilera. "The ATF has a reputation for claiming to focus on 'career criminals' while going all out to get niggling gun charges on otherwise law-abiding citizens." (Pate, 1993a:64) It seemed actually to surprise BATF agents interviewing Koresh's gun dealer the day after the raid that the agency was still unable to find any criminal record on Koresh in its computer checks. (McMahon and Kilpatrick, 1993:156)

For some, the raid spurred a comparison with the Nazi assault on the Warsaw Ghetto, with both incidents spurred by a religion held in contempt by the government, a search for weapons, accusations of child abuse, news media serving as government propagandists on the dangers of the group attacked, and unexpected resistance. (Dingell, 1993) Until the release of Aguilera's affidavit, it certainly looked as though the primary reason for focusing on Koresh was the unpopularity of the Branch Davidians, leading Randy Weaver's attorney to note: "I dare say the Bureau of Alcohol, Tobacco and Firearms and the FBI could, if they choose, infiltrate the Salvation Army and find some timid soul who chopped down a Christmas tree in a national forest. The wearisome pattern of the government is to discover, usually with the trickery of undercover agents, a violation of some petty law in order to do in these tricklet groups." (Spence, 1993) With the release of the affidavit, it looked more as if BATF's action were not spurred to infringe on religious freedom alone but they attacked Koresh because he freely expressed political views critical of federal gun laws and showed a videotape denouncing BATF's actions in the past. (Pate, 1993c:49; Aguilera, 1993:15)

Koresh may well have violated some federal gun laws. Certainly, BATF insists that the material found after the fire at Mount Carmel Center justifies the warrant: "The charred remains of a large arsenal of firearms, ammunition, silencers, and explosive devices were discovered. Preliminary examination reveals that over 44 of the 237 firearms found were machineguns and, therefore, possessed in violation of federal laws. In addition, approximately 200,000 rounds of ammunition were found." (Letter from Deputy Director Daniel Hartnett to U.S. Rep. Jon Kyl, June 29, 1993) Firearms and ammunition, in general, would be legal. The silencers42 and machineguns would only be unlawful if not duly registered; and "explosive devices" are not defined or regulated by federal law. If, like Aguilera, Hartnett meant to say "destructive devices," those would be illegal if unregistered, but it is unclear to what extent the destructive devices envisioned in the affidavit would have survived an inferno intact enough to constitute evidence. With the machineguns, the question would be whether Hartnett's statement is true, and whether they were machineguns before BATF began examining them after the fire; BATF had the means, motive, and opportunity to convert Koresh's semi-automatics to full-auto capability. Hartnett's honesty is undermined by the fact that the letter goes on to insist, long after the statement was disproved, that Koresh did not leave or intend to leave the compound.

With a serious crime problem, there remains the issue of why BATF tries to make cases among the non-violent rather than focusing on those violent criminals actively acquiring firearm for criminal misuse. Reforms of the federal gun laws, pushed by the National Rifle Association and other pro-gun organizations, were geared in part to have federal law emphasize the seriousness of repeat offenders, and reduce some paperwork offenses to misdemeanors on which BATF was unlikely to focus. BATF even managed to make lemonade from what may have seemed like lemons, emphasizing its role in focusing on career criminals. (BATF, 1992) So long as victimless possession crimes remain felonies, however, BATF

is likely to engage in investigations of otherwise non-violent persons and persons without criminal records. The most that can be hoped for is that some oversight will limit gun laws being used with political motivation against those merely with unusual or offensive religious, racial, or political beliefs, and that Fourth Amendment protections are somehow enforced by law. It might be easier to impose a layer of effective oversight over the BATF than to hope for improvement from criticism alone.

B. Justice Department and Judicial Oversight of BATF

The Fourth Amendment envisioned having the independent judiciary exercise oversight of the executive branch, making sure there existed probable cause before privacy rights could be infringed by government. The Supreme Court has long insisted that, to enforce the constitutional protection, a warrant may only issue upon the determination of a neutral and detached magistrate that probable cause exists to believe that the search will yield evidence of criminality. The magistrate is to serve as something more than a rubber stamp. (Aguilar v. Texas, 378 U.S. 108 [1964]; United States v. Leon, 468 U.S. 897 [1984])

Magistrate Green did not so much as open the United States Code to determine that the crime Koresh was alleged to have violated was merely a definition of "destructive device" and that the affidavit usually referred to explosives or explosive devices rather than to destructive devices. He did not notice that virtually no one was alleged to have knowledge of firearms, that most of the allegations did not assert possible violations of federal law, or that most of the basis for belief there would be any evidence of a crime is that the evidence would be at the Mag Bag, not the Mount Carmel Center, and was over six months old.

One possible policy recommendation would be to amend the law to make it harder to obtain warrants for gun law violations, and to require by law that such warrants: (a) be reviewed and approved by a U.S. attorney before being presented to a judge or magistrate (although that might have been insufficient in this case); (b) admit hearsay in the affidavit only if the actual witness is unavailable by reason of death, or incapacity, unlike the Aguilera affidavit which used the sister of someone who may have known something about firearms; (c) establish a 30-day limit between the commission of the alleged illegal act and the date of the affidavit, where most of the Aguilera evidence occurred in early 1992; (d) obligate affiants to note possible exculpatory evidence, such as the Sheriff's investigation of alleged machinegun fire at Mount Carmel Center; (e) require that a person's qualifications be established where technical knowledge is required to establish probable cause, something utterly lacking for most of the persons who were supposed to have seen machineguns in Koresh's house; and (f) limit the time for which warrants, affidavits, and related items can be sealed prior to, and after, service, with periodic review if extensions are needed.

The changes would not alter the substance of the law, nor apply to allegations governing warrants for violent crimes or crimes with victims. The changes would merely limit the ease with which the government could obtain a warrant to enforce a victimless crime in an area related to the exercise of a constitutionally recognized right.

Another proposal, from Americans for Effective Law Enforcement, would establish more informal protocols, by agencies rather than by law, with judicial oversight only when law enforcement planned to take extraordinary actions, justifying to a court not merely the probable cause, but the need for use of extraordinary force, unconventional entry methods, abandonment of ongoing negotiations, and the like. (Schmidt, 1993)

C. Revive American and Media Support for Constitutional Freedoms

This is, of course, the most difficult of policy lessons to implement. Most of the news media simply accepted the propriety of the federal operation in Waco, criticizing its planning and performance but not its motivation, and accepting sharp limitations on their right to know which normally would have inspired editorials denouncing government-in-secret.43 (Cheshire, 1993) Some editorialists learned from the experience. The Nation began by sneeringly suggesting the Koresh was clearly "N.R.A. Gun Nut of the

Month" (Nation, 1993a), but noted that "The root cause of the lethal outcome was its central concept as a military operation. The Branch Davidians, after all, were initially accused of illegal weapons possession_hardly a casus belli in Texas. In response the Bureau of Alcohol, Tobacco and Firearms assembled an invasion force and marched on the compound." (Nation, 1993b)

Unfortunately, for most in the news media, and for most Americans, the FBI's actions became an acceptable conclusion. "Of all the troubling questions raised by the tragedy at the Branch Davidian compound near Waco, Texas, perhaps the most disturbing arose a few days after some 90 cult members met their firey [sic] death. It was then that several national public opinion polls reported that an overwhelming majority of Americans found no fault with the way law-enforcement authorities had brought the standoff to a head....Such enthusiasm for an exercise that was botched from the beginning, that ended in a horrible blood bath, and that continues to pose agonizing questions, ought to dismay all of us: We have allowed our national zeal for 'law and order' to carry us beyond the bounds of reason." (Knoll, 1993)

One real concern is that the news media have made gun ownership itself a dubious activity to large numbers of Americans, and when media dislike of firearms is combined with popular and media dislike for persons with quirky religious or political views, the public is willing to accept almost any amount of government-sponsored violence to achieve a "two-fer": constitutional rights must be preserved, in the media's eyes, unless First Amendment rights and Second Amendment rights are both being violated in the same operation. One columnist noted: "It has been said that a 'cult' is what we call a religion that we don't like. Perhaps the Branch Davidians were so unlikable that they blinded federal authorities and, for that matter, most of the rest of us to common sense." (Page, 1993) There is, or should be, serious concern that there may be merit in the new bumper sticker, popular among some gun collectors: "Is your church BATF approved?"

An Oliphant cartoon depicts a Koresh-type character marching with a sign reading, "The end of the world is coming." On the back of the sign, it reads: "We gratefully acknowledge the kind assistance of the FBI, the ATF, and the Department of Justice in the production of this prophecy."

That is not the job of the federal government, and it is appalling that the American public so quickly accepted its revised job description. Criminal investigations of religious groups for possible technical gun-law violations are not supposed to result in government authorization to kill persons, most of whom are innocent of any suspected criminal wrongdoing.

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ENDNOTES

1. Initial press reports put the figure at "more than 100" (e.g., Associated Press, 1993), which were not revised downward until recently. (Labaton, 1993d) Although there were 76 agents involved in the raid, over 130 were involved in the overall operation in and around Waco. (U.S. Dept. of Treasury, 1993:173) Interestingly, as soon as the raid began, the Branch Davidians telephoned "911" to complain about the attack on their house, saying there were about 75 attackers. (Thomas, 1993)

2. A schismatic branch of the Seventh Day Adventists envisioning establishment of a Davidic kingdom in Palestine. (Melton, 1978:467)

3. "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

4. A third reason for purchasing firearms was protection. Koresh received enough hate mail to cause some concern, and George Roden, the person with whom Koresh and a few of his followers were involved in a shootout in 1987 regarding who had lawful control over the Center after the death of its previous owner, had reportedly threatened to come back, saying, "I'm not going to come back with BB guns," and he was a concern to Koresh. (McMahon and Kilpatrick, 1993:105-106)

5. As with much of the BATF operation, it was poorly done. Compliance inspections are ordinarily preceded by telephone calls; this one was not. Aguilera was sloppily dressed, had no identification, and, although introduced as an inspector trainee, not a special agent, made the decision not to visit Koresh's house. McMahon and his partner did not believe it to be a normal compliance inspection.

6. The Treasury report said the gunpowder and igniter cord "were themselves explosives requiring proper registration and storage_neither of which Koresh provided." How he could provide the registration or demonstrate the proper storage without being asked is unclear. In fact, the small amount of gun powder is expressly exempt from the law, and no registration is required for igniter cord. U.S. Code, Title 18, ºº841 et seq.; Title 26, paragraph 5845(f). Treasury's comprehension of the laws it enforces is flawed.

7. BATF would reinterpret that episode, suggesting a tie between the child refusing to touch a gun and her being "allowed to leave" the compound. (Dunagan, 1993c:3n)

8. The date of the assault was moved from a weekday to a Sunday, February 28, because the Waco newspaper began an expose earlier than BATF had expected, or wanted. The result was that many more

men, and some additional children, were at Mount Carmel Center when the warrant was served than would otherwise have been the case.

9. There are unsubstantiated rumors_subject to substantiation only if the matter comes up in judicial proceedings flowing from the Waco incidents _floating around federal law enforcement circles, that there was some judge-shopping necessary to find a judge willing to issue warrants based upon Aguilera's affidavit. Since he was assisted by the U.S. Attorney's office, it would seem more likely that the attorneys simply knew which magistrate would be most willing to rubber-stamp the application for search and arrest warrants.

10. The text of the Treasury report called the materials Koresh ordered "conversion kits" and said: "The parts in the kit can be used with an AR-15 rifle or lower receiver to assemble a machinegun....The parts in the E-2 kit also can be used to convert an AR-15 into a machinegun." (U.S. Dept. of Treasury, 1993:23-24) The statements are false.

11. The authors of Treasury's review of the BATF investigation mention only a single receiver on the AK-47 before falsely asserting that "a semiautomatic AK-47 can be converted into an illegal machinegun by making modifications to the receiver of the weapon and replacing certain internal parts with commonly available selective fire AK-47 parts." (U.S. Dept. of Treasury, 1993:22n) Such modifications are virtually impossible to make and the internal parts are not available.

12. Statements made by Koresh's gun dealer, Henry McMahon, suggest that Gun List, a publication similar to Shotgun News, was also used by Koresh and might be the, or one of the, other "Clandestine" publications seen in Koresh"s house.

13. The Anarchist Cookbook includes recipes for growing, harvesting, and cooking with marijuana" (Powell, 1971:39), information on various drugs (including the admonition: "When going to make a deal for dope, do not take a weapon with you. This is provoking violence and legal hassles. If you don't trust the guy, then don't deal with him" [Powell, 1971:40]), and information on firearms at a time when the prices were significantly lower. There is mention of the AR-15, but no mention of the AK-47, and no information on converting semi-automatic firearms to fire full auto. There is extensive information on making explosives, but (a) with many admonitions against doing so for safety reasons unless one knows more than are in the pages of the book, and (b) generally not with the materials Aguilera established that Koresh owned. (Aguilera, 1993; Powell, 1971:ch.4)

14. The witness not only did not see a copy, but the assertion does not expressly state that the talk involved the book's presence at the compound, only its existence. It does exist. (Powell, 1971)

15. Hedging their bets, the Treasury Department review said the gun was "either a .50-caliber rifle mounted on a bi-pod or a 'British Boys' .52-caliber antitank rifle." (1993:33)

16. Treasury goes on to note that the raid planners determined that Koresh never left the compound, but the source for that information was Joyce Sparks, who investigated the allegations of child abuse, and Treasury "was unable to identify a reliable source for this common assumption...." (U.S. Dept. of Treasury, 1993:53, 136) After the fact, then, Treasury has undermined the credibility of Aguilera's key witness on the violence Koresh intended for the Waco area.

17. Although a small group of BATF agents was sent toward the Mag Bag on the morning of the raid on Mount Carmel Center, it was not until just before the assault began, and they were almost immediately called back to the compound before reaching the Mag Bag. (U.S. Dept. of Treasury, 1993:111, Appendix D-16, D-17) Following the botched raid, Aguilera supplemented his previous affidavit with one adding the assertion that while "I and others have attempted to execute the warrant both on the main compound location and at the 'Mag-Bag', we have been unable to search the premises...," and seeking permission to serve the warrants at night. Although the owner offered to open the building to the agents with a key, BATF preferred to destroy part of the Mag Bag structure in their entrance and search. (Private

communication; U.S. Dept. of Treasury, 1993:22) Had BATF raided the Mag Bag simultaneously with the raid on Mount Carmel Center, a few Branch Davidians might have been caught off guard, rather than returning to assist Koresh, where one was killed and the others arrested. (Dunagan, 1993a)

18.Several weeks after the initial BATF assault on Mount Carmel, it was alleged that handgrenades were used by Koresh's people (Reno, 1993:2), although Koresh, through his attorney, had denied the allegation (U.S. News & World Report, June 7, 1993:44). It was later asserted that some of the injuries to BATF agents may either have been from bullet fragments or from shrapnel. (Dunagan, 1993c:6, 11) And the list of injuries to BATF agents includes several allegedly involving shrapnel. (U.S. Dept. of Treasury, 1993:102)

19. The witness stands by her statement that Koresh made the threat, if that is what it was. She apparently disapproved of her agency's decision to close the case and continued to have telephone contacts with Koresh. (Wattenberg, 1993:37) The Treasury Department explanation is that the statement was made on April 30, the day after the riots began and the day the investigation was closed despite the social worker's objection. (U.S. Dept. of Treasury, 1993:126) One other allegation regarding Koresh's preparation for violence asserted that he once told his followers they would soon go out into the world and kill non-believing members of the public. This apparently was said only as a test of their loyalty, although Treasury expected more on the topic in the trials of surviving Davidians. (U.S. Dept. of Treasury, 1993:127)

20. Koresh was apparently correct in that belief and expectation.

21. Perhaps the ultimate in stale information was used by BATF to persuade the Texas National Guard to allow the use of their helicopters, something which can only be done if there is a drug nexus. Among the justifications offered was that, due to the previous head of the Branch Davidians, "parts of an illegal methamphetamine laboratory had been at the Compound when Koresh took control" around 1987-88, and that the Sheriff's office had planned to collect the equipment but found no records it had done so, "raising the possibility that the illegal equipment might still have been at the Compound." (U.S. Dept. of Treasury, 1993:212) Not mentioned at that point was the fact that construction at the compound by Koresh involved the destruction of over a dozen buildings and their replacement by one large structure. (U.S. Dept. of Treasury, 1993:39-42)

22. This statement is not completely consistent with the statement elsewhere in the affidavit: "In 1987, the property was taken over by Howell and his cult group. The taxes owed on the Mt. Carmel Center have been paid by Howell's group. His cult has grown to about seventy (70) to eighty (80) people which includes men, women and children who now live on the Mount Carmel Center property." (Aguilera, 1993:3) The Treasury review criticized the fact that BATF assaulted the compound expecting about 75 persons in the compound, while the actual number of persons was two-thirds higher. (U.S. Dept. of Treasury, 1993:146, App.B-130)

23. Note that Koresh, who owned AR-15s, did not acknowledge to Agent Rodriguez that he owned a sear, and checks with the various companies BATF identified as having done business with Koresh indicate no purchase by Koresh of a sear (private communications).

24. Actually, G.O.A. stands for Gun Owners of America.

25. He meant "destructive devices," Should the Gun Owners of America ever revise and update their video on BATF, Aguilera's affidavit might well be used to support the allegation that some BATF agents lie.

26. The initial warrants were reportedly released to Koresh on March 19th, but not to the media or the general public until after Mount Carmel Center was destroyed, although the reason for their suppression_"evidence may be altered or destroyed should the direction of the investigation become evident"_ended with Koresh's access to them. (Dennis, 1993:15)

27. The initial reports indicated 15 (Dunagan, 1993c:11) or 16 (Reno, 1993:1) injured, the former of which

would describe the number treated in a hospital, the latter adding cervical disk problems treated by a private physician. The Treasury review lists 20 gunshot or shrapnel wounds, six of which did not require hospital care, two "serious" non-gunshot-related injuries, one of which required some hospital care, and six minor non-gunshot-related injuries, including chipped teeth and heel irritation from "ATF boots." (U.S. Dept. of Treasury, 1993:102-103)

28. Unless the magistrate had expressly authorized a nighttime raid, the warrant had to be served in daytime. [Federal Rules of Criminal Procedure, Rule 41(c)] A motion to supplement the warrant, filed on the night of February 28th, essentially repeated Aguilera's earlier affidavit verbatim adding a paragraph, with the request for a nighttime warrant, claiming that although BATF had "attempted to execute the warrant both on the main compound location and at the 'Mag-Bag', we have been unable to search the premises and retrieve evidence because of heavy armed resistance...." With no resistance at the Mag-Bag_indeed, the men there on the morning of the raid at Mount Carmel Center attempted to return to assist Koresh (Dunagan, 1993a), and one was killed trying to get back into the compound, in what the Justice Department curiously described as an "ambush" by the Davidians_it is unclear why a nighttime search was needed there. The destructive search of the Mag Bag was eventually conducted at 7:30 a.m. on March 3. (U.S. Dept. of Justice, 1993:25, 37)

29. Although there have been reports that BATF agents were known to be in local hotels, and that the activity was the talk of local radio scanners, only 16 BATF personnel were in Waco the night before the raid, in a town of over 100,000. (U.S. Dept. of Treasury, 1993:185, App. B-71 and C-32-33)

30.They were not even alerted to the possibility of return fire by alleged firing on helicopters which BATF reported had been fired upon before the raid really began. (Labaton and Verhovek, 1993:20; Pate, 1993b:41)

31. The question of who fired first was never definitively answered at the trial, even though BATF had announced to reporters in the spring of 1993 that the Bureau had videotape which would conclusively show that the Davidians had fired first and ambushed the federal agents. The tape, if it exists, has never been shown publicly. (Verhovek, 1994b).

32. Who also insisted that the BATF raid involved over 100 agents, while the Branch Davidians' initial estimate was the eventually confirmed figure of about 75.

33.Koresh then allowed a known undercover agent to leave the compound, wishing him good luck, rather than holding him as a possible hostage. During the stand-off with the FBI, Koresh asked to be allowed to speak to Rodriguez on the telephone, in exchange for releasing a six-year-old girl. The offer was refused and the girl is presumed dead. (U.S. Dept. of Justice, 1993:54)

34. The BATF agent who was to serve the warrant testified that he yelled: "Police search warrant, lay down," and, in response to Koresh's asking, "What's going on?", repeated, "Search warrant, lay down," It was further reported that he testified that BATF had "a plan to ram the door down, but there 'was not a plan to knock on the door and serve the warrant, in other words, the plan was to use force.'" (UPI, September 30, 1993)

35. Or, at least, as murder by BATF agents. Since BATF agents reportedly were using some distinctive ammunition, an armor-piercing round known as the 9mm Cyclone (Pate, 1993a:62), the lack of public reports on the ballistic analyses of the wounds of the four killed agents leads to some suspicion that "friendly fire" might have been involved in at least one of the deaths, and some of the non-fatal wounds. The Treasury report goes in to some detail on the ballistics involved in the deaths of Davidians killed in the initial shootout, including caliber and distance, but the four agents are identified merely as having been killed by "Gunshot." (U.S. Dept. of Treasury, 1993:102,104) If Branch Davidians had no excuse for shooting, they would still be responsible for the deaths of BATF agents, by whomever shot, under the felony-murder rule.

36. The Treasury report does not discuss the type of ammunition used, although it attempts to refute most negative reports on BATF's investigation and assault, except for those criticizing the ineffectiveness of the raid, but fails to refute the widespread allegation of Cyclone ammunition being used. Although 76 agents may be using a variety of ammunition, Treasury reports that the Davidians killed by BATF agents were struck with 9mm hydrashock rounds, not the Cyclone. (U.S. Dept. of Treasury, 1993:104)

37. During the standoff in Idaho, microphones were attached to the Weaver cabin, and: "The psychological warfare techniques...continued for several days after Weaver's son, Samuel, 13, and his wife, Vicki, 42, were killed. Court records show that while the woman's body lay in the cabin for eight days, the FBI used the microphones to taunt the family. 'Good Morning Mrs. Weaver. We had pancakes for breakfast. What did you have?' asked the agents in at least one exchange. Weaver's daughter, Sara, 16, said the baby, Elisheba, often was crying for its mother's milk when the FBI's messages were heard." (Seper, 1993b)

38.For example, to law enforcement, Koresh's calling Mount Carmel Center "Ranch Apocalypse" indicated that he "might soon have been inspired to turn his arsenal against the community of nonbelievers." (U.S. Dept. of Treasury, 1993:127) Theologians might have thought the name related to the Book of Revelations.

39. There is a claim, from a clearly biased source, that the FBI checked shortly before the assault, and several hours before the fire, on the number of burn beds available at Parkland Memorial Hospital in Dallas. (Campbell, 1993:1) Certainly, there was some concern about harm to the Davidians or to the FBI. The Attorney General ruled out executing the plan on the weekend because of concern about the availability of emergency rooms. (U.S. Dept. of Justice, 1993:272)

40. At the Branch Davidians' trial, the FBI testified that listening devices indicated to them that mass suicide by fire would occur. If the FBI's testimony is true, the FBI violated the Attorney General's explicit orders to cease the assault if the children were threatened. In addition, the tapes apparently indicated (although the relevant parts of the tapes were not presented to the jury), that the Branch Davidians were pleading for negotiations to end the teargassing. (Verhovek, 1994a), and the FBI's express orders were to cease the assault if serious negotiations would result.

41. Sample federal law enforcement comment: "Have you seen the affidavit? There was no probable cause! And all those children...."

42. Silencers were not among the two-dozen items specified in the initial search warrant application (Aguilera, 1993:Attachment D) or the roughly 30 items mentioned in the expanded follow-up search warrant (Dunagan, 1993b:1). There was no indication in the initial interviews that Koresh had, or had expressed any interest in, silencers. They are referred to in follow-up affidavits where making of two or three silencers for AR-15s is reported (Dunagan, 1993c:6) and following a statement that "Everything that we suspected to be in there was in there." (Dunagan and Aguilera, 1993:15) Aguilera then went on to assert the reliability of a witness whose information was "independently corroborate[d]" and consistent with other evidence known to investigators_except, of course_not mentioned by Aguilera_being the first assertion of silencers. (Dunagan and Aguilera, 1993:16) Even so, they were not added to the list of items to be searched for and seized. In a sense, the serendipitous discovery of unregistered silencers would confirm the incompetency of the investigation conducted between June 1992 and February 1993.

43. A Pensacola television station thought an interview with Koresh's gun dealer, in which he repeated over and over that Koresh would have let BATF visit the compound peacefully and without a warrant, was headline-making news. And so the show, "Lawline," announced that there were other media filming the show behind their regular cameras, and that the station was planning to send tapes of the show to major media outlets around the nation, certain that the media and Congress would be interested in pursuing the investigation. The April 21, 1993, segmentùentitled "Fiasco in Waco"_has remained unknown to most of the American public. If the news media received copies of a tape asserting with some veracity that no raid was needed, no lives had to be lost, they ignored them.