

**FINAL REPORT TO THE
DEPUTY ATTORNEY GENERAL**

**CONCERNING THE 1993 CONFRONTATION
AT THE MT. CARMEL COMPLEX**

WACO, TEXAS

November 8, 2000

**PURSUANT TO ORDER NO. 2256-99
OF THE ATTORNEY GENERAL**

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INTRODUCTION

THIS REPORT contains the findings of the Special Counsel in response to the questions directed to him by Attorney General Janet Reno in Order No. 2256-99, dated September 9, 1999. The questions pertain to the 1993 confrontation between federal law enforcement officials and the Branch Davidians at the Mt. Carmel complex near Waco, Texas. The Report is issued pursuant to Section (e) of Order No. 2256-99 which provides, in relevant part, that the Special Counsel shall submit “to the maximum extent possible . . . a final report . . . in a form that will permit public dissemination.”¹

The Office of Special Counsel has organized the Report in the following format:

- (I) a description of the Issues investigated by the Special Counsel;
- (II) the Conclusions of the Special Counsel;
- (III) a description of the Investigative Methods used by the Special Counsel;
- (IV) a Statement of Facts relevant to the Special Counsel’s investigation;
- (V) Exhibits to the text of the Report; and
- (VI) Appendices that include a narrative summary of the relevant beliefs and practices of the Branch Davidians, a summary of expert findings, a chronological table of events, and the reports of experts retained by the Office of Special Counsel.

¹Technically this Report is not final under the regulations governing the Special Counsel because the Special Counsel continues to pursue a single prosecution. This Report does, however, contain all of the findings of the Special Counsel with respect to the questions that the Attorney General posed to the Special Counsel in Order No 2256-99. The Special Counsel will reissue this Report, with appropriate adjustments, upon the completion of the prosecution. At that time, it will become legally final.

The Office of Special Counsel is separately submitting to the Deputy Attorney General copies of the documents upon which it relied in preparing this Report.²

I. Issues Investigated by the Special Counsel

On September 9, 1999, the Attorney General appointed former United States Senator John C. Danforth as Special Counsel to investigate the 1993 confrontation between federal agents and the Branch Davidians (“Davidians”) that resulted in the deaths of four agents of the Bureau of Alcohol, Tobacco and Firearms (“ATF”) and at least 82 Davidians.³ Senator Danforth and his staff negotiated the terms of the Order directly with the Attorney General and her staff from September 5 to September 8, 1999. Senator Danforth and the Attorney General agreed that the investigation should determine whether representatives of the United States committed bad acts, not whether they exercised bad judgment.⁴ Therefore, they drafted a very specific Order that identified five principal issues:⁵

²The Department of Justice has advised the Office of Special Counsel that public release of these documents cannot be made until they have been reviewed in accordance with applicable federal law, including the Privacy Act of 1974, 5 U.S.C. § 552a. However, the Department of Justice has advised that public release of this Report by the Deputy Attorney General would not violate the Privacy Act.

³The figure of “at least 82” dead is based upon recovered bodies, including six Davidians killed on February 28, 1993, but excluding two unborn children, one of which was near term. The Office of Special Counsel cannot state with certainty the exact number of deaths because of the extensive burning and commingling of bodies that occurred during the tragic fire on April 19, 1993, especially in the concrete bunker area of the complex where the bodies of most of the women and children were found.

⁴For example, the Office of Special Counsel was not tasked with and will not address the issue of whether it was appropriate for ATF to execute a raid on February 28, 1993, or for the Federal Bureau of Investigation (“FBI”) to execute its gas insertion plan on April 19, 1993. These issues require an evaluation of judgment, an evaluation that is outside the scope of the Attorney General’s Order.

⁵A copy of Order No. 2256-99 is attached hereto as Exhibit 1. The Order lists six issues to investigate. For ease of organization, this Report has combined the two “coverup” issues into

- (1) whether agents of the United States started or contributed to the spread of the fire that killed members of the Branch Davidian group on April 19, 1993;
- (2) whether agents of the United States directed gunfire at the Branch Davidian complex on April 19, 1993;
- (3) whether agents of the United States used any incendiary or pyrotechnic device at the Branch Davidian complex on April 19, 1993;⁶
- (4) whether there was any illegal use of the armed forces of the United States in connection with the events leading up to the deaths occurring at the Branch Davidian complex on April 19, 1993;⁷ and
- (5) whether any government representative made or allowed others to make false or misleading statements, withheld evidence or information from any individual or entity entitled to receive it, or destroyed, altered or suppressed evidence or information concerning the events occurring at the Branch Davidian complex on April 19, 1993.⁸

At Senator Danforth's request, the Order of the Attorney General gave Senator Danforth and his staff the power to prosecute federal crimes concerning the above issues and any

one. In addition, the Order refers to the Mt. Carmel "compound." Certain members of the Branch Davidian group interviewed by the Office of Special Counsel objected to this characterization. In deference to them, this Report refers to their place of residence and the surrounding structures as the Branch Davidian complex.

⁶The first three issues— fire, gunfire and pyrotechnic device— relate only to events occurring on April 19, 1993.

⁷The fourth issue, the use of the armed forces of the United States, encompasses events "leading up" to April 19, 1993. This language specifically permitted Senator Danforth to investigate actions of the military that preceded April 19, 1993. Senator Danforth requested this language so that he could investigate allegations that the armed forces had operated inside the Branch Davidian complex prior to April 19, 1993.

⁸The fifth issue, the "coverup" issue, relates principally to activities that post-date April 19, 1993, although the Office of Special Counsel did investigate whether any actions of April 18 and 19, 1993, constituted an effort to cover up crime scene evidence of the initial ATF operation of February 28, 1993, an issue that is only marginally related to the Attorney General's Order. The Office of Special Counsel uncovered no evidence of acts committed by the FBI to cover up the events of February 28, so this Report does not address that issue further.

criminal attempt to interfere with his investigation. Finally, the Order required that Senator Danforth issue a Final Report and such interim reports as he deems appropriate.⁹ This Report updates and supplements the Special Counsel's Interim Report to the Deputy Attorney General dated July 21, 2000.

II. Conclusions of the Special Counsel

The Office of Special Counsel has undertaken an exhaustive investigation into allegations of grave misconduct by employees of the United States government. In essence, the charges are that on April 19, 1993, federal agents caused the fire which destroyed the Branch Davidian complex and killed many Davidians who remained in it, directed gunfire at the complex, illegally employed the armed forces of the United States to assault the complex, and then covered up the alleged misconduct.

The investigation lasted 14 months, employed 74 personnel, and cost approximately \$17 million. The Office of Special Counsel interviewed exactly 1,001 witnesses, reviewed over 2.3 million pages of documents, and examined thousands of pounds of physical evidence. As a result of this effort, the Special Counsel states the following conclusions with certainty:

⁹The Order further indicated that the provisions of 28 CFR §§ 600.4 through 600.10 would apply to the administration of the Office of Special Counsel. Note that certain provisions of the Special Counsel regulations (28 CFR §§ 600.1-3) were omitted from the Charter. Senator Danforth believed that inclusion of these provisions would have indicated that his investigation was purely criminal in nature, which, at least arguably, could have prohibited the public disclosure of part or all of a written report. Instead, Senator Danforth negotiated language indicating that he intended to submit his report in a form that would permit, to the maximum extent possible, public dissemination of his findings.

The government of the United States and its agents are not responsible for the April 19, 1993, tragedy at Waco. The government:

- (a) did not cause the fire;
- (b) did not direct gunfire at the Branch Davidian complex; and
- (c) did not improperly employ the armed forces of the United States.

Responsibility for the tragedy of Waco rests with certain of the Branch Davidians and their leader, Vernon Howell, also known as David Koresh, who:

- (a) shot and killed four ATF agents on February 28, 1993, and wounded 20 others;
- (b) refused to exit the complex peacefully during the 51-day standoff that followed the ATF raid despite extensive efforts and concessions by negotiators for the Federal Bureau of Investigation (“FBI”);
- (c) directed gunfire at FBI agents who were inserting tear gas into the complex on April 19, 1993;
- (d) spread fuel throughout the main structure of the complex and ignited it in at least three places causing the fire which resulted in the deaths of those Branch Davidians not killed by their own gunfire; and
- (e) killed some of their own people by gunfire, including at least five children.

While the Special Counsel has concluded that the United States government is not responsible for the tragedy at Waco on April 19, 1993, the Special Counsel states with equal certainty that an FBI agent fired three pyrotechnic tear gas rounds at 8:08 a.m. on April 19, 1993, at the concrete construction pit approximately 75 feet from the living quarters of the Davidian complex. The pyrotechnic tear gas rounds did not start the fire that consumed the complex four hours later.

The Special Counsel has also concluded that certain FBI and Department of Justice officials failed to disclose to the Attorney General, Congress, the courts, counsel for the Davidians, and the public, evidence and information about the use of pyrotechnic tear gas rounds until August 1999. This failure resulted from a combination of the inappropriate handling of evidence and the dereliction of duty by FBI and Department of Justice employees. As more fully set out below, the Special Counsel has concluded that some of these employees also obstructed the investigation. [REDACTED]

[REDACTED]

1. *Did agents of the United States start or contribute to the spread of the fire that caused the death of Branch Davidians on April 19, 1993?*

Government agents did not start or materially contribute to the spread of the fire. During the morning of April 19, 1993, several Davidians spread accelerants throughout the main structure of the complex, and started fires in several locations. The evidence indicates that many of the Davidians did not want to escape the fire.¹⁰ Indeed, while government agents risked their lives to save Davidians from the fire, one Davidian tried to re-enter the burning complex to die. When an FBI agent questioned this Davidian regarding the location of the children, the Davidian refused to answer. A Davidian who exited the complex during the fire stated that he witnessed

¹⁰There is evidence that structural debris, which resulted from an FBI vehicle breaching the complex, interfered with a potential escape route by blocking the trap door leading to an underground bus, which was located on the west end of the complex. (The complex did not line up precisely on an east-west axis, but the Special Counsel uses these directional approximations for ease of reference.) However, the breaching operations also created three avenues of possible exit— at the base of the main tower, at the front door, and on the east side of the chapel.

others make no effort to leave the complex. Another Davidian expressed remorse that she had not perished in the fire with the rest of the group.

The following evidence demonstrates that the Davidians started the fire:

(a) *Title III Intercepts*.¹¹ Davidian conversations intercepted through the use of concealed listening devices inside the complex from April 17 to April 19 indicate that the Davidians started the fire. An April 17 intercept records Davidians discussing how they could prevent fire trucks from reaching the complex. An April 18 intercept records a conversation between Steven Schneider¹² and other Davidians indicating a conspiracy to start a fire. During that conversation, Schneider joked that another Davidian had always wanted to be a “charcoal briquette.” Another Davidian stated that, “I know there’s nothing like a good fire” On April 19, between the beginning of the tear gas insertion operation at approximately 6:00 a.m. and approximately 7:25 a.m., the Title III intercepts recorded the following statements: “Need fuel;” “Do you want it poured?;” “Have you poured it yet?;” “Did you pour it yet?;” “David said

¹¹“Title III intercepts” are court-authorized, recorded interceptions of conversations, obtained through the use of concealed listening devices. The content of these Title III intercepts may be publicly released pursuant to order of the United States District Court for the Western District of Texas. In order to obtain accurate transcriptions of the recordings, the Office of Special Counsel utilized the assistance of both its retained expert and its own investigators.

¹²An Office of Special Counsel investigator identified Steven Schneider’s voice on the intercepts based on an extensive review of known samples of Schneider speaking. The investigator’s voice identification confirmed a prior voice identification made by an FBI Title III monitor who also became familiar with Schneider’s voice while monitoring Title III recordings throughout the standoff. The Office of Special Counsel’s expert forensic phonetician, Mrs. Elizabeth McClelland, agreed that, on an auditory-phonetic basis, some features of the recorded voices matched known speech samples from Davidians, including Schneider. McClelland cautioned, however, that instrument analysis of the speech signals on the Title III recordings did not produce results from which a forensic speaker identification could be achieved with certainty. See Appendix G.

pour it right?;" "David said we have to get the fuel on;" "We want the fuel;" "They got some fuel around here;" "Have you got the fuel . . . the fuel ready?;" "I've already poured it;" "It's already poured;" "Yeah . . . we've been pouring it;" "Pouring it already;" "Real quickly you can order the fire yes;" "You got to put the fuel in there too;" "We've got it poured already;" "Is there a way to spread fuel in here?;" "So we only light it first when they come in with the tank right . . . right as they're coming in;" "That's secure . . . we should get more hay in here;" "You have to spread it so get started ok?" These statements precede the sighting of fire by several hours, which is further proof that the Davidians intended to set fire to the complex well in advance of actually lighting the fires.

Much closer to the time of the fire, from approximately 11:17 a.m. to 12:04 p.m., Title III intercepts recorded the following statements from inside the complex: "Do you think I could light this soon?;" "I want a fire on the front . . . you two can go;" "Keep that fire going . . . keep it."¹³ The only plausible explanation for these comments is that some of the Davidians were executing their plan to start a fire. Transcripts of the Title III intercepts developed by Mr. Chris Mills, an audio expert retained by the Office of Special Counsel, are attached hereto as Appendix G.

¹³These statements, which are intelligible on the enhanced versions of the Title III tapes, provide compelling evidence that the Davidians carefully planned and then systematically set the fire. The Office of Special Counsel also conducted a detailed investigation into allegations that the overhears should have prompted the FBI commander to call off the tear gassing plan when the FBI monitors heard the Title III intercepts indicating that the Davidians intended to start a fire. Having reviewed the tapes and interviewed the relevant witnesses, the Office of Special Counsel concludes that the intercepts were largely incomprehensible until the FBI later enhanced the tapes and, therefore, that the FBI agents monitoring the intercepts did not hear or understand the statements until after the fire.

(b) Admissions of Branch Davidians. Davidians who survived the fire have acknowledged that other Davidians started the fire. Graeme Craddock told the Office of Special Counsel in 1999 that he observed other Davidians pouring fuel in the chapel area of the complex on April 19, 1993. He further stated that he saw another Davidian, Mark Wendel, arrive from the second floor yelling: "Light the fire." Davidian Clive Doyle told the Texas Rangers on April 20, 1993, that Davidians had spread Coleman fuel in designated locations throughout the complex, although he declined to state who specifically lit the fires.

(c) Statements of Government Witnesses. Observations by government witnesses support the conclusion that the Davidians started the fire. FBI agents who had the opportunity to observe activity within the Branch Davidian complex on April 19, using field glasses or spotting scopes, saw Davidians engaged in activity which they later concluded to be pouring fuel to start a fire. Some of these sightings were noted contemporaneously by the agents in FBI logs. Also, an FBI agent observed an unidentified Davidian ignite a fire in the front door area of the complex shortly after noon. This observation was also reported contemporaneously.

(d) Expert Fire Analysis. Fire experts agree that Davidians started the fire. The Office of Special Counsel interviewed the experts who performed the original, on-scene fire investigation and analysis. The Office of Special Counsel also retained two fire experts, one to review the work product of the previous investigators and to examine independently the photographic and physical evidence, and the other to analyze the spread of the fire throughout the complex. In addition, the Office of Special Counsel retained an expert to determine whether the tear gas, a combination of methylene chloride and orthochlorobenzylidenemalononitrile

(commonly referred to as “CS”), reached concentration levels in the complex that were sufficiently high to have caused or contributed to the rapid spread of the fire.¹⁴

Relying upon photographs, records of previous on-site investigative activity (such as the use of an accelerant detection dog), physical evidence, computer models and Forward Looking Infrared (“FLIR”) tapes, the experts concluded without question that people inside the complex started the fire in numerous locations throughout the complex. Three of these locations developed into large fires¹⁵—on the second floor of the southeast corner of the main structure of the complex, at the stage area at the rear of the chapel, and in the kitchen/cafeteria area of the complex.¹⁶ See Appendices D and E. The experts further concluded that the CS and methylene

¹⁴The Office of Special Counsel also questioned federal agents who drove vehicles into the complex and shot tear gas into the complex to determine if they may have accidentally started the fire by knocking over a lantern or by other means. The Office of Special Counsel has determined that they did not start the fire.

¹⁵Ignition times and locations were determined from still photographs, color videos, interpretation of visible images from the FLIR sensor (Vector Data Systems (U.K.) Ltd., Appendix I), and a computer analysis of changes in temperature within the FLIR imagery (Mrs. Lena Klasén, Appendix H) that are not visible to the human eye.

¹⁶The Attorney General’s Order asked the Office of Special Counsel to determine not only if federal agents started the fire, but also whether they “contributed to the spread of the fire.” Like the other parts of the Attorney General’s Order, this portion of the Order was intended to refer to intentional wrongdoing by the government. As to whether government agents committed intentional wrongdoing which contributed to the spread of the fire, the answer is clearly no. The openings in the complex made by the Combat Engineering Vehicles (“CEV’s”) did allow for greater ventilation, which could have accelerated the spread of the fire in some areas, but the openings were made with the intent to create exits and to deliver tear gas. Moreover, the openings created by the CEV’s, and the subsequent accelerated spread of the fire, did not contribute to the deaths of the Davidians. In fact, in most cases, the openings made additional avenues of exit for the Davidians had they wanted to avoid the fire, and some Davidians did use these openings to escape the fire.

chloride inserted into the complex as part of the plan did not start or contribute to the spread of the fire. See Appendix F.

In addition to the allegations that CS gas could have started the fire in the Davidian complex, some have claimed that tear gas is lethal and should not have been used by the FBI at Waco. Indeed, although concluding, “[I]t is highly unlikely that the CS riot control agent, in the quantities used by the FBI, reached lethal toxic levels,” the United States House of Representatives Judiciary Committee and the Committee on Government Reform and Oversight issued a report on August 2, 1996, stating:

The presented evidence does indicate that CS insertion into the enclosed bunker, at a time when women and children were assembled inside that enclosed space, could have been a proximate cause of or directly resulted in some or all of the deaths attributed to asphyxiation in the autopsy reports.

Therefore, the Office of Special Counsel believed that it was necessary to investigate thoroughly whether the CS gas used at Waco could have killed any of the Davidians.

As stated in the Introduction, the evidence clearly establishes that the Davidians killed themselves. There is no doubt that they set the complex on fire; they refused to come out of the complex after they started the fire; and they shot themselves. No forensic pathologist who has examined the evidence has found any indication that the tear gas killed any Davidian.

Notwithstanding the overwhelming evidence that the Davidians killed themselves, the Office of Special Counsel notes that one of the toxicologists it retained, Dr. Uwe Heinrich, has concluded that, if people exposed to high levels of CS are not able to leave a room, “there is a distinct possibility that this kind of CS exposure can significantly contribute to or even cause lethal effects.”

This opinion is contrary to the expert advice given to Attorney General Reno before she approved the FBI's plan to insert tear gas into the complex. She has consistently stated that her primary concern was whether the tear gas could permanently harm the occupants of the complex, particularly the children. She has stated that had she been told the tear gas could be lethal, she would never have approved the tear gas plan. The expert who advised Attorney General Reno and the FBI on the potential effects of CS gas in April of 1993 told them that the tear gas could not cause death or permanent injury. Based on the then-available literature regarding the effects of CS gas on humans, the expert's advice to Attorney General Reno may have been well-founded at that time. Indeed, no human death resulting from CS has ever been reported in the scientific literature.

The tear gas inserted by the FBI on April 19, 1993, was a liquid aerosol of CS powder dissolved in methylene chloride.¹⁷ Determining the lethality of CS for humans is a very difficult task. Toxicity studies have not involved humans, but rather animals such as monkeys, dogs, and rodents. Therefore, any calculation of the lethality of CS for humans is only based on an extrapolation from the animal studies. Based upon these animal studies, the Office of Special Counsel's toxicologist concluded that extended exposure to high volumes of CS could potentially be lethal.

The following analysis explains why the Office of Special Counsel has concluded that CS, although potentially lethal, was not responsible for the deaths of any Davidians. At some

¹⁷Based upon the report of the Office of Special Counsel expert Dr. George Lucier, the Office of Special Counsel concludes that the amount of methylene chloride in the complex did not reach lethal levels and did not cause the deaths of any Davidians. Some of the Davidians however, could have experienced mild irritation, dizziness and decreased responsiveness to visual and auditory signals from the methylene chloride.

time in the late morning of April 19, 1993, many of the Davidians, including all the children, moved to the concrete bunker in the back of the complex. The bunker was a 20' by 21' room with concrete walls and no windows, located next to the cafeteria. Its only opening was a doorway approximately 4 feet wide. At 11:49 a.m., one of the CEV's penetrated the front of the complex, moving in the general direction of the bunker, and inserted one canister of tear gas into the complex. The CEV was approximately 17 feet away from the bunker when it inserted this tear gas. At 11:50 a.m., the CEV, then approximately 28 feet from the front of the bunker, inserted a second canister of tear gas.

Whether *potentially* lethal levels of CS were reached in the Davidian complex is not known for sure. Some of that tear gas, although no one knows exactly how much, probably entered the bunker. Dr. Heinrich has stated that the lethal effects of CS depend upon the exposed person being prevented from leaving the area of exposure. The evidence indicates that, throughout the gassing operation, many Davidians moved away from exposed rooms, moved and talked freely, and protected themselves with gas masks and wet towels around their faces. There was a doorway to exit the bunker, and people could have left the room. According to the Office of Special Counsel toxicologist, because of the significant discomfort caused by CS, he would fully expect that, unless individuals were forced to stay in the room, any potentially lethal amount of CS would have forced the occupants out of the room long before they could inhale the amount needed to kill them.

Additionally, although there are no human studies, the studies done on laboratory animals indicate that humans would not die immediately following short-term inhalation exposure to high concentrations of CS. Therefore, even if potentially lethal levels of CS had entered the

bunker, and Davidians were holding some of the members in the bunker against their will, there was insufficient time for the CS to kill anyone. The tear gas insertions near the bunker were at 11:49 a.m. and 11:50 a.m. The Davidians started one or more fires in the cafeteria at approximately 12:05 p.m., quickly filling that space with smoke. By 12:14 p.m., the roof of the cafeteria had burned through and the forensic pathologist believes that by this time, everyone in the bunker was dead from either the gunshot wounds or smoke inhalation.

Notwithstanding the clear evidence that the Davidians killed themselves, in light of the findings of the potential lethality of CS, the Office of Special Counsel believes that law enforcement must give very serious consideration to the appropriate circumstances under which CS should be utilized. Therefore, the Office of Special Counsel strongly recommends that law enforcement personnel consider the reports of Dr. Heinrich, Dr. Lucier and Dr. Havens when determining whether to use CS gas in the future.

The Office of Special Counsel also reviewed the decision of the FBI to delay allowing firefighting equipment to arrive at the scene. The Office of Special Counsel has concluded that the Davidians were shooting at outsiders, which would have endangered the lives of any firefighters who approached. In fact, a Title III intercept from April 17, 1993, records Davidians indicating that they intended to prevent firefighters from approaching the complex: “You’re definitely right . . . I think all the time he knows it . . . nobody comes in here . . .;” “Catch fire and they couldn’t bring the fire trucks and they couldn’t even get near us;” “Exactly.” Because firefighters could not immediately approach the complex and fight the fire, it was impossible to control or suppress it. Furthermore, the evidence indicates that many of the Davidians did not want to leave the burning building.

Reports of the fire experts retained by the Office of Special Counsel are attached hereto as Appendices D, E and F. Reports of the toxicology experts retained by the Office of Special Counsel are attached as Appendices K and L.

(e) Medical Analysis. Autopsy and other medical reports on the victims of the fire provide additional information confirming that Davidians started the fire. For example, Raymond Friesen, a Davidian found deceased in the complex after the fire, had very high benzene levels in his system, which may be indicative of inhaling petroleum-based accelerants, and therefore is consistent with the theory that the Davidians spread fuel and started the fire. A surviving Davidian, Clive Doyle, had accelerants on his coat sleeves as well as burn wounds on his hands that the forensic pathologist retained by the Office of Special Counsel believes to be consistent with wounds that could have occurred when his accelerant-soaked hands came in contact with a flame. See Expert Report, Appendix J.

(f) Physical Evidence. The Office of Special Counsel and its experts conducted a detailed review of the physical evidence that relates to the fire. During its review, the Office of Special Counsel located Coleman and other fuel cans containing numerous puncture marks. Expert tool mark examiners confirmed that someone had deliberately punctured several of the cans— a common tactic among arsonists who wish to spread fuel. Investigators also found a handmade torch among the debris in the kitchen/cafeteria, one of the fire's points of origin. An accelerant canine searched the scene from April 23 to 27, 1993, and identified accelerants in areas where the FLIR tapes and other evidence indicate that the fires started. The presence of these accelerants was later confirmed by lab analysis of portions of the remains of the building. Lab

analysis also found accelerants on clothing and shoes of Davidians. See Expert Reports, Appendices D and M.

(g) *Beliefs of the Davidians.* The teachings of Koresh are consistent with the overwhelming eyewitness and physical evidence that the Davidians started the fire. The Office of Special Counsel interviewed Davidians, religious experts and writers to determine whether the Davidians would start a fire for any reason. Based on these interviews, the Office of Special Counsel concluded that the Davidians considered death by fire justified– even desirable– under circumstances in which they were under attack by forces that they considered to be evil, including the government.

Koresh taught the Davidians that fire would “transcend” or “translate” them immediately to heaven. Davidian survivors Marjorie Thomas and Graeme Craddock specifically recalled Koresh teaching that fire is an acceptable means of death for Davidians. Thomas remembers Koresh stating during Bible study that fire would transcend the Davidians to heaven during the “battle” with Babylon, and that Koresh considered the U. S. government to be Babylon. Davidian Kathy Schroeder recalled that, shortly after the confrontation with ATF on February 28, 1993, Koresh told the Davidians that he had a dream that the Davidians would burn in a great fire, their skin would burn off, and they would “transcend” to heaven. The Davidians referred to their complex as “Ranch Apocalypse” and, on April 16, 1993, several federal agents observed a Davidian hold a sign outside a window of the complex that read “the flames await: Isaiah 13.”

An alternative explanation, that of Dr. J. Phillip Arnold of Houston’s Reunion Institute, is that Koresh may have ordered the Davidians to set the fires as protection from government forces in a manner similar to the protection discussed in the Book of Daniel, with the

story of Shadrach, Meschach and Abednego in the fiery furnace. Dr. Arnold further stated that Koresh and the Davidians would not have run from the fire, but rather may have viewed the fire as a fulfillment of prophecy.

Whether the Davidians set the fires to cause their deaths and transcend to heaven, or set them in an attempt to create a shield of fire, once the fire was set, it became a fulfillment of Koresh's prophecy and, in accordance with his religious teachings, was an acceptable and even desirable way of dying for the Davidians. Consequently, there exist strong bases in the Davidians' religious beliefs and conduct to support the conclusion that the Davidians started the fire on April 19, 1993. A more detailed discussion of the beliefs of the Davidians as they relate to the issues presented in this Report is contained in Appendix A.

As the foregoing discussion indicates, the evidence is conclusive that the Davidians started the fire. While actions of the government may have contributed incidentally to the spread of the fire, these actions (or inactions) did not cause the tragic loss of life on April 19, 1993.

2. *Did agents of the United States direct gunfire at the Branch Davidian complex on April 19, 1993?*

No employee of the United States fired a gunshot at the Branch Davidian complex on April 19, 1993.¹⁸ To the contrary, while the Davidians fired upon government agents throughout the morning of April 19, government agents did not return gunfire. Indeed, the FBI

¹⁸For the purposes of this report, the term "gunshot" does not encompass the firing of tear gas rounds from M-79 grenade launchers, which occurred repeatedly at Waco on April 19, 1993.

had the authority to return fire under the law and its deadly force policy, but the agents acted with restraint and did not do so.

In arriving at these conclusions, the Office of Special Counsel relied upon the following evidence:

(a) FLIR Testing and Analysis. Virtually the only evidence cited by those claiming government agents fired shots into the complex on April 19, 1993, is the FLIR videos recorded by the FBI Nightstalker aircraft from approximately 10:42 a.m. to 12:41 p.m. on that day. In fact, however, this evidence strongly supports the conclusion that no agent of the United States fired a shot on April 19.

The FLIR tapes show 57 flashes, emanating principally from alleged Davidian positions inside or on top of the complex. Eighteen of the flashes occur on the back side of the complex, with some occurring around government vehicles that were operating near the complex. During the past three years, representatives of the Davidians and several independent experts retained by the media and Congress have concluded that gunfire could have caused or did cause these flashes. The FBI and its experts have claimed that the flashes are reflections or “glint” coming from debris scattered in and around the complex.

The Office of Special Counsel retained two teams of experts to analyze the FLIR tapes from April 19. Working with the United States district court judge in the civil litigation brought by some of the Davidians and their families against the United States government, the Office of Special Counsel and its expert, Vector Data Systems (U.K.) Ltd., conducted a field test of FLIR technology at Fort Hood, Texas on March 19, 2000. The purpose of the test was to identify the thermal signature, if any, that gunfire and debris would leave on a FLIR recording.

The Office of Special Counsel conducted the test under a protocol agreed to and signed by both the attorneys and experts for the government and the attorneys and experts for the Davidians and their families. The protocol identified the FLIR equipment, the weapons, and the other conditions that would best approximate the scene at Waco in 1993.

Based on a detailed analysis of the shape, duration and location of the 57 flashes noted on the 1993 FLIR tapes, and a comparison of those flashes with flashes recorded on the March 2000 FLIR test tape, Vector Data Systems (U.K.) Ltd., concluded with certainty that each of the flashes noted on the 1993 tapes resulted from a reflection off debris on or around the complex. These conclusions are supported by color photographs which show the reflective debris at the exact location of many of the flashes noted on the 1993 tapes.

Mrs. Lena Klasén, a second independent expert retained by the Office of Special Counsel, concluded that thermal activity caused by human movement or motion did not exist near or around the area of the flashes noted on the FLIR tapes. She further concluded that photographs taken during the tear gas insertion show no people at or near the points from which the flashes emanated. Mrs. Klasén also performed a three-dimensional analysis of the reflection geometry existing at the complex on April 19, 1993. This analysis accounted for the Nightstalker's movement, the position of the FLIR sensor, and the changing angle of the sun. Based on this analysis, Klasén, like Vector, concluded that the flashes on the 1993 tapes were from debris. The FLIR test and the expert analyses prove conclusively that the FLIR tapes do not evidence gunfire directed at the Davidians from government positions. Copies of the Reports of the FLIR experts retained by the Office of Special Counsel are attached hereto as Appendices H and I.

(b) Ballistics Testing. The ballistics expert retained by the Office of Special Counsel further supports the conclusion that there was no government gunfire on April 19, 1993. The Office of Special Counsel conducted ballistics testing on 36 shell casings found at the “Sierra-1” government sniper position to determine if FBI agents fired these shots. The expert concluded with certainty¹⁹ that these casings came from weapons the Office of Special Counsel identified as ATF weapons fired on February 28, 1993.²⁰ The casings do not, therefore, evidence FBI gunfire on April 19. A copy of the Report of the ballistics expert retained by the Office of Special Counsel is attached hereto as Appendix M.

(c) Statements of Davidian Witnesses. The interviews of Davidians further establish that no government agent fired on April 19. The Office of Special Counsel interviewed 13 Branch Davidians, six of whom were in the complex on April 19, 1993.²¹ Attorneys and investigators for the Office of Special Counsel questioned each of these witnesses in detail about the standoff. None of the Davidians who were in the complex on April 19 indicated that he or she saw or heard government gunfire, nor did any Davidian provide other evidence that the government fired at the complex or at the Davidians.

¹⁹After the Office of Special Counsel conducted the ballistics tests, counsel for the parties in the civil litigation also conducted similar testing. Experts for both the plaintiffs and the defendants reached identical conclusions— that the shell casings from the Sierra-1 sniper position did not match the FBI weapons of April 19. As a result, counsel for the Davidians in the civil litigation dropped their claims against FBI sniper Lon Horiuchi, who had been stationed at Sierra-1.

²⁰The Office of Special Counsel could not test four additional shells found near Sierra-1 (three .45 caliber and one .22-250 caliber). The casings appeared to be old, predating the standoff, and not of the manufacture or caliber utilized by the FBI or ATF.

²¹A total of nine Branch Davidians survived the fire but only six of them agreed to speak with the Office of Special Counsel.

The evidence indicates that the Davidians who died from gunfire either committed suicide or were shot by other Davidians. One former Davidian, Kiri Jewell, testified before Congress that Koresh had taught her, when she was 10 years old, how to use a gun to kill herself. Moreover, Dana Okimoto, a former Davidian, reported to the government on March 3, 1993, that Koresh had instructed his followers that, if he died before they did, the women should kill themselves or receive assistance from the men, who were to go on a shooting spree before they died. Title III intercepts indicate that on March 16, 1993, a Davidian, possibly Koresh, discussed committing suicide by shooting himself. These statements further support the conclusion that the Davidians shot themselves and did not die as the result of government gunfire.

(d) Statements of Government Witnesses. The United States government has maintained consistently since April 19, 1993, that no government agent fired a single shot at the Davidian complex on April 19. Every government witness interviewed by the Office of Special Counsel confirmed this contention. The Office of Special Counsel conducted detailed interviews with federal government personnel who were in the vicinity of the complex on April 19, 1993, or otherwise involved with the Waco incident. These included 517 FBI personnel, five United States Secret Service agents, 56 ATF agents, and 92 members of the active duty armed forces of the United States, including members of the Army Special Forces. The Office of Special Counsel also interviewed state and local government officials, including 36 members of the Texas and Alabama National Guards, and 43 Texas Rangers. The Office of Special Counsel informed certain key witnesses that the charter of the Office of Special Counsel permitted criminal prosecution of anyone who lied to representatives of the Office of Special Counsel, and, where

appropriate, that the Office would in fact prosecute any person found to have made false statements to its investigators.

Office of Special Counsel attorneys and investigators asked government representatives who were present at the complex on April 19 (or otherwise involved in the Waco confrontation) not only whether they fired weapons, but also whether they saw any other government person fire a weapon, and whether they even heard discussion or rumor that any government agent engaged in gunfire. Not a single one of the hundreds of government witnesses stated that he or she had any knowledge suggesting that any government agent fired at the Davidians on April 19.

Numerous government witnesses did, however, see or hear gunfire emanating from the complex toward government positions at various times during the morning of April 19. In addition, shortly after the start of the fire, at least four witnesses heard rhythmic bursts of gunfire coming from within the complex, which is consistent with the conclusion that the Davidians were deliberately shooting each other. The eyewitness accounts of government personnel, therefore, indicate that the government did not fire at the Davidians, but that the Davidians fired at the government and shot themselves.

(e) Statements of other people claiming that the government engaged in gunfire.

Several other parties have claimed that the government engaged in gunfire on April 19, but none of them provided credible evidence to support this contention. The Office of Special Counsel interviewed filmmakers, writers, and advocates for the Davidians. None of them had witnessed any government gunfire on April 19. Further, none of them provided evidence supporting their contention of government gunfire on April 19, other than the flashes that appear on the 1993 FLIR

tapes and the shell casings found at the Sierra-1 sniper position.²² As stated above, the FLIR tapes and shell casings do not provide evidence of government gunfire on April 19.

(f) *Polygraph Testing.* Polygraph testing reinforces the conclusion that no government agent fired a shot on April 19.²³ During the course of conducting classified interviews with members of the Army Special Forces, the Office of Special Counsel obtained conflicting information on the exact whereabouts of one Army Special Forces member who was at Waco on April 19, 1993, although no witness suggested that this soldier had entered the perimeter of the complex or fired a weapon. This conflicting testimony also surfaced in the civil litigation between the Davidians and their families and the government, which led to speculation among counsel for the Davidians and their families and the press that this individual may have fired a weapon into the complex. Consequently, the Office of Special Counsel engaged the services of two polygraph examiners from the United States Postal Inspection Service (“USPIS”) to help determine whether this individual had entered the perimeter of the complex at any time or fired a

²²Some of them provided names of alleged witnesses, but either those witnesses could not be located because too little information was given to find them, or the information provided by the witnesses did not support the contention that the government fired into the complex on April 19.

²³In instances where conflicts in testimony occurred, or where there was no other corroborative evidence, the Office of Special Counsel made limited use of polygraph testing. Polygraphs are frequently used in law enforcement investigations. However, the reliability of polygraph results is often disputed. Indeed, due to their possible lack of reliability and significant potential prejudicial effect on juries, the majority of courts do not permit polygraph results to be introduced as evidence. Nevertheless, polygraphs are an investigative tool and the Office of Special Counsel in its effort to seek the truth utilized polygraphs as such. In fairness to the individuals who voluntarily took polygraphs, and in order not to overemphasize their value, the Office of Special Counsel will only report the polygraph results which it ultimately could corroborate with independent evidence of significant probative value.

weapon on April 19. These examiners concluded that this individual was “not deceptive” in saying that he neither entered the perimeter nor fired a weapon at the complex on or before April 19.

(g) *Document Review.* The Office of Special Counsel has reviewed an extensive documentary record relating to events of April 19, 1993. The documents have included FBI sniper logs, FBI “302” memoranda of interviews, and handwritten notes of meetings. Only one document— a June 2, 1993, FBI 302 memorandum of an interview of FBI Special Agent Charles Riley— contained a statement²⁴ that could be interpreted to mean that a government agent fired on the complex. When interviewed, Riley stated to the Office of Special Counsel that the FBI 302 (which he did not author and did not review at the time) should have stated only that he heard agents stationed at Sierra-1 report gunfire emanating from the complex. Riley noted further that he had corrected the June 2, 1993, 302 memorandum by authoring his own 302 memorandum on November 19, 1996, after the FBI brought the erroneous statement to his attention.²⁵ Consistently, FBI logs of the activity on April 19 indicate no government gunfire, but they record numerous instances of Davidian gunfire.

(h) *Videos, Photographs and Recordings.* The videos taken by witnesses and the media on April 19 do not indicate government gunfire.²⁶ None of the thousands of photographs

²⁴The 302 states: “SA Riley related that he heard shots fired from Sniper 1 position.”

²⁵The author of the Riley 302 also told the Office of Special Counsel that she may have misinterpreted what Agent Riley said when she drafted it. Moreover, the FBI 302's of the other agents who were with Agent Riley at the Sierra-3 sniper position on April 19 make no mention of government gunfire.

²⁶The film *Waco: A New Revelation* portrays video of a helicopter allegedly shooting at the complex on April 19. Vector Data Systems (U.K.) Ltd., the Office of Special Counsel's

from April 19 shows people in the places from which government gunfire allegedly emanated.

The Title III intercepts do, however, contain sounds that may be consistent with Davidians firing at government agents from within the complex.²⁷ Video taken by an FBI agent also contains audible evidence of gunfire coming from inside the complex at the time of the fire.²⁸

(i) *Autopsy/Pathology Results.* Autopsy reports and anthropological work support the conclusion that those Davidians who died of gunshot wounds were killed by other Davidians, not by the government. The 1993 pathology studies concluded that at least 20 Davidians²⁹ were shot and one was stabbed³⁰ on April 19. According to the anthropological work, five of the victims were children under the age of 14. The 1993 studies indicated that many of those who

independent expert, has determined that the flashes shown in the film are merely reflected sunlight, and that the helicopter doors were not even open to permit gunfire from the aircraft.

²⁷When the Title III intercept recorded sharp or loud sounds, the sound recorded on the tape falls and then recovers. This “fall and recovery” is caused by the machine’s automatic gain control (“AGC”). Whenever a loud sound that exceeds its maximum recording level is received by the recording machine, the AGC prevents the signal from overloading and distorting the tape. Many of these “fall and recovery” events occur on the intercept recordings. In fact, at 6:05 a.m., the same time HRT reported receiving gunfire from the complex, the Title III listening devices recorded such events inside the complex.

²⁸The Office of Special Counsel audio expert, Mr. Chris Mills, concluded that based on his experience the sharp “cracks” recorded on FBI video tape #1050236 sound to the human ear and look spectrographically like gunshots. However, because no recording of the exact weapon and ammunition being fired exists for forensic comparison, it is not possible to prove with absolute certainty that the sharp “cracks” are in fact gunshots. He further concluded that it is impossible to determine whether the ammunition is being discharged from a firearm or exploding involuntarily due to the heat of the fire.

²⁹The figure “at least 20” is used because the forensic pathologists could not rule out gunshot injuries for several of the Davidian adults and children due to the extensive damage to their bodies by the fire.

³⁰The only stabbing victim, three-year old Dayland Gent, was stabbed in the chest.

died of gunshot injuries were shot in the head or mouth, which is consistent with suicide or execution by the Davidians. Furthermore, information provided to the Office of Special Counsel by those who conducted the 1993 studies indicates that none of the Davidians was shot with a high velocity round³¹ on April 19, which would be expected had they been shot from outside of the complex by government sniper rifles or other assault weapons.

The Office of Special Counsel tested these conclusions thoroughly. While the bodies of the deceased Davidians are no longer available to be examined, the Office of Special Counsel did retain a forensic pathologist with specific expertise in gunfire deaths to conduct a thorough review of the 1993 autopsy reports, the extensive photographic and X-ray record from the initial pathology studies, the DNA findings, and the anthropological work of the Smithsonian Institution on the Davidians' remains. The Office of Special Counsel also interviewed the members of the 1993 pathology team. Based upon this expert analysis and interviews with the original pathology team and the anthropologists from the Smithsonian Institution, the Office of Special Counsel has confirmed that 20 Davidians died of gunshot wounds on April 19. While it is impossible to determine what type of round killed some of the victims, several of the Davidians who died on April 19 had residual evidence indicating that they had been shot with low velocity rounds, either within inches of or in contact with their heads. None of the Davidians who died on April 19 displayed evidence of having been struck by a high velocity round. The expert retained by the Office of Special Counsel concluded that many of the gunshot wounds "support self-destruction either by overt suicide, consensual execution (suicide by proxy), or less likely, forced

³¹Dr. Doug Owsley of the Smithsonian Institution informed the Office of Special Counsel that none of the gunshot injuries to the head exhibited evidence of the damage which would be caused by "high velocity rounds."

execution.” Therefore, the autopsy evidence, while not conclusive as to the gunfire issue for all victims, fully supports the theory that the Davidians shot themselves. A copy of the report filed by the pathologist retained by the Office of Special Counsel is attached hereto as Appendix J.

(j) Tactical Analysis. The Office of Special Counsel also discussed with several witnesses the tactical implications of the allegations that government agents fired guns on April 19 in the manner alleged. The allegations are that government agents exited their armored vehicles in close proximity to the complex, thereby exposing themselves to Davidian gunfire from fortified and elevated Davidian positions within the complex. To have done so would have unreasonably and unnecessarily risked the agents’ lives. For example, FBI snipers at one point observed a .50 caliber weapon high in the tower trained directly on their sniper position. As one FBI agent said, being on foot without the cover of an armored vehicle on April 19 under such circumstances “would be sheer madness.”

(k) Lack of Evidence of Ill Motive. The theory that the government deliberately shot or otherwise harmed the Davidians runs contrary to the overwhelming evidence, before, during, and after the fire, that the government officials occupied themselves with resolving the standoff in a peaceful manner that would preserve life if at all possible. FBI agents negotiated patiently with the Davidians for 51 days. They developed their tactical plan with input from behavioral psychologists and doctors whose paramount concern was the safety of the children in the complex. They had doctors located at forward positions near the complex on April 19, including a doctor at the Sierra-2 sniper position and additional medical support at a location near the intersection of roads (the “T-intersection”) outside the complex, waiting to provide the

Davidians medical assistance. The FBI also set up a field hospital. Military doctors and law enforcement medics treated all nine of the Davidians who escaped on April 19.

One FBI agent even risked his life by going into the complex to rescue a Davidian who had exited and then ran back into the burning complex. The Davidian resisted the agent's efforts to pull her from the fire, but the agent saved her. Former FBI Director William Sessions provided compelling testimony before Congress in 1993 describing the acts of FBI agents, not only in rescuing Davidians from the burning complex, but also in attempting to rescue Davidians whom the FBI hoped had escaped into an underground bus near the complex. Agents, including HRT commander Richard Rogers, waded into the concrete construction pit, waist deep in water containing human waste and rats, in an unsuccessful effort to find children in the underground bus. It is simply not credible to suggest that while agents on the front side of the complex were risking their lives to rescue the Davidians, other agents on the back side were shooting at them to pin them in the burning structure.

In summary, those claiming that government gunfire did occur have presented an unsupportable case based entirely upon flawed technological assumptions. The FLIR tapes and testing, witness interviews, including those of Davidians, documentary evidence, audio and video evidence, photographs, autopsy reports, polygraph examinations, ballistics testing, and basic tactical and behavioral considerations provide conclusive evidence that no agent of the United States fired gunshots at Waco on April 19, 1993.³² The eyewitness evidence and physical

³²During the late afternoon or early evening hours of February 28, Davidians Michael Dean Schroeder, Norman Allison, and Woodrow Kendrick, attempted to gain entry into the Davidian complex. They approached the complex from the rear or back side of the complex in an area commonly referred to as the Perry Barn or Perry Barn catch pen. The Davidians were confronted by a group of 14 ATF agents who were attempting to withdraw from the area. A

evidence are equally overwhelming that the Davidians shot repeatedly at the government on April 19 and that 20 Davidians either committed suicide or were shot by other Davidians as the fire broke out just after noon on April 19.

3. *Did agents of the United States use an incendiary or pyrotechnic device at the Branch Davidian complex on April 19, 1993?*

An FBI agent shot three pyrotechnic military tear gas rounds at the plywood covering of the concrete construction pit³³ on the west or “green” side of the complex at approximately 8:08 a.m. on April 19, 1993.³⁴ The rounds failed to penetrate the covering,

shootout ensued during which Schroeder fired at least 18 shots at the agents. Schroeder was killed, Allison was arrested, and Kendrick escaped. Since the death of Schroeder, allegations have been made that Schroeder may have been wounded during the initial shootout and subsequently executed by ATF agents before the agents completed their withdrawal. The theory of Schroeder’s execution is based upon the claim that Schroeder died from two gunshot wounds to the back of the skull. A review of the autopsy results of Schroeder by an expert retained by the Office of Special Counsel does not support this claim. Although Schroeder suffered two entry gunshot wounds to the skull, both wound tracks indicate Schroeder was facing forward at the time he was shot, which is consistent with a gun battle, not an execution. The two entry wounds are in the front of his head. The projectiles exited from the rear of his head. The autopsy results support the statements and subsequent criminal trial testimony of the ATF agents involved in this confrontation and are not, therefore, indicative of the alleged execution-style shooting.

³³This structure is alternatively referred to as a construction pit and a tornado shelter by many commentators and witnesses. Some also refer to it as a bunker, which has a tendency to confuse this structure with the storage area below the tower inside the complex, which is also referred to as a bunker by numerous sources. For the purposes of this Report, the Office of Special Counsel will refer to the structure at which the FBI fired military tear gas rounds as the concrete construction pit and the storage area within the complex as the concrete bunker.

³⁴The rounds were pyrotechnic but not incendiary. An incendiary round is designed to start a fire. A pyrotechnic round is not designed to start a fire, but contains a composite of materials which burn, creating heat which can start a fire under certain conditions. The FBI has advanced an argument that military tear gas rounds of the type fired by the FBI at the concrete construction pit on April 19, 1993, are not pyrotechnic. Because this tear gas was delivered with a charge that burns, the Office of Special Counsel rejects the FBI’s contention. Military tear gas

bounced off, and landed harmlessly outside the living quarters of the complex. There is no evidence that any government agent fired a pyrotechnic device at the living quarters of the Davidians, nor is there any evidence that any government agent fired pyrotechnic devices after 8:08 a.m. Because the FBI fired the pyrotechnic tear gas rounds nearly four hours before the fire started, at a concrete construction pit partially filled with water, 75 feet away and downwind from the main living quarters, the pyrotechnic tear gas rounds did not start or contribute to the spread of the fire. In support of these conclusions, the Office of Special Counsel relied upon the following evidence:

(a) Witness Interviews and Statements. Members of the FBI's Hostage Rescue Team ("HRT") have repeatedly acknowledged that one member of the HRT fired pyrotechnic tear gas rounds on April 19 in an attempt to penetrate the concrete construction pit. In November 1993, the agents who knew that the rounds had been fired discussed their use with the Department of Justice prosecution team which was preparing to prosecute certain of the surviving Davidians. The interview notes taken and trial summaries prepared by prosecution team members clearly reflect discussion of "military" tear gas rounds fired at the concrete construction pit. The notes reflect that a witness described these rounds (incorrectly) as incendiary. Also in 1993, an FBI pilot told investigators that he had heard radio transmissions on the morning of April 19 discussing the use of a "military round" at the concrete construction pit. In February 1996, the HRT again confirmed the use of pyrotechnic military tear gas rounds in response to an inquiry from the FBI's Office of General Counsel made during the course of the civil case brought by the

rounds are clearly pyrotechnic in nature, as numerous government documents (including the FBI's own Manual of Investigative Operations and Guidelines) and witnesses acknowledge.

Davidians and their families against the government. In 1999 and 2000, HRT agents openly acknowledged using the military tear gas rounds to the Office of Special Counsel.

(b) Photographic and Video Evidence. News footage obtained by the Office of Special Counsel shows FBI Special Agent David Corderman firing pyrotechnic tear gas rounds at the concrete construction pit on the west side of the complex. Film and video footage show a white cloud of tear gas emanating from the area around the concrete construction pit immediately thereafter. An aerial photograph also shows a white cloud around the concrete construction pit, which is a distinctive feature of the type of pyrotechnic tear gas round fired by the HRT. The FLIR tapes contain audio of the conversation at 7:48:52 a.m. in which HRT commander Rogers gave permission to fire these rounds and the conversation at 8:08 a.m. in which the HRT Charlie Team Leader notified Rogers that a member of his team had fired rounds, which had hit the concrete construction pit and bounced off. All of these sources indicate that the FBI fired the pyrotechnic rounds early in the morning, away from the living quarters of the complex.

(c) Physical Evidence. The Texas Rangers placed one expended military tear gas shell that they found during the crime scene search in an evidence locker maintained by the Rangers until the United States District Court for the Western District of Texas ordered the transfer of the evidence to the federal courthouse at Waco. A Texas Department of Public Safety photographer took a photograph of an expended military tear gas projectile on April 30, 1993. This projectile is missing,³⁵ but the photograph is with the Rangers' evidence at Waco. In addition, FBI explosives expert Wallace Higgins told the Office of Special Counsel that he saw

³⁵The photographer's log indicates that the evidence search team originally found the projectile approximately 200 yards northwest of the water tower, a location consistent with Corderman's description of the angle at which he shot.

two other pyrotechnic tear gas projectiles on or about April 20, 1993,³⁶ adjacent to the concrete construction pit. None of the three projectiles was logged into evidence by the Rangers, and the Office of Special Counsel has not located them.

(d) Polygraph Testing. Special Agent Corderman voluntarily submitted to and passed a polygraph test. The testing confirmed the Office of Special Counsel's conclusion that Agent Corderman was truthful in saying that he fired pyrotechnic tear gas rounds only at the concrete construction pit and not at the living quarters of the complex.

(e) Shaped Charge Allegation. The Office of Special Counsel also investigated allegations made by a filmmaker and a former United States Army Special Forces soldier (who was not at Waco on April 19, 1993) that government operatives allegedly entered the complex and placed explosive devices, known as shaped charges, on the concrete bunker at the complex and a propane tank near the tower. Those alleging that the government placed the shaped charges within the complex claim that the massive explosion that occurred during the fire at 12:26 p.m. on April 19 was the detonation of one of the shaped charges. They also point to photographs taken after the fire which show a hole in the roof of the concrete bunker, which they claim resulted from the detonation of the shaped charge.

The Office of Special Counsel found these allegations totally meritless. Experts retained by the Office of Special Counsel concluded that the explosion seen at 12:26 p.m. is a propane tank exploding due to heat from the fire. See Appendices F and N. Notwithstanding the

³⁶The spent cartridge, which would likely be found near the site where it was fired, is commonly called a "shell" or a "shell casing." The used "projectile" would be found near the target. In this report, the Office of Special Counsel will use the term "round" to describe the whole device, the term "shell" to describe the spent cartridge, and the term "projectile" to describe what is actually shot at the target.

near tactical impossibility of placing shaped charges at the locations alleged, the Office of Special Counsel and its experts analyzed the physical evidence relating to the hole in the concrete bunker and determined: (1) the debris remaining near the hole in the roof is inconsistent with the use of shaped charges or similar highly explosive devices; (2) none of the bodies recovered from the bunker presents evidence of a blast injury; (3) the metal rebar from the bunker is not covered with residue from a shaped charge; and (4) fragments from hand-grenades (which the Davidians had in their arsenal) are spread across the roof of the concrete bunker. Based upon this and other evidence, the Office of Special Counsel and its experts concluded that the hole in the concrete bunker was caused by a combination of heat damage and a low-order grenade detonation. See Appendices E and N. The grenade detonation was also caused by the heat of the fire. Significantly, counsel for the families of the Davidians who perished on April 19 did not pursue the allegation that the government used shaped charges against the Davidians. See Expert Analysis, Appendix N.

4. *Was there any illegal or improper use of the armed forces of the United States in connection with events leading up to the deaths of the Branch Davidians on April 19, 1993?*

The Office of Special Counsel investigated allegations that members of the armed forces of the United States violated the law by participating directly in the Waco law enforcement operation. Allegations made against the armed forces included claims that its members shot at the Davidians from helicopters on February 28, 1993, infiltrated the complex during the standoff, placed explosive devices in the complex, offered to kidnap Koresh, and shot at the Davidians from positions around government vehicles on April 19, 1993. These allegations proved entirely meritless.

The armed forces of the United States³⁷ did not violate any civil or criminal statute in connection with their activities at Waco in 1993. While the armed forces of the United States provided extensive support for law enforcement agencies, including reconnaissance, equipment, training, advice, and medical assistance, they were careful in their conduct and well-advised legally as they determined exactly what support to provide.³⁸ In fact, in at least two instances, law enforcement agencies solicited assistance from the armed forces that the armed forces either rejected or scaled back due to concerns about remaining within the bounds of federal law.

The primary issue with respect to the armed forces is whether the use of the active duty³⁹ military violated the *Posse Comitatus* Act, 18 U.S.C. §1385, which prohibits the use of the Army “as a *posse comitatus* or otherwise to execute the laws.” The *Posse Comitatus* law arose out of post-Civil War concerns that the armed forces had become an instrumentality of federal law enforcement in the occupied southern states. The overriding purpose of the legislation was to preclude the military from direct participation in arrests, searches and seizures. While the law establishes the important principle of separation of civil and military actions, it has never been the

³⁷The phrase “armed forces of the United States” customarily does not include the National Guard unless ordered into federal service, which did not occur at Waco. However, the Office of Special Counsel chose to read “armed forces of the United States” to include “armed forces of a state of the United States” so as to give the American public complete disclosure of military activity at Waco.

³⁸The conclusion that the military support provided at Waco was legal is not a close call. The applicable laws unequivocally permit such military assistance. Much of the criticism of the military support provided at Waco has focused on the issue of whether the law should permit this type of military assistance. This is a question for Congress and not for the Office of Special Counsel.

³⁹The term “active duty” means full-time duty in the active military service of the United States. See 32 U.S.C. §101(12).

basis of a successful prosecution. The *Posse Comitatus* Act does not prohibit all military support to civilian law enforcement, but only support that directly involves the military in law enforcement functions. Supplementing the *Posse Comitatus* Act, the Military Assistance to Law Enforcement Act, 10 U.S.C. §§ 371-378, precludes direct participation by active duty forces in searches, seizures, and arrests, but permits indirect support to law enforcement operations such as loaning equipment, training in the use of the equipment, offering expert advice, and providing equipment maintenance. These laws do not apply to the National Guard unless it is federalized by being ordered to active duty by the President.

In arriving at its conclusions regarding the use of the armed forces at Waco, the Office of Special Counsel considered the legality of armed forces support in five principal areas: (a) operations support, (b) equipment, (c) training, (d) expert advice, and (e) National Guard.

(a) Operations Support. In its investigation of the active duty military, the Office of Special Counsel focused on the level of participation by military personnel in law enforcement operations. In concluding that all active duty military support was legal, the Office of Special Counsel analyzed the support provided during three time periods: (1) preparation for the ATF operation of February 28, 1993, (2) the 51-day standoff, and (3) the activities of April 19, 1993.

1. Pre-February 28, 1993. Members from a detachment of the Rapid Support Unit (“RSU”), Operational Detachment “Alpha” 381 (“ODA 381”), which was comprised of ten U.S. Army Special Forces soldiers, provided assistance to ATF during its training at Ft. Hood, Texas, during February 1993. Specifically, ODA 381 reserved a facility at Ft. Hood that represented the complex, constructed a portable door entry and a reusable window for the facility, outlined part of the Davidian complex with engineering tape using photographs, facilitated the use of the ranges at

Ft. Hood, and served as human “silhouettes” of Davidians during ATF room-clearing exercises. This support is “indirect” military assistance that is within the bounds of applicable law and regulations.

In addition, the Office of Special Counsel has investigated the allegation that members of ODA 381 were present during the ATF’s attempt to execute warrants at the Davidian complex. The Office of Special Counsel has concluded that no member of ODA 381 was present during the ATF’s raid of the Branch Davidian complex. The evidence, including witness statements, a travel voucher, and a hotel receipt, indicates that four members of ODA 381 were late returning to McGregor Range at Ft. Bliss in El Paso, Texas, due to a flat tire and a severe thunderstorm and not because they had disobeyed orders and become participants in the ATF raid.

2. Support During the Standoff. Most of the active duty military support provided to the FBI during the 51-day standoff consisted of repair and maintenance of the equipment loaned to the FBI. This type of operations support is clearly legal.⁴⁰ Generally, FBI personnel brought equipment to rear positions around the complex for repair and maintenance, or in the case of the loaned military helicopters, the FBI brought the helicopters to Ft. Hood. However, on at least two occasions, military personnel deviated from this standard procedure. On one occasion, a tank driven by an FBI agent broke down within sight of the Davidian complex, and some of the tank’s maintenance crew rode in a Bradley vehicle to its location to correct the problem. On the other occasion, a member of the Army Special Forces went to a forward position to help replace a battery in surveillance equipment the FBI had placed on a water tower approximately one mile

⁴⁰10 U.S.C. § 374(a).

east of the complex. These deviations from the standard procedure did not constitute a “direct role” in law enforcement operations and the actions were, therefore, within the bounds of the law.

Throughout the standoff and on April 19, 1993, members of the Army Special Forces were at Waco as observers and technicians. During the standoff, there were a total of ten Army Special Forces personnel— seven equipment technicians and three observers— present at Waco. Typically, there were three or four present at any one time, one or two of whom were observers. The main purpose of the observers was to allow the Army Special Forces to learn how the FBI conducted a barricaded hostage operation using Special Forces equipment. Despite allegations to the contrary, the Office of Special Counsel has concluded that these Army Special Forces personnel did not penetrate the Davidian complex, did not offer to kidnap Koresh, did not place a shaped charge in the complex, did not wear clothing immune to infrared or thermal imaging detection, did not fire any weapons into the complex (and were not even armed), did not run their own separate Tactical Operations Center (“TOC”), and did not engage in any other action that violated the *Posse Comitatus* Act or any other criminal or civil statute. The Army Special Forces observation and equipment maintenance activities were well within the bounds of the law.

3. April 19 Support. The only active involvement of the military in the FBI operations on April 19, 1993, was to provide medical support to injured Davidians and government personnel. Several former Army lawyers expressed to the Office of Special Counsel some reservation about the propriety of the medical support provided by the active duty armed forces on April 19, because, by treating Davidians who may have been involved in the fire, military doctors may have become involved in crime scene activity and the chain of custody of

evidence. Indeed, such reasoning may have been behind the decision to preclude Army Special Forces medics from being present during the ATF operation on February 28. Nevertheless, the Office of Special Counsel concludes that the humanitarian provision of medical support did not violate any law. To the contrary, such support is justifiable within the relevant law, military regulations and policy.

(b) Equipment Support. From the evening of February 28 until after the fire on April 19, law enforcement agencies solicited and received large amounts of military equipment from the armed forces, including the United States Army Special Operations Command and the United States Air Force. The equipment included, among other things, two tanks, a transport aircraft, helicopters, ammunition, surveillance “robots,” classified television jamming equipment, classified thermal imagers, classified ground sensing systems, classified remote observation cameras, mine detectors, search lights, gas masks, night vision goggles, concertina wire, tents, cots, generators, and medical supplies. In the case of the two tanks, among other equipment, the military commanders required that the offensive capability of the equipment be disabled before providing it to the law enforcement agency. While the level of support was extensive, there is no legal restriction on the amount of equipment the active duty military may supply civilian law enforcement agencies, provided that the level of support does not adversely affect national security or military preparedness. Since providing equipment to the FBI at Waco did not adversely affect national security or military preparedness, it was proper under the law.⁴¹

⁴¹10 U.S.C. § 372(a). Moreover, the Davidians were heavily armed with machine guns and grenades. Only heavily armored equipment could have adequately protected the FBI agents present at Waco from the Davidians. The armed forces were the only organization that had such equipment.

(c) Training of Law Enforcement Personnel. The active duty military provided training to law enforcement agencies both prior to and during the standoff stages of the Waco incident. Most of the training occurred in three discrete areas: (1) training of ATF personnel by ODA 381, prior to February 28, 1993, (2) training of FBI personnel in the use of unclassified equipment such as tanks and other vehicles during the 51-day standoff, and (3) training of FBI personnel by Army Special Forces personnel in the use of classified surveillance equipment during the 51-day standoff.

The relevant statutes⁴² and Department of Defense directive⁴³ permit the active duty armed forces to train law enforcement personnel, but the directive precludes “large scale” or “elaborate” training.⁴⁴ In February 1993, ATF requested extensive training from the active duty military in several areas, including close quarters battle training. Due to the law, military regulations and policy, the active duty armed forces scaled back the training requested by ATF. ODA 381 refused to provide the close quarters battle training⁴⁵ requested by ATF because such training is highly complex and was beyond the capabilities of the RSU at that time. The armed forces properly limited the areas of training to range safety, communications, and medical evacuation. With respect to the training of FBI agents in the use of military vehicles and

⁴²10 U.S.C. § 373(1); P.L. 101-510, div. A, title X, § 1004(b)(5).

⁴³DoD Directive 5525.5, paragraph E4.1.4.

⁴⁴The Office of Special Counsel found no established standard for what qualifies as “large scale” or “elaborate” training.

⁴⁵Of the six detachments within the RSU, ODA 381 was specifically chosen to work with the ATF because none of its members were trained in close quarters battle.

classified surveillance equipment during the 51-day standoff, such training is explicitly permitted under the relevant laws and regulations and was, therefore, proper.

(d) *Expert Advice.* The active duty armed forces of the United States provided expert advice to other government entities involved with the events at Waco, and all such advice was in accordance with law. Government entities requested advice from members of the active duty military on four occasions. In December 1992 and January 1993, ATF sought and received advice from the Department of Defense liaison to ATF regarding what military support was available to assist ATF's operation. From February 3 to 27, 1993, ATF requested through Joint Task Force Six ("JTF-6") (a military organization responsible for coordinating counterdrug activity) that a detachment from the RSU provide advice concerning the planning and execution of the raid on the Davidian complex. From February 28 to March 1, 1993, the Governor of Texas requested and received advice from a general at Ft. Hood on what federal agencies to contact and how to respond to requests for Texas National Guard support. Finally, on April 13 and 14, the FBI and the Department of Justice requested and received advice from present and former members of the Army Special Forces on the effects of the tear gas that the FBI planned to insert into the complex.

The relevant statute⁴⁶ and Department of Defense directive state that the active duty military may provide "expert" advice to law enforcement agencies, but the directive precludes "regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations."⁴⁷ The relevant active duty military authorities were well

⁴⁶10 U.S.C. § 373 (2).

⁴⁷See DoD Directive 5525.5, paragraph E4.1.5.

aware of this legal standard. With respect to ODA 381's involvement with ATF prior to February 28, the appropriate military authorities prohibited ODA 381 from providing some of the advice requested by ATF, including evaluating ATF's plan of operations. The military legal authorities determined that critiquing ATF's operations plan could constitute direct participation in law enforcement activity. Specifically, the commander of JTF-6 ordered ODA 381 not to become directly involved in ATF operational planning, nor assume responsibility for the ATF plan. The commander did authorize ODA 381 to assist ATF in setting up its practice area and critiquing the safety aspects of ATF's rehearsal. There is some evidence that a member of ODA 381 provided limited advice⁴⁸ in an area of his expertise on one occasion, but the Office of Special Counsel has concluded that the advice was within the bounds of the law.

The advice given to the Governor of Texas on February 28, 1993, consisted of discussing ATF's request for the loan of Bradley vehicles and informing the Governor of the capabilities of the FBI's HRT. The General gave very limited advice in an area of his expertise, and this advice was, therefore, permissible under the law.

Finally, the present and former members of the Army Special Forces whom the FBI flew to Washington, D.C. on April 14, 1993, to advise Attorney General Reno on the proposed tear gassing plan, explicitly told FBI and Department of Justice officials that they could not "grade your paper," meaning that they could not endorse or critique the gassing plan. Rather, they discussed the effects of CS gas on people, whether the delivery of tear gas could start a fire, whether the HRT personnel were fatigued or in need of retraining, and they described how the

⁴⁸A weapons sergeant for ODA 381 stated that he provided ATF general advice within his expertise in mounting and dismounting vehicles in a tactical manner, but he did not give specific advice to the ATF in mounting and dismounting the cattle trailers used in the February 28 raid.

military would conduct the operation. They emphasized the differences between military and civilian law enforcement operations. This advice was within the areas of their expertise and did not constitute direct participation in law enforcement activity.

(e) National Guard Support. The National Guard, in its state status,⁴⁹ also provided extensive support to ATF and the FBI at Waco. Prior to the February 28 operation, the Texas National Guard flew five reconnaissance flights over the Davidian complex. In addition, the Alabama National Guard made one surveillance flight in support of the Texas National Guard's counterdrug program. ATF sought and received the support of three Texas National Guard helicopters, flown by Guard personnel, to act as a diversion during the February 28 operation. These helicopters were hit by Davidian gunfire early in the ATF operation. Throughout March and April, Texas National Guard personnel were present at Waco and served primarily in maintenance, liaison, and support positions. On April 19, members of the Texas National Guard were present at Waco in their capacity as maintenance and support technicians, but none became directly involved in the law enforcement operation. Finally, the Texas National Guard provided substantial military equipment to the FBI beginning on the evening of February 28. Specifically, the Guard provided, among other equipment, ten Bradley vehicles, five Combat Engineering Vehicles ("CEV's"), one M88 tank retrieval vehicle, 12 M1009 vehicles, two heavy trucks, and various military supplies.

⁴⁹The National Guard provided personnel support under the counterdrug provisions of 32 U.S.C. §112. Most of the equipment loaned by the Texas National Guard was loaned in accordance with the requirements of National Guard Regulation ("NGR") 500-1, Military Support to Civil Authorities.

None of this support violated the *Posse Comitatus* Act because that Act does not apply to the National Guard in its state status. The Office of Special Counsel also considered, however, whether this support violated any other laws or the applicable National Guard regulations (“NGR’s”).⁵⁰ The Office of Special Counsel has concluded that the Texas National Guard’s decision to accede to ATF’s request by flying three National Guard helicopters near the complex on February 28, 1993, may have resulted in an inadvertent violation of guidance in NGR 500-2 which states that “pilots in command will not fly into or land in areas where the aircraft is likely to be fired upon”⁵¹ and commanders “will also ensure that Guard members are not knowingly sent or directed to enter into a hostile environment where there is a probability of encountering small arms fire or life threatening situations.”⁵² Although the pilots indicated that they did not expect to be fired upon, the pilots knew that the Davidians were a dangerous group, and they did in fact take heavy fire from the Davidians during the ATF operations. Except for this possible inadvertent violation of guidance in NGR 500-2, the Office of Special Counsel has concluded the Guard’s support was entirely in accordance with law and regulation.

The Office of Special Counsel has concluded that the allegation that National Guard helicopter crews fired at the Davidians on February 28 is without merit. Interviews with each of the crew members indicate that the Davidians fired at the helicopters, but that the

⁵⁰The National Guard relied upon both NGR 500-1 and NGR 500-2, National Guard Counterdrug Support to Law Enforcement Agencies to provide the support it did to the law enforcement agencies. Moreover, two versions of NGR 500-2 were used with the latter taking effect March 1, 1993.

⁵¹See NGR 500-2 dated October 1, 1992 at paragraph B-4 in Appendix B.

⁵²See NGR 500-2 dated October 1, 1992 at paragraph B-5 in Appendix B.

helicopter crews did not return fire. Video taken on board one of the helicopters confirmed that the crews immediately terminated the mission and landed their aircraft.

(f) *Procedural and Administrative Issues.* The Army conditions the loan of equipment on the execution of a loan agreement prior to delivery of the equipment. With respect to the equipment provided by the Army at Ft. Hood to the FBI after the February 28 ATF operation, the Army did not execute the lease agreement until June 30, 1993. The Office of Special Counsel considers this delay to be a procedural matter requiring no action on its part.

In addition, there has been extensive prior investigation into the issue of whether ATF fabricated information concerning drug use and production by the Davidians in order to obtain military support of the counterdrug resources of the active duty armed forces and the National Guard in preparation for the original raid on the complex, with sharply conflicting conclusions.⁵³ The issue is relevant to the charter of the Office of Special Counsel if the lack of a drug nexus would have precluded otherwise permissible activity of the armed forces of the United States.⁵⁴ It is important to note that the vast majority of military support provided at Waco was

⁵³There is no legal standard for how strong the drug nexus needs to be in order to obtain military support. Clearly there was some investigation by ATF into possible drug activity at the complex, and ATF sought some assistance from the United States Drug Enforcement Administration (“DEA”). Moreover, there is no requirement that the military independently investigate the accuracy of the drug nexus alleged by a law enforcement agency soliciting military support.

⁵⁴The issue of a drug nexus also goes to the question of whether the active duty military and National Guard had to be reimbursed for providing support to law enforcement agencies. If there is a drug nexus, then support provided by the armed forces premised on that drug nexus does not have to be reimbursed. See the National Defense Authorization Act of 1991, P.L. 101-510, div. A. Title 10 § 1004, November 5, 1990, 104 Stat. 1485 and 32 U.S.C. §112. In the case of Waco, the vast majority of costs were reimbursed, and the issue of reimbursement was accurately addressed in the Report of the General Accounting Office of August 1999. Therefore, the Office of Special Counsel did not re-investigate this matter.

not premised on any alleged drug nexus. Only the limited training provided to the ATF by ODA 381 before February 28 and some of the National Guard support were based on the drug allegations. None of the support provided by the active duty military to the FBI from February 28 through April 19, 1993, was in any way dependent on drug allegations. Thus, the drug nexus is a very minor issue with respect to this investigation.

Although the Office of Special Counsel did not extensively investigate the basis for ATF's assertion that there was a drug nexus, there is some evidence prior to February 28, 1993, connecting "drug activity" with the complex which could form the basis of a drug nexus (although ultimately federal agents found no evidence of illegal drugs at the complex).⁵⁵ Even if there had been no such nexus, the Office of Special Counsel has concluded that law enforcement agencies could have obtained the same level of support from the armed forces. While ATF would not have been permitted to make use of the counterdrug administrative resources of JTF-6 had there not been a drug nexus, the active duty military could have provided virtually the same support through other means even without a drug nexus. Similarly, the National Guard could have supported law enforcement in the manner it did without a drug nexus, although obtaining such support may have been somewhat difficult under the relevant law and regulations.⁵⁶ Regardless of the level of drug

⁵⁵The apparent drug nexus included ATF's claim of four prior drug arrests and one drug conviction of Davidians, a "hot spot" detected in the complex during the Guard's surveillance flights which purportedly was an indicator of an active methamphetamine lab, and the alleged presence of a methamphetamine lab at the complex in the late 1980's. However, others have noted that there was no evidence of active use of drugs at the complex in 1993 and that Koresh had allegedly removed the methamphetamine lab when he took control of the Davidian group.

⁵⁶If there were no drug nexus, all of the National Guard's support would have been provided under NGR 500-1. Obtaining the same support may have been difficult (but not illegal) because some of the support such as surveillance flights is not directly addressed in NGR 500-1, as it is in NGR 500-2.

nexus present, therefore, the Office of Special Counsel has concluded that the active duty military and National Guard lawfully provided their support. In sum, the armed forces conducted themselves properly and commendably at Waco.

5. *Did any employee of the United States make or allow others to make false or misleading statements, or withhold evidence or information from any individual or entity entitled to receive it, or destroy, alter, or suppress evidence or information relative to the events occurring at the Branch Davidian complex on April 19, 1993?*

Attorney General Reno gave the Special Counsel a broad mandate to investigate whether employees of the United States covered up material information concerning the government's actions at Waco on April 19, 1993. Public concerns about a potential cover-up stemmed principally from several revelations in August and September of 1999: (1) that the FBI had fired pyrotechnic tear gas rounds on April 19, 1993, contrary to the repeated public denials of the FBI and Department of Justice for over six years; (2) that a previously undisclosed FLIR video recorded during the early morning of April 19, 1993, contained confirmation that the FBI fired such pyrotechnic tear gas rounds; and (3) that the 49th page of a key FBI lab report, which indicated that a shell from one of the pyrotechnic tear gas rounds was found near the Branch Davidian complex after April 19, 1993, was omitted from the document production made to Congress prior to the 1995 hearings.⁵⁷ The Office of Special Counsel, therefore, focused its cover-up investigation on determining whether employees of the FBI or Department of Justice

⁵⁷There was also substantial public concern over the revelation that military Special Forces personnel had been present at Waco and were alleged to have participated in the operation. The Office of Special Counsel has definitively laid to rest the allegations concerning the activities of the Army Special Forces, as previously discussed in Section 4 above.

deliberately concealed the FBI's use of pyrotechnic tear gas rounds from Congress, the courts, counsel for the Davidians, and the American public. The Office of Special Counsel devotes much of its "cover up" analysis below to answering this question. In short, the Office of Special Counsel has concluded that numerous individuals knew that the FBI had fired pyrotechnic tear gas rounds on April 19, 1993. Several of these individuals should have, but did not, disclose this fact to the Attorney General, Congress, the courts, and counsel for the Davidians. [REDACTED]

[REDACTED]

[REDACTED]

Consistent with its mandate, the Office of Special Counsel also pursued numerous other cover-up allegations and leads ranging from inconsistencies among witnesses' accounts, to claims of broad government-wide conspiracies to cover up activities that occurred at Waco other than the firing of the pyrotechnic tear gas rounds. None of these allegations resulted in any credible evidence of misconduct by any government employee.

Three of these issues, however, have generated significant public concern, and the Special Counsel therefore feels it is appropriate to put these concerns to rest. These issues are: (1) whether the FBI deceived Attorney General Reno about the conditions in the complex and the status of negotiations prior to her approval of the tear gas plan; (2) whether any FBI employee intentionally removed audio from the FLIR tape recorded by the FBI Nightstalker aircraft from 10:42 a.m. until 12:26 p.m. on April 19; and (3) whether the FBI commanders at Waco lied to Congress in 1995 and to the Office of Special Counsel when they stated that they ordered a CEV to penetrate the complex on April 19 in order to create escape routes for the Davidians and deliver tear gas. As described below, the Special Counsel has concluded that: (1) the FBI did not deceive

Attorney General Reno prior to her approval of the tear gas plan; (2) the FBI did not remove the sound or otherwise alter the FLIR tape covering the period 10:42 a.m. to 12:26 p.m.; and (3) the FBI commanders were truthful in their testimony about the purpose for breaching the complex.

(a) Did government officials intentionally conceal the FBI's use of pyrotechnic tear gas rounds from Congress, the courts, counsel for the Davidians, and others from April 1993 until August 1999? As detailed earlier, the FBI fired three pyrotechnic tear gas rounds at the concrete construction pit outside the main structure of the complex shortly after 8:00 a.m. on April 19, 1993. The firing of these rounds neither started nor contributed to the spread of the fire that consumed the complex four hours later. However, until August of 1999, FBI and Department of Justice officials repeatedly denied that the FBI had used *any* such device during the tear gassing operation. These statements were false, and the failure to acknowledge the use of pyrotechnic tear gas rounds for more than six years has greatly undermined public confidence in government.

To provide some context for its specific conclusions, the Office of Special Counsel offers the following overview, which (i) defines the issue with specificity, and (ii) summarizes the misleading statements and missing evidence that have been the subject of the investigation.

1. Terminology Issues. Whether or not there was a cover-up is in many respects dependent upon nuances in terminology. The first issue relates to the difference between “pyrotechnic” and “non-pyrotechnic” tear gas rounds. In March and early April 1993, as the FBI developed its tear gassing plan, several people— from the FBI, the Department of Justice, and the military— raised the concern that the tear gassing operation could cause a fire. Throughout consideration of the plan, the FBI gave its assurances to anyone who asked that the tear gas would

be delivered through non-pyrotechnic means, meaning that the tear gas would not be spread with a charge that burns. However, the plan approved by Attorney General Reno did not use the words “pyrotechnic” or “non-pyrotechnic,” stating only that the FBI was to deliver tear gas to the complex through booms on CEV’s or, if the Davidians fired upon the FBI, through “ferret rounds” fired from M-79 grenade launchers. Canisters attached to booms on CEV’s spray CS gas without any sort of pyrotechnic charge to effectuate the delivery of the gas. A Ferret projectile, a plastic bulb with fins, breaks open on impact and disperses the CS gas in a liquid form without using a pyrotechnic charge. While the plan authorized the use of two forms of non-pyrotechnic tear gas, it did not expressly preclude the use of pyrotechnic means of delivery. There is no dispute, however, that Attorney General Reno expressly prohibited the use of pyrotechnics during her discussions of the plan with the FBI.

Further complicating the issue is that the word “pyrotechnic” is often, but mistakenly, used synonymously with the word “incendiary.” The purpose of an incendiary device is to cause a fire. Technically, therefore, a pyrotechnic tear gas round is not “incendiary.” Pyrotechnic tear gas rounds can cause a fire under certain circumstances, but they are not designed to do so and are non-incendiary. Statements that the FBI did not fire “incendiary” devices at Waco on April 19 are technically true, but could be misleading.

Further still, HRT commander Rogers, who authorized the use of the pyrotechnic tear gas rounds, asserted that the prohibition against pyrotechnics applied only to the introduction of tear gas at the living quarters of the Davidians, and did not apply to the concrete construction pit 75 feet from the living area of the complex. Attorney General Reno believes her exact words prohibited pyrotechnics “at the compound,” which in her mind included the concrete construction

pit. However, she has fully acknowledged that there was no discussion of what the “compound” was, and that others might not have understood the concrete construction pit to be part of the “compound.” Attorney General Reno had the impression that the FBI would not use pyrotechnic devices during any phase of the operation, but Rogers did not share that belief, so there was no meeting of the minds.

This situation creates semantic difficulties in determining whether the FBI or Department of Justice covered up the FBI’s use of pyrotechnic devices. Some of the statements that led the public to believe that the FBI had not used any pyrotechnic devices on April 19 suggest only that no pyrotechnic devices were fired at the “compound” and arguably do not encompass the concrete construction pit. Another misleading statement, contained in a Department of Justice report on Waco, states that the FBI used only “non-incendiary” devices at Waco, which is, again, technically true because pyrotechnic tear gas rounds are not incendiary, although some government personnel used the terms “pyrotechnic” and “incendiary” interchangeably.

The issue is even further complicated by the various alternative names given to pyrotechnic tear gas rounds. In addition to the official designation of XM651E1 and abbreviated designation of M651, pyrotechnic tear gas rounds have been commonly referred to as “military rounds.” At least one FBI agent allegedly referred to them as “cupcake rounds.” Some government employees have used the term “bubblehead” during the past seven years to describe the appearance of pyrotechnic tear gas projectiles. Much of the documentary and testimonial evidence from 1993 and 1994 confirming that the FBI fired three pyrotechnic rounds at Waco on April 19 makes no mention of the word “pyrotechnic,” but rather refers to M651 casings, military

rounds, cupcake rounds, or bubbleheads. As described below, some individuals with access to this information, who nonetheless failed to inform Congress, the public, or the courts that the FBI used the pyrotechnic gas rounds, have told the Office of Special Counsel that they did not understand that military tear gas rounds, bubbleheads, or cupcake rounds were pyrotechnic.

2. The Misleading Statements and Missing Evidence. The following trail of public statements led the American people to believe that the FBI had not used pyrotechnic tear gas rounds on April 19, 1993. Immediately following the fire, FBI Special Agent-in-Charge and spokesperson Robert Ricks stated at a press conference that the FBI had not used any pyrotechnic devices during the entire tear gassing operation. In a prepared statement, Ricks stated, “the gas used was non-pyrotechnic; CS gas which does not cause a spark or flame. Also the delivery system utilized is non-pyrotechnic.” In this same statement, Ricks later stated, “there was no gas being inserted into the building at the time of the fire. No pyrotechnics were used at any time.” A few days later, Attorney General Reno told Congress that in discussions prior to her approval of the plan she “asked for and received assurances that the gas and its means of use were not pyrotechnic.” Director Sessions told the same congressional committee that a critical factor in the FBI’s choice of CS gas was that it “can be used without pyrotechnics.” The “Report to the Deputy Attorney General on the Events at Waco, Texas February 28 to April 19, 1993” (the “Scruggs Report”) issued by the Department of Justice on October 8, 1993, stated that “a nationally recognized team of arson experts has also concluded that ... the gas delivery systems that the FBI used were completely nonincendiary.”

During the preparation for the criminal prosecution of the Davidians in 1994, although HRT witnesses had told prosecutors that the FBI had fired “military rounds,” “cupcake

rounds” and “bubbleheads,” (and the prosecutors’ and paralegal’s notes include the term “incendiary” to describe the rounds), prosecutors formally advised the defense counsel that there was “no evidence government agents fired gunshots on April 19, 1993 *other than ferret tear gas rounds.*” (Emphasis supplied.) Under the case of *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors are required to provide the defense with exculpatory evidence, and, even though the question of who started the fire was an issue in the case, the prosecutors failed to disclose to the defense the FBI’s use of the pyrotechnic tear gas rounds.

During the joint hearings in 1995 by the House Committee on Government Reform and Oversight and the Committee on the Judiciary, the Committees issued a request for documents to the Department of Justice, specifically asking for “a listing of all pyrotechnic and incendiary devices” used at the Davidian complex. The Department of Justice provided no such list in its response to Congress. Rather, Department of Justice employee Richard Scruggs has acknowledged that during several informal briefings he told members of the Committees that the FBI used no pyrotechnic devices at Waco on April 19, 1993. Additionally, a member of the criminal trial prosecution team, Ray Jahn, submitted a written statement to the Committees stating that the FBI fired nothing on April 19 “other than the non-lethal ferret rounds which carried the CS gas.” As discussed in more detail below, he has admitted that this statement is false but claims that he was merely “negligent” in not disclosing that rounds other than Ferret rounds had been used.

Several internal Department of Justice and FBI documents demonstrate how some of these incorrect statements to Congress originated. In preparation for its response to the congressional request for documents, Scruggs received a memo in June of 1995 from FBI

headquarters staff specifically stating that “there were no incendiary or pyrotechnic devices used against the Branch Davidians on 4/19/93.” The Department of Justice later assembled a briefing book for Attorney General Reno which included a section on the flammability of CS gas. It concluded: “[P]yrotechnic rounds are not used by the FBI.”

During the pre-trial phase of the civil lawsuit filed against the United States, counsel for the Davidians and their families filed the affidavit of an expert who received information from a Davidian attorney, Kirk Lyons, that a round referred to as a “bubblehead” was fired at the complex on April 19. The expert noted that “military pyrotechnic munitions” may have been used by the FBI against the Davidians. Later, after more evidence of the use of such a round was advanced by the Davidians, the civil trial team filed a pleading incorrectly implying that the Davidians may have fired a pyrotechnic tear gas round, not the FBI.

Adding to the concerns raised by this series of misleading statements is that, to this day, no one can locate any of the three expended pyrotechnic tear gas projectiles, and no one has located two of the three shells. An FBI explosives expert has told the Office of Special Counsel that he saw two military tear gas projectiles on April 20, 1993, lying next to the concrete construction pit, and on April 30 a photographer photographed the third projectile which had been marked for evidence collection. One of the Texas Rangers who was on the scene recalls collecting one expended shell, and discussing the shell with an FBI agent, who said he would have it examined, and later confirmed that it was a military tear gas shell. This shell is the only one in evidence. In addition, an FBI lab report detailing some of the evidence contains a reference only to this one casing.

Equally disconcerting is the failure of the FBI to release, until September 1999, the early morning FLIR tape on which HRT commander Rogers is heard authorizing the firing of the military tear gas rounds. On a subsequent tape, approximately 18 minutes later, the HRT Charlie Team reports that the military rounds had bounced off the concrete construction pit. The FBI emphatically denied for years preceding their release that any such early morning FLIR tapes existed, raising concerns that these FLIR tapes remained undisclosed precisely because they contained independent confirmation that the FBI fired pyrotechnic tear gas rounds on April 19.

Finally, in September of 1999, the Department of Justice acknowledged that, in 1995, it produced to Congress an incomplete, 48-page version of the 49-page FBI evidentiary laboratory report. The missing 49th page of the report discloses that a 40 millimeter military tear gas shell was recovered at the Branch Davidian complex.

Considering the large number of misleading statements and omissions, as well as the missing physical evidence, it would appear that there was a cover-up. However, there are countervailing considerations. First, all entities which received misleading information—Congress, the courts and counsel for the Davidians—concurrently received other information indicating that the FBI had in fact fired pyrotechnic rounds at Waco. For example, despite the misleading testimony cited above, Congress acknowledged that it received in 1995 several documents that referred to the use of “military rounds” by the FBI at Waco. Similarly, while the prosecutors did not make affirmative disclosure that the FBI used pyrotechnic tear gas rounds to the Davidians, on December 15, 1993, Assistant United States Attorney LeRoy Jahn did provide defense counsel for the Davidians with the FBI laboratory report that contains the reference to the military tear gas shell and the photograph of the projectile. Further still, some of the lawyers for

the Davidians in the civil suit received the FBI lab report, the photograph, and notes from the preparation for the earlier criminal trial in which the Department of Justice trial team made reference to “military rounds” and “bubbleheads.”

3. Conclusions regarding a possible cover-up. The Office of Special Counsel has resolved the issues concerning the cover-up investigation as follows.⁵⁸

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

B. FBI Statements in 1993. The Office of Special Counsel has also concluded that FBI Director Sessions did not knowingly mislead Congress in 1993 regarding the FBI’s use of pyrotechnics at Waco. Director Sessions’ statement that CS gas was chosen because it could be used without pyrotechnics was true. He simply did not know that three pyrotechnic military tear gas rounds had also been used on the morning of April 19. Similarly, when Ricks gave his press briefing immediately after the fire, he did not know that any pyrotechnic tear gas rounds had been

⁵⁸The Office of Special Counsel provided those individuals whom this Report criticizes an opportunity to respond to the conclusions contained herein. Those responses are contained in Exhibit 2.

used. The FBI's plan clearly called only for the use of Ferret tear gas rounds which are non-pyrotechnic, and no one told Ricks that the HRT had used pyrotechnic tear gas rounds that morning.

C. The Scruggs Report and Investigation. As stated earlier, in 1993, a team of Department of Justice lawyers and FBI investigators, led by Richard Scruggs, issued a report on the events at Waco. Although they did not investigate the issue of pyrotechnics, the Scruggs Report indicated that the tear gas rounds used by the FBI at Waco was "non-incendiary." Members of the Scruggs team went into the project with the assumption that the FBI had done nothing wrong. Former Deputy Attorney General Philip Heymann, who oversaw the entire project, agreed with this characterization of the Scruggs investigation. The Scruggs team did not even ask witnesses about the use of pyrotechnic rounds. During interviews of the HRT Charlie Team, the Scruggs investigators failed to ask about the different types of munitions fired on April 19. Even so, one witness told the investigators that he had heard radio transmissions about the use of a "military round" on April 19. The Scruggs team attributed no significance to this term, and did not pursue the matter. The Scruggs team was also aware of the video *Waco: The Big Lie*, produced by Linda Thompson, which contains news footage of "smoke" rising from the concrete construction pit. The film alleges that this "smoke" is evidence that the FBI started the fire. Even though the Scruggs Report discusses the cause of the fire, the Scruggs team never investigated the origin of this "smoke," which was actually tear gas emanating from a pyrotechnic military tear gas round. Lastly, Scruggs' FBI investigators had access to the FBI's photos, including the photo depicting a cloud of "smoke" rising from the area of the concrete construction pit and the photo of the military tear gas round in the field.

The failure of the Scruggs team to discover and report that the FBI used pyrotechnic tear gas rounds was the result of initiating the investigation with the assumption that the FBI had done nothing wrong, was inconsistent with the responsibility to conduct a thorough and complete investigation, and was clearly negligent.

D. The FBI Hostage Rescue Team. In November 1993, the team prosecuting the Davidians interviewed members of the HRT at Quantico, Virginia. Those who knew of the use of the military tear gas rounds, including HRT commander Rogers, admitted openly to the criminal prosecution team that the FBI had fired the military tear gas rounds at the concrete construction pit on April 19. In addition, HRT Special Agent Robert Hickey acknowledged the use of the military tear gas rounds and their capacity to start a fire in a memorandum to an FBI lawyer in February 1996. HRT members candidly admitted to the Office of Special Counsel that they had used these rounds. There was clearly no attempt on their part to conceal the use of military tear gas rounds.

HRT commander Rogers did, however, sit silently behind Attorney General Reno when she testified to Congress in April 1993 that she had sought and received assurances that the gas and its means of delivery would be non-pyrotechnic. Rogers claims that he was not paying attention and did not even hear her when she made this statement, and Attorney General Reno notes that her statement was technically true because she sought and received the assurances *before* the operation. Similarly, Rogers attended the 1993 testimony of FBI Director Sessions, and did not correct misimpressions left by Sessions' statement that the FBI had chosen CS gas because it could be delivered without pyrotechnics. Rogers' failure to correct the misleading implications of the testimony of Attorney General Reno and Director Sessions was a significant omission that contributed to the public perception of a cover-up and that permitted a false

impression to persist for several years. Rogers attended the congressional hearings precisely to ensure that Congress was provided with accurate information. Instead, in the terms of the Attorney General's Order to the Special Counsel, Rogers "allowed others to make . . . misleading statements." Nevertheless, the Office of Special Counsel has determined that Rogers' conduct did not constitute a prosecutable offense because: (1) the statements of Attorney General Reno and of Director Sessions were technically true; (2) Rogers did not have a *legal* obligation to ensure the accuracy of another person's testimony; (3) and it is impossible to prove that Rogers actually heard and comprehended the Attorney General's or FBI Director's statements. In any event, the statute of limitations relating to the statement before Congress expired in 1998.

E. Attorneys Preparing for the 1995 Congressional Hearings. Attorneys from the Department of Justice who produced documents to the United States House of Representatives Committee on Government Reform and Oversight and the Committee on the Judiciary in advance of the 1995 hearings have come under public scrutiny for producing the FBI laboratory report containing the reference to the military tear gas shell without the 49th page, which contains the relevant reference. In fact, however, while one copy of the report did not contain the 49th page, the Committees were provided with at least two copies of the lab report in 1995 which did contain the 49th page. The Office of Special Counsel easily located these complete copies of the lab report at the Committees' offices when it reviewed the Committees' copy of the 1995 Department of Justice document production. The Department of Justice document production to the Committees also included several other documents that referred to the use of the military tear gas rounds, including the criminal prosecution team's witness summary chart and interview notes. The

Special Counsel has concluded that the missing page on one copy of the lab report provided to the Committees is attributable to an innocent photocopying error.

The Office of Special Counsel has also investigated the origins of certain internal Department of Justice and FBI documents generated in connection with the 1995 hearings. The Committees conducting the hearings were investigating the issue of pyrotechnics, as indicated by their June 8, 1995, request for documents which sought, among other things:

[a]ll records of or concerning pyrotechnic devices and incendiary weaponry, including a listing of all pyrotechnic and incendiary devices and corresponding technical data and manufacturer used on April 19, 1993, against the Residence of Koresh and the Branch Davidians . . . [a]ll records of or concerning the names of FBI employees who launched any such pyrotechnic devices . . . [and all] records of or concerning the names and command structure for the decision to use any pyrotechnic or incendiary devices

A team of attorneys at the Department of Justice, once again led by Richard Scruggs, Steven Zipperstein, and Robert Lyon, spent several months preparing for the hearings. As part of their work, these attorneys prepared briefing materials for Attorney General Reno on issues that they expected Congress to raise during the hearings. Several of those documents incorrectly state that pyrotechnic devices were not used at Waco. Also, several documents sent from the FBI to the Department of Justice in response to questions raised during preparations for the hearings wrongly state that the FBI used no pyrotechnic devices at Waco. The Office of Special Counsel has not found any evidence that these misstatements were deliberate.⁵⁹

⁵⁹The Office of Special Counsel also investigated a statement that Ray Jahn, the head of the criminal prosecution team that prosecuted the Branch Davidians, submitted to Congress in 1995. This statement will be discussed in the analysis of the criminal prosecution team's activities below.

In particular, the Office of Special Counsel investigated the origins of the following incorrect statements in internal Department of Justice and FBI documents:

- The Attorney General Briefing Book, August 1995, prepared by Department of Justice attorneys for Attorney General Reno, includes a page entitled “Issue: Flammability of CS Gas.” This page states that an independent arson team found that the tear gas and delivery system did not “contribute to the ignition or spread of the fire” and concludes with the statement that “In summaary [sic], pyrotechnic rounds are not used by the FBI.”
- Waco Fact Sheet No. 39 prepared by Department of Justice attorneys states that “Monty Jett, the firearm expert at Quantico who suggested the CS gas and the ferret round delivery system, stated that they were made for indoor use and were non-flammable.”
- Waco Fact Sheet No. 45 prepared by Department of Justice attorneys, states that CS gas “is the most tested chemical agent in the world, is approved by the surgeon general and is non-pyrotechnic in the method in which it was utilized.”
- A facsimile from Linda Bateman, in the FBI’s Office of Public and Congressional Affairs, to Richard Scruggs in a response to Congress’ request for documents regarding pyrotechnic or incendiary devices states that “[T]here were no incendiary or pyrotechnic devices used against the Branch Davidians on 4/19/93.” A facsimile from Tony Betz, Unit Chief of the FBI’s Domestic Terrorism Unit, to Department of Justice attorney Helene Goldberg states that “CS gas is the safest and most extensively researched riot control agent known. . . The FBI has specifically chosen methods of delivery and dispersal of CS that do not utilize pyrotechnic or incendiary components.”

During the congressional 1995 hearings, Attorney General Reno was not asked about pyrotechnic devices. Both Scruggs and John Collingwood, an FBI Assistant Director, Office of Public Affairs, told the Office of Special Counsel, however, that they had informed Congressional staffers that the FBI had used no pyrotechnic devices on April 19, 1993. Several Congressional staffers confirmed that they were told by FBI and Department of Justice representatives that no pyrotechnics were used. In addition, Congress received the erroneous Waco Fact Sheets after the hearings.

The Office of Special Counsel has identified the sources of all of these incorrect statements, and it has concluded that all of these individuals believed that the FBI did not use pyrotechnic devices on April 19, 1993. While Department of Justice attorneys preparing for the hearings did investigate the use of pyrotechnic devices on April 19, 1993, on several occasions, they were told, ostensibly by knowledgeable FBI employees, that the FBI did not use pyrotechnic devices to deliver the tear gas on April 19. Individuals who were asked whether pyrotechnic devices were used may have been negligent in failing to thoroughly research the issues, but there is no indication anyone intentionally provided false information.

Specifically, Linda Bateman of the FBI's Office of Public and Congressional Affairs told Scruggs that the FBI used no pyrotechnic or incendiary devices at Waco on April 19, 1993. Bateman obtained this information from James Atherton, an HRT explosives expert who had been at Waco on April 19. Atherton was not, however, part of the Charlie Team which had actually fired the pyrotechnic rounds. He told the Office of Special Counsel that he was the source of the incorrect information and that he did not know that the HRT had fired any

pyrotechnic tear gas rounds and did not make inquiries to find out otherwise. This Office found Atherton to be credible in all respects and has no reason to doubt his statement.

Helene Goldberg and other Department of Justice attorneys met with Tony Betz, the Unit Chief of the FBI's Domestic Terrorism Unit, in preparation for the 1995 hearings. Betz was involved with the situation at Waco from the beginning of the standoff through the development and implementation of the tear gas plan, but was not at Waco on April 19, 1993. Betz told Helene Goldberg in a fax that the FBI had specifically chosen "methods of delivery and dispersal of CS that do not utilize pyrotechnic or incendiary components." Betz did not interview any HRT members before drafting this statement. Rather, Betz believed that the statement was true, based both on his own involvement with the Waco matter and the discussions he had with Monty Jett, the FBI munitions expert who set up the tear gas delivery systems for use on the CEV's at Waco. Jett provided extensive information to Tony Betz and to FBI attorneys who were working on the 1995 hearings. Jett was involved in ordering equipment, including the Ferret rounds, used in the tear gas operation, and he believed that the FBI had used only equipment that he had ordered. Jett did not discuss the use of pyrotechnics with any members of the HRT. Accordingly, the possibility that the FBI had used pyrotechnic tear gas rounds never crossed his mind and he told anyone who asked that the FBI had used no pyrotechnic tear gas rounds. The Office of Special Counsel found Jett to be credible on this point.

The Office of Special Counsel has found no evidence that anyone involved in preparations for the 1995 hearings ever asked any member of the Charlie Team or HRT commander Rogers about pyrotechnic devices. It has found no evidence that anyone involved in the preparations ever learned that the FBI had fired pyrotechnic devices. In short, there is no

evidence that anyone deliberately provided false or misleading information in preparation for the 1995 Congressional hearings.

The Department of Justice attorneys working on the 1995 hearings made a good faith effort to confirm their belief (based on the Scruggs Report) that pyrotechnic devices had not been used on April 19, 1993. Indeed, while the Office of Special Counsel is critical of the investigation conducted by the Scruggs team in 1993, it would be unfair to criticize the Department of Justice lawyers for their efforts in 1995. In spite of Scruggs' own belief that the FBI had used no pyrotechnic devices, he inquired further in 1995 and the FBI told him plainly that the FBI had not used pyrotechnic devices on April 19.

In concluding that Congress was not intentionally misled, the Office of Special Counsel notes that the Department of Justice did produce to Congress several documents indicating that the FBI had fired military rounds on April 19. In addition to the FBI laboratory report, the Department of Justice gave Congress copies of a paralegal's notes of the criminal prosecution team's interview of HRT's Charlie team (which include a misspelling of the word "incendiary" to describe the military round)⁶⁰ and of the notes of the interview of HRT commander Rogers, as well as the trial team's witness outline which referred to military rounds. The production of these documents is further evidence that there was no deliberate effort to conceal this information from Congress.

It is not surprising, however, that the Congressional investigators did not find these references to military rounds or connect them to the use of pyrotechnic devices. As Scruggs and

⁶⁰The paralegal's handwriting and spelling would make it difficult for almost anyone to decipher the word.

Collingwood made clear, Department of Justice and FBI representatives assured them on several occasions that the FBI had not used pyrotechnic devices at Waco. The FBI submitted written Fact Sheets which contained the same assertions. Given these assurances, it is unreasonable to suggest that Congressional staffers should have found and appreciated the significance of a few references to “military rounds” buried in thousands of pages of documents produced by the Department of Justice before the hearings.

F. Criminal Prosecution Team. Several weeks after the standoff began, the Department of Justice assigned Assistant United States Attorney Ray Jahn to serve as the lead prosecutor in the government’s case against the surviving Davidians. His wife, LeRoy Jahn, also an experienced federal prosecutor, served as his principal assistant. The other members of the team who prosecuted the Davidians were also experienced federal prosecutors: Assistant United States Attorneys William “Bill” Johnston and John Phinizy, and Department of Justice attorney John Lancaster. The team was assisted by paralegal Reneau Longoria. The Office of Special Counsel has concluded that prosecution team members knew in November 1993 both that the FBI had fired “military” rounds at Waco and that these rounds were pyrotechnic; however, the team did not disclose this information to the defense attorneys for the Davidians or to their superiors within the Department of Justice.

The Office of Special Counsel has devoted considerable time and resources to investigating whether any members of the criminal prosecution team engaged in a cover-up of the FBI’s use of these pyrotechnic military rounds at Waco. While other members of the prosecution team bear some responsibility for failing to disclose this information, the Office of Special Counsel has concluded that [REDACTED] members of the team, Ray and LeRoy Jahn, and [REDACTED]

went to great lengths to conceal their knowledge of the military rounds, obstructing the investigation and severely hampering the Office's ability to uncover the truth about what happened in 1993.

1. Ray and LeRoy Jahn

The Office of Special Counsel has investigated exhaustively the conduct of the Jahns before, during and after the criminal trial of the Davidians to determine whether they engaged in a cover up of the FBI's use of three pyrotechnic tear gas rounds at Waco on April 19, 1993. In particular, the Office of Special Counsel focused on three critical issues: (1) whether at any time prior to August 1999 the Jahns knew that the FBI had fired the pyrotechnic tear gas rounds; (2) if they knew about the pyrotechnic rounds, whether they wrongfully failed to disclose this fact; and (3) if they failed to disclose their knowledge, either by covering up the use of the pyrotechnic rounds prior to September 1999 or by obstructing the Office of Special Counsel's investigation, whether a prosecution is warranted. As detailed below, the Office of Special Counsel has concluded that the Jahns knew as early as November 1993 that the FBI had fired pyrotechnic tear gas, that they had a legal duty to disclose this fact, and that they failed to do so.

The Special Counsel also believes that there is sufficient evidence to conclude that the Jahns conducted themselves dishonestly and unprofessionally, and the Special Counsel therefore recommends that the Jahns no longer be permitted to serve as Assistant United States Attorneys. However, for the reasons detailed below, the Office of Special Counsel has concluded that, without additional evidence, it cannot prosecute them for their conduct.

- (a) Whether the Jahns knew at any time prior to August 1999 that the FBI had fired pyrotechnic tear gas at Waco on April 19, 1993.

Both Ray and LeRoy Jahn claim that they did not know until August of 1999 that the FBI had used pyrotechnic tear gas at Waco. Ray Jahn admits that the HRT had told him in November 1993 that an HRT member fired “penetrator” rounds at the concrete construction pit, but he insists to this day that he did not know that the penetrator rounds were pyrotechnic in nature. LeRoy Jahn’s notes of a November 1993 interview with HRT commander Rogers indicate that the HRT fired “cupcake” rounds with “greater penetrator power” than Ferret rounds, but she too insisted to the Office of Special Counsel that she did not know that these rounds were pyrotechnic.

The Office of Special Counsel finds that the Jahns’ claim that they did not know that the HRT had fired pyrotechnic tear gas rounds lacks credibility. The following facts support the conclusion that the Jahns knew that the HRT fired pyrotechnic tear gas rounds at Waco on April 19, 1993.

(1) Visit to Quantico in November 1993. In November 1993, the entire criminal prosecution team went to HRT Headquarters in Quantico, Virginia, to interview HRT members. One of the principal purposes of the visit was to hear the HRT’s response to the allegations contained in a film entitled *Waco: The Big Lie*. In this film, producers showed footage of an FBI agent shooting a grenade launcher, followed by “smoke” rising from the concrete construction pit just after 8:00 a.m. on April 19, 1993, and cited the “smoke” as evidence that the FBI started the fire. The trial team showed the video to a group of HRT members and then broke into groups to interview HRT members to determine, among other things, what had caused the “smoke.” The

issue of whether the FBI had used pyrotechnic or incendiary devices was, therefore, significant to the prosecutors when they went to Quantico.

The Office of Special Counsel has reviewed notes from several prosecution team members that indicate that HRT member David Corderman told some team members that he had fired “incendiary” military tear gas rounds at Waco. First, paralegal Reneau Longoria took notes from the interview of Corderman indicating that he identified the rounds as incendiary in nature. Longoria’s notes state that the smoke in *The Big Lie* movie resulted “when these guys tried to shoot gas into the bunker (military gas round)/Dark grey bubblehead w/ green base/1 military round and 2 others.” She then drew an arrow from the word “military” to a misspelling of the word “incendiary.” Similarly, Lancaster’s notes, apparently of the Corderman interview, state in relevant part: “Corderman– military gas round at the liner– fired 1-4 incendiary rounds.”

Johnston also took notes at Quantico [REDACTED]
[REDACTED] stating “Charlie– one green military (incind) Smoke.” [REDACTED]

There is reason to believe that LeRoy Jahn was also present at the Corderman interview along with Lancaster. Although he states that he cannot remember if he was present, Lancaster took notes that indicate that he probably attended this interview. According to the schedules prepared before the interviews, LeRoy Jahn and Lancaster were slated to interview the Charlie Team, including Corderman. Indeed, while preparing for the interviews that would occur the following day, LeRoy Jahn personally wrote next to the Charlie Team, “John/LeRoy Tues. 5:00.” Because the Office of Special Counsel has Lancaster’s notes that appear to be from the interview, it follows that LeRoy Jahn was probably present as well. Although the Office of

Special Counsel has not seen any notes taken by LeRoy Jahn regarding the Corderman interview, neither she nor Ray Jahn will certify– as the Department of Justice has requested– that they have provided all of their documents concerning Waco to the entities that have requested them.

Additionally, Lancaster recalled during one of his interviews by the Office of Special Counsel that, during the interview of Rogers, at which both Ray and LeRoy Jahn were present, Rogers referred to the use of a “cupcake” round to penetrate the construction pit. According to Lancaster, LeRoy Jahn asked Rogers, “What is a cupcake round?” and Rogers replied either that a cupcake round was a military munition or a pyrotechnic munition. Longoria’s interview notes indicate that Rogers said that it was a military tear gas round. While Lancaster does not remember the exact words that Rogers used, Lancaster told the Office of Special Counsel that he believes that Rogers or other members of the HRT made the pyrotechnic nature of the military rounds quite clear during these 1993 interviews.

Also, notes from the Rogers interview indicate that Rogers stressed that the concrete construction pit was filled with water when he explained why he gave permission to try the military rounds. This fact is relevant only to the fire-producing characteristic of military rounds, lending credence to Lancaster’s statement that HRT members made the pyrotechnic nature of the rounds clear during their interviews. Finally, LeRoy Jahn’s own notes from Quantico indicate that Supervisory Special Agent Stephen McGavin specifically told her that certain military rounds were pyrotechnic when he explained why the HRT could not use some rounds obtained from other FBI offices when the supply of Ferret rounds ran low. This information should have alerted her that the military rounds described by Rogers (who was interviewed after McGavin) were also pyrotechnic.

(2) Preparation for the Criminal Trial. The notes taken by members of the criminal prosecution team at Quantico, therefore, provide strong evidence that prosecution team members knew that the HRT had fired pyrotechnic tear gas at Waco. The subsequent conduct and strategy of the prosecution team as it prepared the case for trial further support this understanding. LeRoy Jahn told the Office of Special Counsel that, after the Quantico interviews, the entire criminal prosecution team met to determine which HRT members it would call at trial. The criminal prosecution team determined that they would not call in their case in chief any HRT members that had knowledge of the use of pyrotechnic rounds on April 19.

As the team prepared for trial after the Quantico trip, Longoria prepared a chart summarizing the key information received from the HRT members. The entire trial team reviewed this chart. Under “Corderman” the chart states: “smoke on film came from attempt to penetrate bunker w/1 military 2 ferret rounds, Military was grey bubblehead w/green base.”

[REDACTED]

[REDACTED] Both charts– [REDACTED]

[REDACTED]– indicate that the team had decided that Corderman would only be a “rebuttal” witness. The Office of Special Counsel has located a handwritten note of LeRoy Jahn’s that also identifies Corderman as a rebuttal witness. Designating Corderman as a rebuttal witness meant that the prosecution had decided not to call him to testify in its case in chief. Rather, the team decided to call him to testify only if attorneys for the Davidians made the “smoke” coming from the concrete construction pit an issue at trial. According to members of the trial team, Ray and LeRoy Jahn knew of the decision to make Corderman a rebuttal witness. The decision to leave the firing of military rounds for rebuttal testimony suggests that the criminal prosecution team

thoroughly discussed the issue and understood the precise source of the “smoke” on *The Big Lie* film— a pyrotechnic military tear gas round.

In sum, the facts and circumstances discussed above undermine the Jahns’ claim that they had no idea that the military tear gas rounds fired by Corderman were pyrotechnic. The Jahns went to Quantico in part to investigate allegations that the FBI had started the fire. FBI witnesses explained to the prosecution team that the military rounds were “incendiary.” The Jahns then attended a strategy meeting of their team at which the military rounds were a specific subject of discussion. Finally, the Jahns participated in the decision to save that information for rebuttal. The logical conclusion from these facts is that the Jahns knew in 1993 that the FBI had fired pyrotechnic munitions at Waco.⁶¹

(3) Conduct of the Jahns During the Investigation by the Office of Special Counsel.

The obstructive conduct of the Jahns during the course of the investigation by the Office of Special Counsel provides additional credence to the Special Counsel’s conclusion that the Jahns learned in 1993 about the firing of pyrotechnic tear gas rounds at Waco. When information about the pyrotechnic rounds became public in August and September 1999, the Jahns took affirmative steps to conceal their knowledge of the firing of these rounds, to persuade other witnesses that

⁶¹The Office of Special Counsel similarly concludes that other members of the trial team also knew that pyrotechnic tear gas rounds were used on April 19, 1993. Longoria’s notes, which use the word “incendiary,” indicate that she knew. [REDACTED] Lancaster, to his credit, is the only member of the trial team who readily admitted that he was aware of the pyrotechnic nature of the military rounds. Phinizy maintains that he did not learn about the pyrotechnic rounds in 1993. Phinizy recalls being told by LeRoy Jahn not to worry about the “smoke” in the film because it was just tear gas and did not start the fire. Therefore, the Office of Special Counsel cannot conclude that Phinizy knew the rounds were pyrotechnic.

they knew nothing about the use of the rounds, and to shift blame for their non-disclosure to others. Specifically, the Jahns engaged in the following conduct:

I. As stated above, the Jahns refused to sign a certification that they had provided all of their records concerning Waco to the Department of Justice, despite two requests by the Department of Justice that they do so.

II. In a teleconference with Richard Scruggs in the fall of 1999, the Jahns assured Scruggs that they knew nothing about the use of military rounds at Waco. Shortly thereafter, they telephoned Scruggs and said that Bill Johnston had known about the rounds. They then faxed to Scruggs the notes and trial preparation charts of Longoria which reference the military rounds and their incendiary nature and which suggest that Johnston learned this information in 1993. Although the Jahns told Scruggs that they had not seen these documents until 1999, the Office of Special Counsel has established that, at a minimum, they had seen the witness preparation chart in 1993.

III. In response to an August 1999 e-mail from Ray Jahn to Lancaster about the issue of pyrotechnic rounds, Lancaster called Ray Jahn and made a statement that the trial team did in fact know about the pyrotechnic devices in 1993. Jahn replied in an angry voice that if Lancaster recalled anything about the firing of such devices, he was the only one on the trial team who remembered it. Later, Ray Jahn denied to the Office of Special Counsel that this exchange with Lancaster had occurred, but LeRoy Jahn confirmed that it had in fact occurred.

IV. In August of 1999, the Jahns called Phinizy and suggested to him that they had not been present at the relevant HRT interviews in 1993. They further stated that Bill Johnston

had served in the military, implying that only he should have known that a military round was pyrotechnic. They neglected to tell Phinizy that Ray Jahn also had served in the military.

V. At the conclusion of the first interview of Ray Jahn by the Office of Special Counsel, the Deputy Special Counsel explained to Ray Jahn the importance of not communicating with other witnesses in order to allow the Office of Special Counsel to interview witnesses without their having been prepared or coached. Ray Jahn indicated that he understood the concern raised by the Deputy Special Counsel. Jahn also told the Deputy Special Counsel that he had not contacted Reneau Longoria because to do so would “look bad.” Yet, despite the admonition, within a few days, the Jahns returned a call from Longoria. Instead of declining to talk to Longoria, the Jahns coached her on how to handle her interview with the Office of Special Counsel. For example, they “reminded” her that she had been teamed up with Bill Johnston for some of the critical interviews, and told her that she should ask for documents if she did not recall facts, knowing that at least some documents implicated Johnston and that these documents might deflect attention away from them. They further told her that if she did not recall an incident, that was all right. Possibly as a result, Longoria was evasive in her first interview with the Office of Special Counsel, even professing not to be able to identify notes in her own handwriting. Eventually, Longoria told the Office of Special Counsel that she felt that the Jahns had been trying to manipulate her in this conversation.

VI. In August 1999, the Jahns called ATF agent Davy Aguilera, who had not heard from the Jahns in several years and did not know them well. After some small talk about family that Aguilera believed to be insincere, the Jahns asked Agent Aguilera whether he had known about the use of pyrotechnic military rounds at Waco. He said that he had not. LeRoy Jahn

indicated that she and her husband did not know either, and the conversation ended. The Office of Special Counsel believes that the Jahns placed this call in an attempt to influence the recollection of this witness.

In sum, the conduct of the Jahns in refusing to certify that they had produced documents, manipulating witnesses, and interfering with the investigation of the Office of Special Counsel, reinforces the conclusion that the Jahns knew about the use of pyrotechnic tear gas rounds at Waco in 1993. Finally, this conclusion is corroborated by a polygraph examination which indicated that Ray Jahn was deceptive in stating that no one specifically told him in 1993 that the FBI had used pyrotechnic or incendiary rounds and in stating that he did not intentionally withhold *Brady* material in 1993.

(b) Whether the Jahns Improperly Failed to Disclose the Use of Pyrotechnic Tear Gas and Whether They Breached that Duty.

While the Office of Special Counsel concludes that the Jahns, along with other prosecution team members, knew in late 1993 that the HRT fired pyrotechnic tear gas at Waco on April 19, 1993, the Order of the Attorney General appointing the Special Counsel requires that the Special Counsel proceed a step further by determining whether any government employee covered up information from any “individual or entity entitled to receive it.” Consequently, in order to respond affirmatively to the Attorney General’s question, the Office of Special Counsel must establish not only that the Jahns knew about the pyrotechnic tear gas rounds, but also that they improperly failed to disclose this knowledge. For the following reasons, the Office of Special Counsel has determined that the Jahns improperly failed to disclose their knowledge of the FBI’s use of pyrotechnic tear gas rounds.

(1) Under the *Brady* case referenced earlier, as well as Rule 3.09 of the Texas Rules of Professional Conduct, Ray Jahn, the leader of the prosecution team (as well as other prosecution team members), had a duty to submit to the attorneys representing the Davidian defendants information that would tend to be exculpatory. Ray Jahn has admitted to the Office of Special Counsel that the issue of who started the fire was relevant to the criminal trial of the Davidians and that the pyrotechnic nature of the military rounds met the *Brady* standard.

Ray Jahn, as the lead prosecutor, had principal responsibility to make the *Brady* disclosure, as did LeRoy Jahn, who took responsibility for filing all *Brady* responses. The Jahns did not disclose to the defense counsel the HRT's use of pyrotechnic tear gas. Moreover, in response to the defendants' particularized request for exculpatory information about government gunfire, Ray Jahn submitted a pleading containing the affirmatively misleading statement that "the government has no evidence that government agents fired gunshots on April 19, 1993, other than ferret [sic] tear gas rounds."⁶²

(2) On July 19, 1995, Ray Jahn testified to Congress about the activities of the FBI and the conduct of the Davidians at Waco. Again, he failed to disclose the FBI's use of pyrotechnic rounds. Further compounding his failure, he again made the misleading statement

⁶²Because the Jahns were the leaders of the trial team and they prepared and filed this pleading, they bear principal responsibility for the decision not to disclose the information about the use of the military rounds. Still, all of the attorneys on the trial team were experienced prosecutors and should not escape criticism for the government's failure to make a proper disclosure, if they knew.

that, “[t]he FBI did not fire a shot, other than the non-lethal ferret rounds which carried the CS gas.”⁶³

(3) In 1999 and 2000, the Jahns had yet another opportunity to disclose their knowledge of the FBI’s use of pyrotechnic tear gas rounds when they were interviewed by the Office of Special Counsel. They failed to do so. The Office of Special Counsel finds that the Jahns lied to the Office by denying that they knew the FBI had fired pyrotechnic tear gas rounds at Waco, and obstructed the investigation by attempting to manipulate witnesses, and by lying about their attempts to manipulate a witness, as discussed above.

Finally, the Office of Special Counsel notes the serious consequences flowing from the Jahns’ failure to disclose this information. The Jahns and other members of the prosecution team had information that they knew contradicted the understanding of their superiors and the understanding of the public that the FBI had not fired pyrotechnic rounds at Waco, yet they did not bring this information forward. Had the Jahns made one phone call to the Office of the Attorney General in 1993 disclosing the inconsequential use of pyrotechnic rounds, they could

⁶³In this section of his statement, Ray Jahn was discussing the law enforcement agents who were on the front line at Waco:

They were brothers and sisters, husbands and wives, mothers and fathers, and sons and daughters; they were little league coaches, band chaperones, scout leaders and members of the family that sits in the next pew at Church. On the 28th of February, two of the ATF agents were newlyweds; several of the ATF agents had candies in their pockets for the children; and many never fired a single shot, even though, once all the evidence was recovered from the compound, it became abundantly clear that the Branch Davidians had possessed a massive arsenal of assault weapons, illegal explosives, and illegal machine guns, as originally alleged in the ATF search and arrest warrants. On the 19th of April, though repeatedly fired upon by the occupants of Mt. Carmel, the FBI did not fire a shot, other than the non-lethal Ferret rounds which carried the CS gas.

have spared the entire nation the baseless suspicion that government agents were responsible for the fire at Waco.

(c) Whether the Office of Special Counsel Can Prosecute The Jahns for Their Misconduct.

The Office of Special Counsel has carefully studied the relevant facts and law and has concluded that the Jahns have committed legal and ethical violations that should result in their losing their status as federal prosecutors. However, the Special Counsel has determined that it cannot prosecute the Jahns criminally for the following reasons:

(1) The failure of the Jahns to disclose *Brady* material is an ethical and legal violation but not a criminal act.⁶⁴ Moreover, the Jahns did produce a large volume of information to the Davidian defense team, which included both the FBI lab report containing a reference to the casing of a military round, and the photograph of the military pyrotechnic projectile taken at the crime scene. Additionally, at least one of the defense attorneys representing the Davidians knew that the FBI used pyrotechnic tear gas rounds at Waco, and he chose not to make it an issue at trial.⁶⁵

(2) Similarly, the Jahns' refusal to certify that they have produced all of their Waco-related documents is unacceptable conduct for Assistant United States Attorneys, and the

⁶⁴Although the Office of Special Counsel believes that the prosecution should have explicitly provided this information about pyrotechnic devices to the defense attorneys prior to trial, the Office of Special Counsel expresses no view as to whether the failure to make such a disclosure entitles the defendants to a new trial.

⁶⁵Although the Office of Special Counsel believes that the prosecutors should have informed the defendants explicitly that pyrotechnic tear gas rounds had been used on April 19, 1993, the Office expresses no view as to whether the failure to make such a disclosure entitles the defendants to a new trial pursuant to *Brady*.

Office of Special Counsel cannot imagine any legitimate excuse for their refusal, but it is not a crime.

(3) The statement that Ray Jahn made to Congress, while misleading, related to the issue of returning gunfire rather than pyrotechnics, and was not material either to the issues that Ray Jahn addressed in his testimony or to the questions that Congress posed to him. The Office of Special Counsel, therefore, believes that this misleading statement was not a crime.

(4) The conduct of the Jahns during the course of the investigation of the Office of Special Counsel presented a closer call as to whether the Office of Special Counsel should commence a prosecution. The Special Counsel believes that the Jahns lied to investigators of the Office of Special Counsel when they stated that they did not know that military rounds were pyrotechnic. Because the subject of the lie was their state of mind— what they knew in 1993— proving it beyond a reasonable doubt would be difficult. The evidence that the Jahns knew of the pyrotechnic devices is circumstantial— they were the leaders of the team, several members of their team knew, and the notes of their team members suggest that they knew. [REDACTED]

[REDACTED] the Office of Special Counsel has no notes in the handwriting of the Jahns specifically indicating that they knew that Corderman had fired the pyrotechnic or incendiary military tear gas rounds at the concrete construction pit.

[REDACTED] the Office of Special Counsel cannot prove conclusively that the Jahns deliberately concealed documents from its investigation. Their failure to certify creates an inference of nondisclosure, but that again is not enough for a conviction.

Further still, Rogers, Corderman, and the members of the prosecution team have no specific recollection of who was in what interview in 1993, so it becomes difficult to place the Jahns at the relevant meetings, although the circumstantial evidence again suggests that they were present at least at some of the relevant meetings. [REDACTED]

[REDACTED] Finally, the polygraph evidence that Ray Jahn was deceptive in denying knowledge of the pyrotechnic rounds would almost certainly be inadmissible to prove that he committed a criminal offense. Because the standard of proof for a criminal prosecution is “beyond a reasonable doubt,” the Office of Special Counsel declines to seek an indictment of the Jahns for lying to the Office about their knowledge of pyrotechnic tear gas rounds based only on circumstantial evidence and inadmissible polygraph results.

The Office of Special Counsel also considered carefully whether the course of conduct by which the Jahns called and manipulated witnesses constituted obstruction of justice. Again, while reprehensible, the Office of Special Counsel has concluded that obstruction of justice could not be proved beyond a reasonable doubt. First, the evidence of what occurred in these conversations is somewhat ambiguous since none of the participants has a clear recollection of what precisely was said six years earlier. Second, much of the Jahns’ egregious conduct, such as the phone calls with Scruggs, Phinizy, Lancaster and Aguilera, occurred prior to the appointment of Senator Danforth as Special Counsel, and therefore could not be prosecuted as obstruction of a pending proceeding. See 18 U.S.C. §1505. The conversation with Longoria did occur during the investigation, but Longoria’s account of that conversation, while certainly establishing that the Jahns acted inappropriately, is far too ambiguous to form the basis of a

criminal prosecution. Consequently, the Office of Special Counsel declines prosecution and, instead, refers its Report to the Office of Professional Responsibility at the Department of Justice with the recommendation that the Department of Justice preclude the Jahns from serving further in their honored capacity as Assistant United States Attorneys.

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G. Missing Physical Evidence. As described above, HRT Charlie Team member Corderman fired three M651 pyrotechnic tear gas rounds at the roof of the concrete construction pit at approximately 8:08 a.m. on April 19, 1993. Two of the projectiles landed in a trench outside of the concrete construction pit, and both of them discharged, creating a tear gas cloud. The third projectile bounced off the roof of the construction pit and landed approximately 200 yards northwest of the water tower. Gas from this projectile drifted toward Sierra-2 and was reported by HRT members there. The use of three M651 rounds on the morning of April 19, 1993, generated six items of evidence relating to the incident, three spent *casings* and three spent *projectiles*. Of these six items, only one casing (Q1237) was ever logged into evidence. There are no reports of anyone ever seeing the two other casings. One or more crime scene personnel saw each of the three projectiles, but no one collected them and logged them into evidence.

The absence of five of the six items of evidence relating to the pyrotechnic tear gas rounds is troubling. Although these rounds did not in any way contribute to the fire, their absence raises suspicions as to the way that crime scene investigators handled the evidence. Therefore, pursuant to the Attorney General's Order, the Office of Special Counsel conducted an exhaustive investigation into whether this evidence was "destroyed, altered, or suppressed" by examining all matters related to the processing and collection of the crime scene evidence. The Office of Special Counsel interviewed all of the nearly 250 possible witnesses associated with the crime scene, re-interviewed 32 witnesses; spent approximately 1200 hours analyzing and cataloguing thousands of pounds of evidence in the United States District Court in Waco and at a local warehouse containing numerous large CONEX containers; and studied thousands of photographs and hundreds of hours of videotapes.

The Office of Special Counsel believes that someone removed the evidence from the crime scene, but has been unable to determine whether it was removed for an ill motive. The evidence may have been innocently discarded because it had no relevance to developing a criminal case against the Davidians. However, the Office of Special Counsel cannot exclude the possibility that an individual at the crime scene decided to remove the evidence in order to hide it from the public.

1. There is no evidence of a widespread criminal conspiracy to destroy or hide the physical evidence that the FBI used pyrotechnic tear gas rounds.

The Office of Special Counsel has not uncovered evidence to support a conspiracy involving a group of crime scene personnel, FBI laboratory personnel, or members of the Department of Justice criminal prosecution team in their handling of the pyrotechnic evidence. The FBI did not control the crime scene at Waco. The Texas Rangers had primary responsibility

for securing the scene and organizing the search for evidence. They were assisted by representatives from the FBI Laboratory, the Tarrant County Medical Examiner's Office, the Houston Fire Department's Arson Division, the United States Attorney's Office for the Western District of Texas, the Texas Department of Public Safety Crime Laboratory, the Texas Highway Patrol, ATF, and the Smithsonian Institution. Although FBI personnel may have had a motive to conceal the evidence of pyrotechnic rounds (since they had publicly announced that no such devices were used), none of the other crime scene participants had any motive to conceal this evidence. While in Waco, the FBI had a poor relationship with other law enforcement agencies involved in the incident. Given the discord between ranking officials in the ATF, Texas Rangers, and the FBI, the state agencies associated with the crime scene search had no motivation to support the FBI's public statements denying the use of pyrotechnics. In fact, some witnesses have suggested that representatives of state agencies may even have been motivated to disclose publicly the existence of the rounds, if found, in order to embarrass the FBI. During the interviews of nearly 250 witnesses from numerous different state and federal agencies who took part in the evidence collection process, no one offered any evidence of any conspiracy to conceal or destroy evidence at the scene.

Another factor weighing heavily against finding a widespread conspiracy is that so many different groups actually disclosed information about these pyrotechnic rounds to others. First, the HRT members told anyone who asked them about the use of the pyrotechnics. Second, the FBI explosives expert who found the two M651 projectiles in the trench next to the construction pit, borrowed a gun from, he believes, a Texas Ranger to render the projectiles safe and then joked with him about how many shots he needed. He also readily told the Office of

Special Counsel about finding the pyrotechnic tear gas rounds. The supervisory FBI agent on the scene, James Cadigan, also voluntarily disclosed the spotting of those two projectiles. Third, the FBI Supervisory Special Agent who was present when the third projectile was found in the field on April 30, 1993, 11 days after the fire, had the item flagged and photographed. The photograph was part of the evidence given to defense attorneys for the Branch Davidians. Fourth, rather than hiding the evidence, an FBI supervisory agent, Richard Crum, transported to Washington, D.C. the one casing that was collected as evidence from Waco. The casing was logged into evidence, assigned a new lab number, and properly analyzed by the laboratory. Fifth, Crum also told Texas Ranger George Turner about the use of the rounds during the criminal trial in 1994. Finally, the 49-page lab report prepared by the FBI lab and provided to the criminal defense and Congress, specifically indicated that the recovered shell was a “fired U.S. military 40 mm shell casing which originally contained a CS gas round.”

These facts indicate that there was no systematic attempt to conceal the pyrotechnic evidence.

2. The physical evidence appears to have been removed from the scene.

While there was no widespread conspiracy, the evidence indicates that someone did remove at least two, and probably all three, of the projectiles from the crime scene. As referenced earlier, on April 20, 1993, during an initial walkthrough of the crime scene intended to discover and disarm any explosive devices, Wallace Higgins, the FBI explosives expert, found the two M651 projectiles in the trench next to the construction pit. Believing one of the rounds still contained tear gas, he asked for and received permission from his supervisor, FBI Special Agent James Cadigan, to shoot one of the projectiles to render it safe. Higgins states that he then

borrowed a pistol and shot at the projectile. Neither the Rangers nor the FBI prepared a report of the gunfire at the scene. Although Higgins stated he may have picked up the projectile and looked at it after he shot at it, he did not retrieve the projectiles— since he was not responsible for gathering evidence— and he instead left them in the trench.⁶⁷ No one ever logged these two projectiles into evidence.

Although the projectiles were in the trench on April 20, 1993, they were not there at the end of the crime scene search. No formal search of this particular portion of the crime scene was ever conducted,⁶⁸ but two Texas Department of Public Safety (“DPS”) lab employees have stated they looked into the area of the trench around April 28, 1993. One technician, who walked the area above the trench, did not see the projectiles there. The other technician went into the trench and also never saw the projectiles. Additionally, Higgins, who recalled walking by the trench after the conclusion of the crime scene search, said that he did not see the projectiles that he had previously seen there. Since the two projectiles were in the trench on April 20, 1993, and

⁶⁷Higgins’ account, including his insistence that he did not remove the projectiles from the scene, was confirmed by polygraph testing.

⁶⁸On May 3, 1993, a search team led by Rangers Johnny Waldrip and Fred Cummings began to search Sector U, the area just to the left or green side of the complex. As it appears on the sector map, Sector U included the underground construction pit, the ground level area between the construction pit and the water tower and the ground level area to the rear of the construction pit, including the trench where Higgins saw the two projectiles. The search team apparently misunderstood Sector U to include only the underground area and never officially searched the above ground area. The Ranger crime scene search report refers to the sector only as an underground area and includes a drawing of the sector excluding the ground level portion of the sector. As a result, no crime scene searcher remembers searching the ground level portion of this sector and no articles of evidence contained in the evidence database were collected from this portion of Sector U.

were not there two weeks later, someone must have removed them from the crime scene during the interim.

On April 30, during a “line search” involving 53 law enforcement officials who lined up fingertip to fingertip and searched the area outside the main structure of the complex, an FBI supervisory special agent was present when the third M651 military tear gas projectile was found approximately 200 yards northwest of the water tower. Someone then flagged the item for recovery and a Texas DPS photographer photographed the projectile. The FBI agent summoned either Crum or Cadigan to the area to show the projectile to one of them. This projectile was never inventoried as evidence, and extensive searches since have failed to locate it. The photograph was, however, in the binders of photographs produced to the Davidian criminal defense attorneys. While it is possible no one ever retrieved this projectile due to the tall grass, its distance from the burnt remains of the complex, or some other reason, since it was flagged, someone in all likelihood picked up the projectile and discarded it.

The disappearance of these three projectiles does not necessarily mean that they were concealed or discarded for some evil purpose. Crime scene personnel may have treated these three projectiles similarly to other pieces of ammunition found on the scene and innocently discarded them. The Jahns and other officials instructed the search teams to collect evidence to assist in proving the *government’s* case against the Davidians. Because the crime search personnel were collecting evidence for the murder and firearms case against the Davidians, the search teams may not have considered evidence that the FBI fired tear gas at the complex on April 19 as probative of any relevant issue at the time. When the focus was on prosecuting the Davidians, search teams may not have viewed the pyrotechnic rounds as significant.

In a crime scene as large as the Davidian complex, discarding “non-probative” evidence was part of the established protocol. The Office of Special Counsel knows, for example, that only some of the Ferret casings were recovered from the scene and logged into the database. Many were simply thrown away.⁶⁹ This procedure was a discretionary decision made by the on-scene agents who were attempting to collect as much evidence as possible under extraordinary circumstances.⁷⁰ Therefore, the searchers may very well have discarded the projectiles, along with the other “non-probative” material into the dumpsters located on the scene.

On the other hand, the absence of five of the six items which would have shown the use of pyrotechnics remains disconcerting. The Office of Special Counsel cannot exclude the possibility that someone at the crime scene decided to remove the evidence in order to benefit the FBI. An extensive investigation has uncovered no evidence to identify any individual who did so, however, so the Office cannot conclude that anyone disposed of these pieces of evidence for improper purposes.

⁶⁹As described above, one casing from a pyrotechnic tear gas round was collected, logged into evidence, and properly analyzed by the FBI lab as item Q1237. The Office of Special Counsel has received no evidence that the other two shells were ever located. The Bradley vehicle from which the rounds were fired never was part of the crime scene search. Crime scene searchers may well have thrown the casings for the military rounds away with the Ferret casings that they discarded.

⁷⁰The Waco crime scene was unprecedented in size and scope. The difficulty of the search was compounded by the fire, which destroyed much of the evidence and buried other probative evidence under the collapsed structure of the complex. The remains of the Davidians caught in the fire were burned and charred, some beyond recognition. Identifiable burned body parts were commingled with body parts from other individuals when the structure collapsed on itself. Hundreds of weapons had been burned in the fire, leaving only the charred frames of the guns. Hundreds of thousands of rounds of ammunition were also found in and around the complex. An untold number of rounds were “cooked off” during the fire. Among this massive assortment of firearms, bodies, live ammunition rounds, spent rounds, and approximately 380 Ferret casings spread over 77 acres, were the six component parts of the pyrotechnic rounds.

In the interest of completeness, however, the Office of Special Counsel must state that the conduct of two of the FBI's lead agents at the crime scene causes it concern. As discussed above, FBI agent Higgins discharged a weapon at the crime scene in an attempt to render safe one of the pyrotechnic tear gas rounds. The Office of Special Counsel has determined that shooting at a tear gas round to render it safe is not standard FBI protocol and is an unusual practice, but it is not in violation of any rules or regulations. However, FBI regulations have long required the reporting and investigating of each incident where an agent discharges a weapon. See Manual of Investigative Operations §12-1.9, "Reporting of Shootings," as revised March 1990. No one reported this shooting. Agents Cadigan and Crum, who were the FBI supervisory agents for the crime scene search, knew that Higgins discharged a weapon at the crime scene but never reported the incident and did not require Higgins to do so.

Moreover, during and after the crime scene search, Cadigan made extensive notes of his observations and his work effort concerning the search of the complex during April and May of 1993. On the first page of his notepad, Cadigan made a clear reference to the shooting incident and wrote, "Wally found a live 40 mm gas grenade - he disabled it- Took 4 shots." Cadigan did not maintain the notepad with his other Waco records in his office, but rather kept it at his home in his attic. Cadigan did not produce this notepad to the prosecution team during the criminal trial; consequently, the notes were not produced to the defense attorneys when Cadigan testified during the trial (as required by the Jencks Act, 18 U.S.C. § 3500). Further, in 1999, when FBI officials sent several requests throughout the FBI seeking all Waco-related documents, Cadigan produced all of his Waco records except this notepad. Cadigan did voluntarily produce the notepad to the Office of Special Counsel in September 2000.

While the Office of Special Counsel does not find that Cadigan obstructed its investigation, the Office has a different view of Agent Crum. The Office of Special Counsel believes that Crum, the crime scene “foreman” responsible for collecting evidence for the FBI, lied to the Office during the investigation. During his interviews, Crum was evasive, and his statements, even concerning innocuous matters, were unbelievable. Specifically, the Office of Special Counsel refers to the following points in support of its conclusions:

- (a) During the crime scene search, Cadigan kept notes of the remarkable events in his notepad. In particular, he noted that Higgins had fired four gunshots at a 40 mm tear gas projectile in order to render it safe. Crum reviewed Cadigan’s notes and in fact made handwritten changes and corrections to the notes, yet Crum claims to have had no recollection of this event.
- (b) When Texas Ranger Turner found a casing on the scene, he recalled that he showed the casing to Crum and that Crum replied, “I don’t know what it is, but I will find out and get back to you.” Crum said that he had no recollection of this event either.
- (c) Ranger Turner later spoke to Crum at the criminal trial and Crum told Turner that the casing was from an explosive military round, that the FBI was authorized to fire the round, and that the round was used to penetrate a door to the concrete construction pit. This conversation indicates that Crum had at least one conversation with some knowledgeable source prior to speaking to Turner. Crum claimed to have no knowledge of any of these

conversations, although he acknowledged that Ranger Turner was an honest man and that he would credit Turner's recollection.

- (d) In August 1993, LeRoy Jahn asked Crum to transport personally the shell from Waco to the FBI Lab in Washington. This is the only piece of evidence that Crum personally delivered, and the request to do so was highly unusual. The Office of Special Counsel is unaware of any other piece of evidence that the FBI transported in such a manner. Crum prepared the required paperwork and hand-delivered the item. Yet, when asked about the item, Crum again claimed that he had no recollection of this event.
- (e) A polygraph examiner determined that Crum was "deceptive" when he denied knowledge of the pyrotechnic military rounds.

The Office of Special Counsel gave very serious consideration to the possibility of bringing criminal charges against Agent Crum for obstructing the investigation. However, the Office of Special Counsel has determined that there is insufficient evidence to prove a criminal case beyond a reasonable doubt. While the Office of Special Counsel suspects that Crum lied to conceal his knowledge of the missing evidence, the investigation was unable to uncover corroborating evidence which would establish that Crum participated in or had knowledge of the disappearance of the pyrotechnic tear gas projectiles. In fact, although he claims not to remember, he did transport the shell to the FBI lab to be analyzed and did discuss the round with Ranger Turner in 1994. Both those actions would indicate he was not trying to conceal the evidence. These facts would make an obstruction case very difficult to prove in court.

Additionally, Crum did not deny that the events occurred. Rather, he simply claims not to remember them. A dishonest claim of lapse of memory is very difficult to prove when dealing with events seven years in the past. Additionally, Crum's failure of a polygraph examination is not likely to be admissible in a criminal trial.

Although Crum cannot be prosecuted, he should not be an FBI agent. Following his last interview with the Office of Special Counsel, Crum voluntarily retired from the FBI, so the Office of Special Counsel cannot recommend that further action be taken.

H. Civil Trial Team. In February 1996, an HRT member wrote a memorandum to an FBI attorney, Jacqueline Brown, discussing the use of military rounds and their potential for causing fires. The Office of Special Counsel devoted considerable resources to determining why the responsible government officials did not disclose this information in the civil case or to the public until August of 1999. The short answer is that the FBI attorney failed to pass the memorandum on to the Department of Justice.

In January 1996, Marie Hagen, the Department of Justice attorney responsible for the defense of the civil case, asked Jacqueline Brown, the FBI attorney assigned to the case, for help in responding to a declaration filed by an expert for the Davidians and their families who alleged that the HRT had fired "at least one 'military round' in an effort to penetrate the construction pit." Brown faxed the declaration to the FBI chemical agent specialist. The declaration was also provided to HRT Special Agent Robert Hickey who discussed the particular areas of concern with Brown. On February 15, 1996, Hickey drafted a memorandum to Brown which clearly stated that the HRT had fired two or three military tear gas rounds at the "underground shelter" early in the morning and explained that these rounds could not be used

elsewhere in the complex “due to their potential for causing fire.” Brown received a draft of the memorandum on February 16, discussed it with Hickey, and made notations regarding this key passage on her copy of the memorandum.

The Department of Justice did not specifically respond to the plaintiffs’ expert’s allegations regarding the military rounds in February 1996. In 1997, counsel for the Davidians and their families filed a supplemental declaration by the same expert which reiterated the allegation that the government had fired pyrotechnic tear gas rounds on April 19, 1993. Again, the Department of Justice did not respond factually to the allegation. When the issue was again briefed in 1998, however, Hagen signed a pleading which stated in a footnote that:

The degree to which plaintiff’s expert testimony is based on speculation is demonstrated by Mr. Sherrow’s conclusion that the 40 mm ordnance found within the compound “probably was fired by the U.S.” because “it could be fired only from a military weapon and civilian possession of these weapons is severely restricted.” This statement is extraordinary in that it ignores the virtual arsenal gathered by the Davidians, including two .50 caliber anti-tank guns.

While this footnote is not technically false, it is misleading in that it fails to acknowledge that the HRT did fire military tear gas rounds on April 19. Brown briefly reviewed this pleading before it was filed.

The key question is whether Brown told Hagen or anyone else about the information regarding military tear gas rounds contained in the Hickey memorandum. Although Brown insisted to the Office of Special Counsel that she gave the information regarding the use of military rounds to Hagen and to Brown’s supervisor at the FBI, the evidence indicates that she did not.

First, the only evidence that Brown told Hagen about the Hickey memorandum is Brown's own statements. Brown's assertions are contradicted by the clear testimony of numerous witnesses and, more importantly, by her own later statements. The Office of Special Counsel interviewed Brown on four different occasions during which Brown gave several different accounts of her actions with respect to the Hickey memorandum. Even before the appointment of the Special Counsel, Brown asserted to several colleagues at the FBI that she was certain that she had faxed the Hickey memorandum to Hagen, an assertion that was belied by the absence of a fax cover sheet in her meticulously documented files. In a subsequent interview with the Office of Special Counsel, Brown denied having said that she remembered faxing the memo to Hagen. In another interview, Brown claimed that she had read key portions of the Hickey memorandum to Hagen word for word over the phone. She also claimed that she had discussed the memorandum and the use of military tear gas rounds with Hagen again in 1997 after the Davidians filed the supplemental expert declaration. Hagen had no memory of any such conversations, and ultimately Brown, too, conceded that she had no specific memory of talking to Hagen about pyrotechnic military rounds before August 1999. Brown also claimed that she had discussed the Hickey memo with her immediate supervisor, Virginia Buckles. Buckles denied that Brown had told her about the Hickey memo, and, again, Brown ultimately told the Office of Special Counsel that she did not, in fact, recall speaking to Buckles about the Hickey memo or the FBI's use of military rounds. In short, Brown repeatedly made inconsistent, self-serving, misleading, and false statements to the Office of Special Counsel. Her assertion that she told Hagen or anyone else about the use of military tear gas rounds at Waco, therefore, lacks credibility.

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

Brown clearly lied to the Office of Special Counsel during the course of this investigation. Her efforts to avoid blame in this matter have wrongly and unfairly cast suspicion on Hagen and on Brown's own superiors at the FBI. Her misleading statements have wasted countless hours and investigative resources. What the Office of Special Counsel has found is one FBI attorney's attempt to cover up her own misconduct. While this is reprehensible, it is not the principal focus of this investigation. Therefore, the Office of Special Counsel declines to pursue a criminal prosecution,⁷¹ but has forwarded the matter to the Department of Justice Office of Professional Responsibility for appropriate action.

I. Undisclosed Morning FLIR. Until September 1999, the government repeatedly denied the existence of FLIR tapes preceding 10:42 a.m. on April 19, 1993. These early morning tapes are significant evidence in that they contain the audio of HRT commander Rogers

⁷¹As mitigating facts, the Office of Special Counsel notes that Brown did not destroy copies of the memorandum, and instead kept at least three copies in FBI files. Nor did she ask Hickey to change his statements about the use of military rounds. Indeed, Brown's diary entry could indicate that she did intend to give the information to Hagen, but simply failed to do so.

authorizing the firing of the military tear gas rounds and the Charlie Team reporting that the military tear gas rounds bounced off the concrete construction pit. The issue investigated by the Office of Special Counsel was where the original morning FLIR tapes have been since April 1993 and why the government repeatedly and incorrectly denied their existence.

On April 19, 1993, the Nightstalker aircraft containing the FLIR recording equipment began recording at 5:58 a.m. After landing at 9:30 a.m., an FBI aviation specialist removed at least one set of original tapes, and possibly both sets, from the aircraft and turned them into the FBI Command Post at the airport hanger.⁷² These tapes were not turned over in discovery during the criminal trial or to Congress when Congress requested them during the 1995 hearings. Additionally, in response to numerous Freedom of Information Act (“FOIA”) requests from David Hardy to the FBI dating from 1995 to 1997, which specifically sought all FLIR tapes from April 19, 1993, the government repeatedly denied that any FLIR tapes existed from April 19, 1993, prior to 10:42 a.m., and only produced the two FLIR tapes beginning at 10:42 a.m.

The Hardy situation is the most troubling. In May 1997, Hardy or his attorney specifically requested the early morning FLIRs in three separate letters. One letter stated that “[t]he earliest of the FLIR tapes provided begin about 10:42 A.M., yet we know that FLIR tapes were made going back to before 6:00 A.M. . . . [W]e would suggest you speak with the FLIR operators, including Arnold L. Ligi, who were drawn from the FBI’s Aviation Special Project

⁷²The aviation specialist does not recall signing anything when he turned in the tapes and no FBI evidence form or “green sheet” relating to these tapes has been located. A “green sheet” is an FBI Form FD-192, an evidence form that includes the case, the date property was acquired, from whom it was acquired and a description of the evidence. Each time custody of the item is transferred, the FD-192 requires a signature and date. One set of FLIR videotapes from the second shift, beginning at 10:42 a.m. were green sheeted and maintained as evidence.

Group.” Another letter suggested that Assistant United States Attorney Ray Jahn may have information because “[o]ne of the defense attorneys informs me that Ray Jahn indicated that the FLIR was on back into the predawn hours”

As a result of these letters, the FBI paralegals responsible for gathering the materials in response to the FOIA request made further inquiries to determine if there were FLIR tapes prior to 10:30 a.m. Notes indicate that they reviewed at least one FBI 302 memorandum from a pilot on the second shift of the Nightstalker aircraft which began recording at 10:42 a.m. However, there is no evidence that anyone at the Department of Justice or FBI looked for any further 302's from the pilots or FLIR operators on April 19, 1993. Had they looked for the documents, these 302's would have clearly indicated that there were two crews on April 19, 1993, and that the Nightstalker was in the air during the “initial stages” of the operation.

The paralegals also contacted Aviation Specialist Arnold Ligi and wrote a memorandum which stated: “Hardy has made this allegation (that the FLIR surveillance on 4/19/93 began earlier than the videos that we have provided) before in his attorney’s letter of 5/29/97. Pursuant to his attorney’s letter, we checked with Ligi (the FBI employee cited by his attorney) and Ligi stated that the FLIR surveillance did **not** begin any earlier.” (Emphasis in original.) Ligi denies that he would have made such a statement. One of the paralegals also spoke to Ray Jahn, who told the paralegal that he thought the plane had gone up before 10:30 a.m., but was willing to go along with whatever time was on the FLIR tapes.

As a result of these inquiries the FBI concluded that there were no FLIR tapes prior to 10:42 a.m. and considered the issue closed. In a letter to Hardy, dated June 17, 1997, the FBI stated:

In response to the first issue in the letter of your attorney, we contacted the FBI employee named in the letter and he advised us that the earliest FLIR videotape was not recorded at 6:00 a.m., but rather at the approximate time (10:42 a.m.) indicated by your attorney as the earliest FLIR videotape released to you. Please be advised that all FLIR videotapes recorded on April 19, 1993, have been released to you pursuant to your FOIA request.

This statement was repeated in several pleadings and in a declaration signed by the FBI Special Agent in charge of FOIA Litigation Unit.

In late August 1999, the HRT located one of the early morning FLIR tapes at its headquarters and forwarded it to the FBI General Counsel's Office. Jacqueline Brown reviewed an index which listed the tape, recognized its significance and passed the information on to her superiors. A few days later, on September 1, the FBI located two additional tapes at the Aviation Special Operations Unit ("ASOU"). Experts retained by the Office of Special Counsel concluded that all three of the tapes discovered in September 1999 are original early morning FLIR tapes. It is, therefore, troubling that three original FLIR tapes were missing and not located and made public until August and September 1999. No one can state with certainty where these three FLIR tapes were between the time that they were turned in to the command post on April 19, 1993, and the time that the FBI located them in 1999. It is clear, however, that an original tape of an FBI operation that ultimately resulted in the deaths of over 80 people should have been treated as evidence and handled as such. The FBI failed to establish the proper chain of custody for these tapes.

With respect to the FLIR tape found at HRT, the Office of Special Counsel has found no one who will say how or when the tape arrived at HRT. The agents in charge of the Waco materials admit that the FBI records system was "awful" and no inventory of material was ever made. In response to the FOIA request for FLIR tapes, no one ever asked HRT to search for

FLIR tapes because the personnel conducting the search did not expect to find FLIR tapes at HRT, since the Nightstalker was an aviation operation.

It is even more troubling that the two tapes located at ASOU were not found until September 1, 1999. The supervisory aviation specialist in whose file cabinet they were found stated to the Office of Special Counsel that he did not know that they were there. ASOU was asked on several occasions, however, to search for any FLIR tapes or other material from Waco. FBI agents and employees claim that they performed several searches, but apparently never searched the filing cabinet where the tapes were located. The only explanation provided for the failure to produce the tapes is that the label says “Nightstalker 4/19/93” and does not say “Waco.” Of course, FBI’s only operational Nightstalker aircraft was in Waco on April 19, 1993, a date that those conducting the search should have recognized.

As negligent as this cavalier approach to congressional subpoenas and FOIA requests may have been, the Office of Special Counsel does not believe that the FBI’s failure to disclose the early morning FLIR tapes was the result of any intentional effort to conceal them. In fact, had individuals at the FBI intended to conceal this evidence, they could have simply destroyed the tapes rather than preserving them for six years with the label “Nightstalker 4/19/93.” It is probable that the failure to produce the early morning FLIR was the result of the failure of ASOU, or someone at ASOU, to conduct proper searches when asked to do so. Additionally, those persons responsible for the FOIA inquiry did not conduct an exhaustive⁷³ search as they failed to speak to anyone at ASOU besides the one pilot and failed to examine all FBI 302s, which

⁷³Of course, FOIA only requires a reasonable search, and this Report makes no conclusion about whether the search was reasonable.

would have established that the Nightstalker was flying during the “initial stages” of the April 19, 1993, operation. Finally, some responsibility lies with those who failed to treat and document the early morning FLIR tapes as evidence. The Office of Special Counsel concludes, therefore, that the government’s failure to produce the early morning FLIR tape until September 1999 was negligent, but not a criminal cover-up.

(a) The FBI did not mislead Attorney General Reno in order to persuade her to approve the tear gas plan. The Office of Special Counsel investigated allegations that the FBI misled Attorney General Reno about the conditions in the complex and the status of negotiations in order to convince her to approve the tear gas plan. These allegations are entirely baseless. The Office of Special Counsel has interviewed all of the witnesses who attended meetings with Attorney General Reno during the days prior to her approval of the plan and has reviewed the documents that were provided to her and her staff. The FBI briefed Attorney General Reno fully and fairly on the conditions at Waco. The FBI provided her all of the information that she requested, and the FBI diligently followed up on the questions that she raised. Indeed, Attorney General Reno maintained during her interview with the Special Counsel that she was apprised of all material facts, and the evidence confirms the same.

(b) The FBI did not alter the FLIR video. The FLIR tape recorded by the FBI Nightstalker aircraft from 10:42 a.m. to 12:16 p.m. on April 19, 1993, does not contain audio. Attorneys for the Davidians and their families claimed that the FBI removed the audio in the weeks following the fire in order to hide radio communications among the FBI commanders. This

allegation took on greater credibility with the discovery of undated handwritten notes that the Office of Special Counsel removed from the office of an FBI attorney. The notes read in part: “the originals had audio on them but when copies were made by FBI HQ, the audio portion was removed.”

To investigate this allegation, the Office of Special Counsel had an accomplished audio and video alteration experts conduct detailed examinations of the original FLIR tape. The experts determined that the FLIR tape was recorded in a depth modulated form, meaning that the audio and video signals were intermixed during recording. In this mode of recording, it is not possible to delete the audio from the video tape without also deleting the original video. The experts concluded that, although the entire FLIR tape for the period 10:42 a.m. to 12:16 p.m. contains no audio (and video is off for five minutes and 41 seconds of the tape), no one altered the FLIR tape. Instead, the experts believe it is probable that the crew of the Nightstalker simply failed to activate the audio. This conclusion is buttressed by an audio transmission from the preceding flight of the Nightstalker which indicates that the operator turned off the audio recorder at the conclusion of that flight.

The Office of Special Counsel believes this expert analysis completely resolves the issue and concludes there was no alteration of the late morning FLIR. The Office of Special Counsel has included an expert report concerning this issue as Appendices G and H attached hereto.

(c) The FBI commanders did not mislead Congress about their reasons for ordering the CEV to breach the gymnasium area of the complex in order to facilitate the

introduction of tear gas. The Office of Special Counsel investigated whether the FBI on-scene commander Jeffrey Jamar and HRT commander Rogers were truthful when they testified before Congress that they ordered CEV-3 to breach the gymnasium to clear a path to the base of the tower of the complex for tear gas insertion. Jamar also testified that he wanted to create escape routes for the Davidians. Members of Congress and others have charged that the destruction of the gymnasium was an effort to harm the Davidians or to dismantle the building prematurely.

Rogers and Jamar provided the Office of Special Counsel the same explanation they had provided to Congress. Their statements were fully supported by all of the other agents involved in this aspect of the April 19 operation. These agents confirmed that: (1) earlier in the day, Rogers and Jamar had expressed a desire to create escape routes for the Davidians; (2) Rogers instructed CEV-3 to breach the gymnasium in order to make a path that would permit the insertion of tear gas into the tower; and (3) Jamar and Rogers never indicated an intent to dismantle the complex or to harm the Davidians. Further support for the credibility of the agents' statements is that one of the two HRT agents in CEV-3 had told FBI investigators about Rogers' instructions to make a path to the base of the tower only 24 hours after the fire at Waco— long before the propriety of their activities at the gymnasium came into question.

In addition to the statements of the agents, one of the logs kept on April 19 has a specific entry at 10:57 a.m. which fully supports the statements that CEV-3 was attempting to create a path to the base of the tower for tear gas insertion. It states: "HRT-1 directs delivery to base of the tower— Black." "HRT-1" refers to HRT commander Rogers. "Black" refers to the back side of the complex, where the gymnasium was located.

The FLIR video which recorded almost the entire activity of CEV-3 at the gymnasium also provides very significant evidence. While the video clearly shows the collapse of the gymnasium, it also supports the agents' statements that they were attempting to create a path to the tower. CEV-3 made its first penetration of the gymnasium at 11:18 a.m. Between 11:18 a.m. and 11:27 a.m., CEV-3 made nine successive penetrations into the gymnasium. Each penetration was into the same opening and towards the tower. After the ninth penetration, when the gymnasium roof began to collapse, the driver of CEV-3 continued to attempt to penetrate the gymnasium, still aimed toward the tower.⁷⁴ If the intent had been to dismantle the gymnasium, there were both safer and quicker means to accomplish that result. In fact, HRT had a CEV with a blade specifically equipped to dismantle the structure if the HRT so desired.

The Office of Special Counsel is also aware of a document dated June 24, 1993, entitled "Recommendation for the Shield of Bravery for the Hostage Rescue Team," which states:

At mid-morning, [the agents in CEV-3] were given the mission of slowly and methodically beginning the dismantling of the large facility to the rear of the compound commonly called the "gymnasium." Utilizing their CEV in a very deliberate and surgical manner, they began dismantling the gymnasium.

The Recommendation was submitted by Jamar and Rogers, although the investigation was unable to determine who actually drafted the document. While the document contradicts the testimony of Jamar and Rogers that the penetration of the gymnasium was for the insertion of tear gas and the creation of escape routes, on March 3, 1994, Jamar resubmitted a revised Recommendation in which the above-quoted language was deleted.

⁷⁴Eventually, CEV-3 did begin to penetrate the gymnasium in a direction not aimed at the tower. However, the evidence indicates this was done because of concern of a possible threat of a Davidian reported to be in the upper floor of the gymnasium.

The Office of Special Counsel is confident the quoted language is simply incorrect. The FLIR video does not show a “deliberate and surgical . . . dismantling of the gymnasium,” and the agents in CEV-3 were fully credible in stating that they were not given the mission to dismantle the gymnasium. Rather, the evidence indicates Jamar and Rogers wanted the Davidians to exit the complex peacefully, and they testified truthfully as to their intent in ordering CEV-3 to breach the gymnasium.

* * * * *

After interviewing 1,001 witnesses, reviewing in excess of 2.3 million pages of documents, examining thousands of pounds of physical evidence, studying thousands of photographs, listening to hundreds of hours of audiotapes, viewing hundreds of hours of videotapes, and conducting numerous expert analyses and tests, the Office of Special Counsel concludes with certainty that the government did not start the fire on April 19, that the government did not fire gunshots on April 19, and that the government did not misuse its armed forces during the Waco incident. Rather, the Davidians caused the tragic loss of life on April 19. The Office of Special Counsel has further concluded that the government did use three pyrotechnic tear gas rounds on April 19. The use of these rounds did not start the fire, nor did it otherwise cause harm to the Davidians.

With respect to the government’s handling of inquiries and litigation that followed April 19, 1993, the Office of Special Counsel has concluded that incorrect statements concerning the use of pyrotechnic tear gas made by Attorney General Reno and FBI Director Sessions, were due to lack of knowledge rather than to any deliberate effort to mislead the public or anyone else. However, a few government employees did knowingly conceal the FBI’s use of pyrotechnic tear

gas rounds at the concrete construction pit on April 19, 1993, from Congress, the courts, and the public, and are responsible for the widespread but erroneous belief that the government caused the deaths of the Davidians.

III. Investigative Methods

This Section of the Report describes the investigative methods employed by the Office of Special Counsel to ensure the reliability of the conclusions discussed above.

Prior to the appointment of the Special Counsel, the executive, legislative, and judicial branches of government had already conducted factual inquiries concerning the events at Waco. The Office of Special Counsel studied the 1993 “Report to the Deputy Attorney General on the Events at Waco, Texas February 28 to April 19, 1993” (the “Scruggs Report”); the 1993 “Fire Investigation Report;” the 1993 “Lessons of Waco: Proposed Changes in Law Enforcement” (the “Heymann Report”); the 1993 “Evaluation of the Handling of the Branch Davidian Stand-Off in Waco, Texas by the United States Department of Justice and the Federal Bureau of Investigation” (the “Dennis Report”); the 1993 “Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco and Firearms Investigation of Vernon Howell also known as David Koresh” (the “Treasury Report”); the 1999 Report by the General Accounting Office to the Secretary of Defense, Attorney General and Secretary of the Treasury entitled “Military Assistance Provided at Branch Davidian Incident” (the “GAO Report”); transcripts of the congressional hearings of 1993 and 1995; the 1996 Report on the “Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians” issued by the United States House of Representatives, Committee on Government Reform and Oversight and Committee on the Judiciary (the “House Report”); transcripts of the criminal trial of the Davidians in 1994; and filings and testimony in the civil suit brought by the Davidians and their families against the United States. While the Office of Special Counsel did not rely upon the findings of these

inquiries, it adopted a methodology that thoroughly tested the relevant conclusions that they reached.

1. Staffing. The Office of Special Counsel employed 74 people at its peak of its operations, including 16 attorneys, 38 investigators, and 21 support personnel. In hiring attorneys, the Special Counsel sought a balance of experience: prosecutorial, criminal defense, large case management, and writing experience. The supervisory attorneys included Deputy Special Counsel, Edward L. Dowd, Jr.,⁷⁵ who resigned as the United States Attorney for the Eastern District of Missouri to serve as Senator Danforth's deputy.⁷⁶ The remaining attorneys included one criminal defense lawyer, three present and one former Assistant United States Attorneys, two former judge advocates of the United States Air Force, two civil attorneys and one former Department of Justice trial attorney.

The United States Postal Inspection Service ("USPIS") provided most of the investigators. The Office of Special Counsel did not hire agents from the FBI, ATF or any other agency implicated in the investigation. A core of 15 USPIS inspectors assisted in all aspects of investigative operations, and 20 inspectors performed document and evidence review and coding. The USPIS provided its inspectors without seeking reimbursement from the Department of Justice

⁷⁵Other supervisory attorneys included Chief of Staff Thomas A. Schweich, a civil litigator at Bryan Cave LLP and writer with experience in large case management; Director of Investigative Operations, James G. Martin, an Assistant United States Attorney specializing in public corruption cases; and Stuart A. Levey, chief of the Washington Office, who came from the criminal defense firm Miller, Cassidy, Larroca & Lewin LLP. Thomas E. Wack, a civil litigator at Bryan Cave LLP and member of the American College of Trial Lawyers, served as General Counsel. The Office also retained legal scholar Geoffrey Hazard as an ethics consultant.

⁷⁶Concurrently, Mr. Dowd became a partner at the St. Louis office of the law firm Bryan Cave LLP.

for their salaries.⁷⁷ Most inspectors had at least 10 years of investigative experience, many at a supervisory level. The Office of Special Counsel also hired one retired USPIS Deputy Chief Inspector, a retired special agent of the Internal Revenue Service, and the resident agent in charge of the U. S. Drug Enforcement Administration office in St. Louis.

Support personnel included secretaries, legal assistants, a receptionist, two administrative officers, and three interns. The Office of Special Counsel also hired contractors to assist in matters relating to information technology.

Each employee who did not have an active government security clearance went through a background check conducted by the Office of Federal Investigations,⁷⁸ and certain employees designated by the Office of Special Counsel obtained security clearances at the top secret level and special Department of Defense briefings required for access to a specific category of national defense information. Senator Danforth required each employee and expert to sign a statement in which the employee or expert promised complete impartiality and agreed not to communicate publicly on issues concerning the investigation.

2. *Offices.* At the outset of the investigation, Senator Danforth determined that he would headquarter the investigation in St. Louis, Missouri, since the witnesses were dispersed across the country. Senator Danforth also believed that he could better conduct an impartial, unimpeded investigation if it were headquartered outside of Washington, D.C. However, in the interests of economy and efficiency, Senator Danforth opened a smaller Washington office that

⁷⁷The agents were under the supervision of the Director of Investigative Operations and Assistant Inspector In Charge Robert Stewart and Inspector In Charge Rick Bowdren.

⁷⁸Because the FBI was a subject of the investigation of the Office of Special Counsel, the Office did not permit the FBI to conduct the background checks.

interfaced directly with the various federal agencies involved in the investigation and handled matters concerning many witnesses who live in the Washington, D.C. area.

The Office of Special Counsel also staffed a small office in Waco, Texas, so that investigators would have more direct access to the voluminous evidence stored at or near the courthouse. The Waco office generally housed two or three investigators who focused on reviewing the physical evidence and obtaining information from the Texas Rangers.

3. Document Acquisition and Control. In order to organize the large volume of documentary evidence, the Office of Special Counsel assigned one lawyer, 20 agents, and a paralegal to work on document acquisition, control, and review.

(a) ACQUISITION. The Office of Special Counsel established a highly structured system for the acquisition of documentary evidence. The Office has obtained over 2.3 million pages of documents, 27,400 photographs, 440 video tapes, 1900 audio tapes, 250 computer diskettes, and 13 computer hard drives. The Office requested documents from the Department of Justice, the FBI, the Central Intelligence Agency (“CIA”), the United States Attorney’s Office for the Western District of Texas, ATF, the Department of Defense (including several thousands of pages of classified materials), the Smithsonian Institution, the White House, counsel representing the Davidians and their families in the civil litigation, and several additional sources.

The Office of Special Counsel asked the government entities to produce all documents and other materials related in any way to the Waco matter. The Office of Special Counsel also reviewed the records compiled by the Texas Rangers, which the Rangers had delivered to the custody of the United States District Court for the Western District of Texas,

Waco Division.⁷⁹ Initially, the federal agencies provided the Office of Special Counsel with the same documents that the agencies had provided to the Court in the civil litigation, but this production lacked some relevant documents, including privileged, law enforcement sensitive, post-September 1999, and computer-stored documents, among others. The Office of Special Counsel encountered substantial resistance from some federal agencies to the production of some of these records.

The Department of Justice, for example, resisted the production of notes and records of its attorneys that post-dated the appointment of Senator Danforth, even though it acknowledged that it had no right to withhold privileged communications from the Office of Special Counsel (because the Office is technically part of the Department of Justice). Furthermore, the Office of Special Counsel and Department of Justice had numerous disagreements over the production of computer files, hard drives, and e-mail. In addition, the Office of Special Counsel repeatedly received assurances from the Department of Justice that the Department of Justice had produced all hard copy documents, yet witnesses told the Office that certain categories of documents had not been turned over to the Office. Similarly, individual witnesses arrived at interviews with notes, videos, and diaries that the Department of Justice had never asked them to provide to the Office of Special Counsel.

Ultimately the parties resolved evidence production issues to the satisfaction of the Office of Special Counsel. However, the Office expended an unnecessarily large amount of time and resources negotiating these issues in light of the Attorney General's initial offer of total

⁷⁹On August 9, 1999, Judge Walter S. Smith, Jr. ordered that all federal agencies and the Texas Rangers deliver their Waco-related documents and evidence to the federal courthouse at Waco.

openness and independence for Senator Danforth.⁸⁰ On several occasions, Deputy Attorney General Eric Holder had to intervene to secure the cooperation of certain Department of Justice officials. While the FBI was generally cooperative with the document requests made by the Office of Special Counsel, on several occasions during the investigation the FBI discovered Waco-related information that had not previously been provided to the Office of Special Counsel, despite FBI Director Louis Freeh's clear instruction to conduct an exhaustive search. In addition, on one occasion, the Office of Special Counsel received information that led the Office to believe that there may have been omissions in the FBI's production of documents. The Office of Special Counsel (with the consent and approval of Director Freeh) therefore took the unprecedented step of sending eleven agents and three attorneys to search files within the FBI's Office of General Counsel, and obtained important records in the process.

Similarly, ATF initially resisted the production of records that ATF had promised its agents would be kept confidential. The parties agreed that the Office of Special Counsel would review those documents at ATF and copy only those relevant to the investigation. Ultimately the cooperation of ATF was commendable.

The Office of Special Counsel also obtained commendable cooperation in obtaining documents from the United States Attorney for the Eastern District of Texas, the Department of Defense, and the counsel for the Davidians and their families.

⁸⁰Because she is a material witness, the Attorney General recused herself from interface with the Office of Special Counsel, so she bears no personal responsibility for the difficulty in obtaining records.

(b) DOCUMENT CONTROL. Investigators for the Office of Special Counsel put documents obtained from any source, except for classified Department of Defense documents⁸¹ and some documents from the FBI Office of General Counsel, into a computerized database system established and run by Washington, D.C. based Litigation Systems Inc. (“LSI”). LSI, which has developed and utilized digital litigation support technology since 1984, had previously worked on numerous complex civil cases as well as several federal projects, including a major case for the Antitrust Division of the Department of Justice. Ultimately, LSI assisted the Office of Special Counsel in converting 2.3 million pages of documents into an easily accessible electronic form. Cleared LSI personnel performed the initial document coding, entering such fields as author and date. The Office of Special Counsel utilized 20 experienced postal inspectors to review and comment on documents received.⁸² Each lawyer and investigator received mandatory training on how to search for documents, by using specific text, words, and fields within documents. This activity proved valuable in locating a significant number of key documents that previous investigators and parties had not uncovered and that would probably not have come to light were it not for the efforts of the United States Postal Inspection Service document review team and the sophisticated technology provided by LSI.

⁸¹The Office of Special Counsel handled classified Department of Defense information in accordance with Department of Defense security and storage requirements. The findings of this report are in no way limited by the inability of the Office of Special Counsel to disclose certain classified aspects of the Department of Defense’s activity at Waco. All such information is immaterial to the questions contained in the Attorney General’s Order.

⁸²This effort was led by Assistant Special Counsel John J. Sardar and Postal Inspector Frank L. Graham.

4. Physical Evidence Review. The Office of Special Counsel conducted an exhaustive review of the physical evidence that the Texas Rangers gathered from the complex after the fire. The evidence is located in two places. First, the physical evidence that the Rangers believed might be used in legal proceedings is currently in 214 numbered boxes in the basement of the federal building in Waco. Investigators from the Office of Special Counsel examined and photographed all of this evidence. They then provided a log of the evidence to each Office of Special Counsel attorney and investigator for review.

Second, several thousand pounds of shells, fire debris, concrete, etc., which the Department of Justice criminal prosecution team did not believe would be used in legal proceedings, are in 12 large CONEX containers stored two miles from the courthouse at Waco. Several investigators with the Office of Special Counsel, working with the Rangers, went through these containers and found additional physical evidence relevant to the investigation.

5. Witness Interviews and Reports. The Office of Special Counsel interviewed 1,001 witnesses, including present and former employees of the Department of Justice, the FBI, the Department of Defense, ATF, the CIA, the Texas Rangers, the Texas Department of Public Safety, the Alabama and Texas National Guards, the Smithsonian Institution, the Tarrant County Medical Examiners Office, Davidians, fire and FLIR experts, pathologists, experts on the religious practices and beliefs of the Davidians, and interested third parties. The Office conducted follow-up interviews of 129 witnesses. In addition, the Office of Special Counsel reviewed statements made by these witnesses in interviews, depositions, testimony, and Congressional hearings.

During the first two weeks of the investigation, the Office of Special Counsel secured agreements with the Department of Justice, the Court, the congressional committees investigating the Waco matter, and counsel for the Davidians that any party interviewing any witness would afford the Office of Special Counsel 10 days prior notice so that the Office could interview the witness first.⁸³ The Office wanted to interview witnesses before they were prepared for testimony before Congress or in the civil litigation discovery process.

The Office of Special Counsel's Director of Investigative Operations then determined the order of the interviews. When an interview was scheduled, the responsible attorney or agent posted information about the interview on a central board at the office, so that the entire team could provide information to the interviewers that would assist in the interview process. Upon completion of the interview, the agent or lawyer assigned to each interview prepared a detailed memorandum of interview. The interviewers gave brief reports of interviews at staff meetings and distributed the memoranda of interviews to attorneys and agents. The document team then placed the completed memoranda of interviews on a searchable database.

On request, the Office of Special Counsel reviewed with several witnesses copies of their memoranda of interview, and allowed the witnesses to make suggestions or corrections. The Office of Special Counsel permitted other witnesses to go over the notes of the interview with the agent at the end of the interview to ensure that the notes accurately recounted the witness

⁸³Senator Arlen Specter, heading a subcommittee of the United States Senate Committee on the Judiciary, agreed in a letter only to hold off on interviews for thirty days after the beginning of the investigation, but in practice generally provided advance notice of any interview that his staff intended to conduct. The parties to the civil litigation did not actually execute a stipulation requiring 10 days notice until March 2000, but agreed to this process from the outset and adhered to it prior to the execution of the stipulation.

statements. None of the witnesses made any material changes to the notes or memoranda reviewed by them.

6. *Expert Analysis, Field Tests, and Reports.* The Office of Special Counsel retained experts in the fields of arson, fire spread analysis, toxicology, chemical engineering, atmospheric gas dispersion, explosives, ballistics, tool mark examination, audio and video enhancement and authentication, forensic phonetics, forensic pathology, air traffic operations, FLIR systems, and FLIR imagery interpretation.⁸⁴ The Office of Special Counsel experts reviewed the prior work of other experts and performed independent analyses of physical, audio, video and photographic evidence. The work and findings of these independent experts have been critical to the Office of Special Counsel's investigation. Copies of their reports are attached hereto as Appendix D through Appendix N. The USPIS administered the retention and payment of experts to prevent the Department of Justice from obtaining insight into the activities of the experts. The USPIS also provided polygraph and forensic document examination (which included both handwriting and indented writing analysis) expertise, forensic photography, computer forensic assistance and video reformatting and reproduction assistance.

Experts provided opinions on the following issues:

(a) FIRE. The Office of Special Counsel instructed its fire experts to determine: (A) whether CS or methylene chloride gas caused or contributed to the spread of the fire; (B) the effect of ventilation on the tear gas concentration levels inside the complex; (C) the points of origin and cause of the fire; (D) how fast and in what manner the fire spread; (E) whether having firefighting

⁸⁴These experts worked under the direct supervision of Bradley J. Swenson, Assistant Special Counsel–Experts and Consultants.

equipment on the scene would have saved additional lives; and (F) the cause of the explosion observed at 12:26 p.m. on April 19. Copies of their reports are attached hereto as Appendices D, E and F.

(b) TOXICOLOGY. The Office of Special Counsel tasked its two toxicological experts to determine whether CS or methylene chloride gas killed, incapacitated or disoriented any Davidians to the point that they were unable to exit the complex. Copies of their reports are attached hereto as Appendices K and L.

(c) WEAPONS/BOMB. The Office of Special Counsel ballistics and tool mark experts determined: (A) whether shells collected from FBI sniper positions indicated that the FBI fired shots on April 19, and (B) whether fuel cans collected from the debris contained manmade tool strike holes. Explosives experts from Northern Ireland and the United States also analyzed debris and other evidence to respond to allegations that a shaped charge exploded at the complex on April 19. Copies of their reports are attached hereto as Appendices M and N.

(d) PATHOLOGY. A forensic pathologist with special expertise in sudden death due to gunshots, explosion, and fire reviewed the original autopsy files and independently attempted to determine the cause of death for each Davidian who died on April 19. For each Davidian who died of a gunshot wound, the pathologist determined the likely type of ammunition used (high versus low velocity) and, if possible, the distance from which the weapon was discharged. A copy of his report is attached hereto as Appendix J.

(e) FLIR. As stated earlier, the Office of Special Counsel retained two organizations with FLIR expertise to analyze the 1993 FLIR data. Vector Data Systems (U.K.), Ltd. performed an analysis of the 1993 “flashes” on the FLIR tape and worked jointly with the

Office of Special Counsel and the United States District Court for the Western District of Texas to develop the protocol for and to execute the FLIR test at Ft. Hood.⁸⁵ The second expert utilized advanced enhancement techniques, computer algorithms and three-dimensional reflection geometry analysis to determine whether the flashes on the 1993 FLIR tape were associated with any human movement or government gunfire. In connection with the execution of the FLIR test, the Office of Special Counsel also retained an air operations expert who controlled the activity of the helicopter and fixed-wing aircraft during the test at Ft. Hood. Copies of their reports are attached hereto as Appendices H and I.

(f) AUDIO/VIDEO. The Office of Special Counsel retained three experts to analyze audio and video tapes including the Title III tapes from April 16 to 19, 1993, and the FLIR tapes from April 19, 1993. These experts reviewed the relevant tapes for alteration, erasure, and authenticity. They also transcribed audio tapes. Copies of their reports are attached hereto as Appendices G and H.

7. *Civil Proceedings*. At the time that Attorney General Reno appointed Senator Danforth and several times thereafter, senior representatives of the Department of Justice recommended that the Office of Special Counsel seek a stay of the civil proceedings brought by the Davidians and their families against the government pending the outcome of the Office of Special Counsel investigation. The Office of Special Counsel rejected this recommendation because: (1) Senator Danforth did not want to delay or deprive the Davidians of their day in court; and (2) the legal precedent for such a stay was weak since the investigation was not initially criminal in nature.

⁸⁵The FLIR test would not have been possible without the direct assistance of Secretary of Defense William S. Cohen and his staff, and the assistance of the Right Honorable Geoffrey Hoon MP, Secretary of State for Defence of the United Kingdom.

The Office of Special Counsel developed early a constructive relationship with the Court that ultimately allowed for such activities as the court-supervised FLIR test and an effective system for the production, maintenance, and storage of evidence. The parties to the civil litigation agreed that the Office of Special Counsel could have *ex parte* communications with the Court.⁸⁶ Cooperation between the Court and the Office of Special Counsel has proven beneficial to the truth-seeking process.

8. *Interaction with Congress.* The Office of Special Counsel maintained communications with representatives of both the majority and the minority members of the congressional committees that have been conducting investigations of the Waco incident concurrently with the investigation by the Office of Special Counsel.⁸⁷ The Office of Special Counsel did not disclose specific investigative facts to the congressional committees, but it did coordinate the interviews of certain witnesses with the congressional committees. At the request of the Department of Defense, the Office of Special Counsel also allowed the disclosure to Congress of the results of the polygraph test of a former U. S. Army Special Forces soldier who was acting as an observer at Waco on April 19, 1993. In addition, the Office of Special Counsel permitted

⁸⁶After the Office of Special Counsel proposed the joint FLIR test with the Court against the wishes of the Department of Justice, some Department of Justice officials made efforts to have the Department of Justice order the Office of Special Counsel to cease communicating with the Court. The Office of Special Counsel made it clear to the Department of Justice that it would not cease such communications. The Deputy Attorney General agreed with the Office of Special Counsel that the office could continue *ex parte* communications with the Court.

⁸⁷These committees were the United States Senate Committee on the Judiciary chaired by Senator Orrin Hatch, Senator Patrick Leahy, Ranking Minority Member and its special subcommittee headed by Senator Arlen Specter; and the Committee on Government Oversight and Reform of the House of Representatives of the United States chaired by Representative Dan Burton, Representative Henry Waxman, Ranking Minority Member.

several congressional staff members to observe both the FLIR test at Ft. Hood on March 19, 2000, and the review of evidence in the CONEX containers at Waco in November of 1999. The Office of Special Counsel cooperated fully with an audit of its financial controls by the General Accounting Office, the auditing arm of Congress, in April 2000.

9. *Interaction with the Department of Justice and FBI.* As Senator Danforth was the first person appointed under the new Department of Justice Special Counsel Regulations, 28 CFR § 600 *et seq.*, the Office of Special Counsel interacted frequently with the Department of Justice to resolve issues concerning the division of administrative responsibility between the Office of Special Counsel and the Department of Justice. The Office of Special Counsel and the Department of Justice also had frequent contact concerning the Department of Justice's compliance with investigative requests made by the Office of Special Counsel during the course of the investigation.

These discussions were often contentious. Employees of the Department of Justice took the position that the Department of Justice could maintain a certain degree of control over the conduct of the investigation, which the Office of Special Counsel considered improper since the Department of Justice was a subject of the investigation. For example, the Department of Justice: (1) attempted to deny the Office of Special Counsel access to internal documents postdating the appointment of Senator Danforth and resisted the production of important e-mail as being too burdensome; (2) claimed to control the power to waive the Department of Justice's attorney-client privilege; and (3) demanded that the Department of Justice be consulted before the Office of Special Counsel took any actions (such as proposing the FLIR test) that might affect the results of the civil litigation. The Office of Special Counsel did not allow these problems to affect the

integrity of its investigation, and ultimately obtained all the information that it requested.

However, the Office of Special Counsel strongly recommends that the Department of Justice draft more specific guidelines outlining the relationship between a Special Counsel and the Department of Justice in situations where the Department of Justice is the subject of the investigation, and that the Department of Justice recognize the need for the investigative independence of the Office of Special Counsel in such situations.⁸⁸

The Office of Special Counsel also interacted on a regular basis with the FBI. The successful completion of the Office's investigation of the FBI depended on the commendable efforts of Supervisory Special Agent Patrick Kiernan, who was designated by the FBI to serve as the liaison to the Office of Special Counsel. Agent Kiernan, who is a lawyer and an ethics instructor at the FBI Academy, ensured that the Office of Special Counsel received the requested information from the FBI and greatly facilitated the Office's access to many FBI witnesses.

IV. Statement of Facts

The following Statement of Facts contains the essential background information needed to understand the conclusions of the Special Counsel's Report on the five issues contained in Order 2256-99 of the Attorney General. It does not attempt to chronicle fully the Waco incident.

⁸⁸The need for more specific guidelines is underscored by the fact that the Office of Special Counsel had numerous problems with the Department of Justice which often required the personal intervention of the Deputy Attorney General and the Director of the FBI to resolve.

A. ATF Commences its Investigation of the Branch Davidians.

1. In May 1992, the McLennan County Texas Sheriff's Department provided information to the Bureau of Alcohol, Tobacco and Firearms ("ATF") that Vernon Howell, also known as David Koresh ("Koresh"), leader of the Branch Davidians religious group at Mt. Carmel (the "Davidians"), had received large shipments of firearms, inert grenades, and black powder at a small structure known as the Mag Bag, located approximately six miles from the main Davidian living quarters outside of Waco, Texas. Investigation by ATF revealed deliveries by United Parcel Service ("UPS") of suspicious firearms components and possible explosive precursor materials. Further investigation revealed that upon arrival at the Mag Bag, the UPS driver would be met by a Davidian and escorted to the Mt. Carmel complex. At the complex, the Davidian would make payment, often in cash.

2. Working in consultation with the United States Attorney's Office for the Western District of Texas, Waco Division, ATF began a federal investigation of the Davidians. Over the next several months, ATF agents developed additional information which corroborated their suspicion that the Davidians had produced, and continued to manufacture, illegal weapons and explosives. ATF derived this information from interviews with former Davidians, discussions with a confidential informant, records of UPS shipments to the complex, and reports of experts who had studied the contents of shipments of explosive materials received by the Davidians.

3. In addition to the specific evidence of illegal gun manufacturing, ATF learned that Koresh and his followers harbored strong anti-government views, that he expected confrontation

with the federal government, and that he and his followers viewed such confrontation as a means to religious salvation. More detailed information on these beliefs is included in Appendix A attached hereto. This information heightened ATF concerns that Koresh had violent intentions that posed a danger to the public.

4. Following a series of internal ATF meetings in December 1992, ATF began an undercover operation intended to develop additional evidence that the Davidians had violated federal firearms laws. ATF rented a house approximately 325 yards from the Davidian complex and, on January 11, 1993, began surveillance operations. In addition, ATF agents posed as students and made contact with Davidians who worked in and around Waco. In particular, ATF undercover Special Agent Robert Rodriguez made direct contact with Koresh in late January 1993 and continued to visit the complex up to and including February 28, 1993. Koresh conveyed to Agent Rodriguez his disdain for federal gun control laws and ATF in particular. As a result of the information developed during the course of the investigation, ATF concluded that there existed probable cause to believe that the Davidians had violated and continued to violate federal firearms laws. At that point, ATF began preparations for a search of the complex and the arrest of Koresh.

B. ATF Seeks the Support of the Armed Forces of the United States and Claims a Drug Nexus to Its Investigation.

5. In late November or early December 1992, ATF determined that it might be able to supplement its understanding of the Davidian complex by conducting aerial reconnaissance. On December 4, 1992, a representative from the Department of Defense told ATF that it could obtain aerial reconnaissance from the armed forces, but that ATF would have to reimburse the armed

forces for the costs of the support that the armed forces provided unless the investigation had a “drug nexus.” At that time, ATF informed the Department of Defense representative that there was no drug connection with its investigation.

6. On December 11, 1992, a representative of ATF visited the office of the Texas National Guard counterdrug support program to solicit National Guard support. A National Guard representative also told ATF that the counterdrug support program would only support ATF if ATF established a drug nexus to its investigation. Nevertheless, on December 14, 1992, ATF wrote a letter to the Texas National Guard counterdrug support program requesting “the use of aerial reconnaissance of the target site in the form of aerial photography,” but did not mention the existence of a drug nexus.

7. In mid-December 1992, Special Agent David Aguilera, the ATF case agent for the investigation of the Davidians, began to solicit information from his sources about the possible use of illegal drugs at the complex. A former Davidian reported to ATF that there had been an illegal methamphetamine lab at the Davidian complex when Koresh took over the complex in 1988. ATF reported that some Davidians had histories of drug use, trafficking, and arrests, and that the Davidians had received shipments of chemicals that they could possibly use to manufacture methamphetamine. An ATF agent later reported that Koresh had stated that the complex would be a good site for a methamphetamine lab.

8. Believing that it had developed an adequate “drug nexus” to avail itself of the National Guard’s counterdrug program, ATF sent a second request for support to the Texas National Guard dated December 18, 1992. This letter explicitly referenced possible narcotics at the complex. From this point forward, all ATF requests for assistance to the National Guard and the active duty military of the United States in connection with the initial investigation of the Davidians made some reference to the possible use or manufacture of illegal drugs at the complex.

9. The Texas National Guard agreed to support the investigation. On January 6, 1993, it flew an aerial surveillance mission over the Davidian complex using a UC-26 fixed wing aircraft equipped with a thermal imaging system. An informal analysis of the thermal imaging data done by a Guard airman who was not a qualified infrared image interpreter revealed a “hot spot” which he thought to be consistent with the existence of a methamphetamine laboratory at the complex. The Alabama National Guard, working at the request of the Texas National Guard, flew a follow-up mission over the complex on January 14. The Texas National Guard then resumed its surveillance flights, flying missions over the complex on February 3, 6, 18 and 25. The Guard aircraft provided video and photographic reconnaissance to ATF which assisted ATF in planning future operations.

10. As the National Guard provided its surveillance support, ATF stepped up its efforts to obtain support from the active duty armed forces of the United States for a planned search of the complex and arrest of Koresh. On January 21, Department of Defense’s liaison to ATF drafted a letter for the signature of ATF’s Chief of Special Operations to the Army Regional Logistics

Support Office (“RLSO”) in El Paso, Texas. The letter requested (a) the use of the Military Operations in Urban Terrain (“MOUT”) facility at Ft. Hood, (b) the loan of seven Bradley Fighting Vehicles (“Bradleys”) to ATF, and (c) driver training and on-call maintenance support for the Bradleys. The letter referred explicitly to the “continuation of the firearms and drug case” and contained an attachment listing an extensive amount of equipment that it wanted on an on-call basis. The Army RLSO orally informed ATF that it could not meet a request of such magnitude.

11. Despite the initial rejection of its request, ATF continued to solicit military support. On February 2, ATF briefed representatives of Operation Alliance, the Joint Task Force Six (“JTF-6”), and the commander of the Rapid Support Unit (“RSU”) on the status of the investigation. Operation Alliance is a coalition of law enforcement and military organizations which coordinates counterdrug support in the Southwest Border Region, including the State of Texas. JTF-6 serves primarily as a “clearing house,” linking law enforcement agencies with military units for counterdrug missions. In early 1993, the RSU was comprised of a Special Forces company of Third Special Forces Group from Ft. Bragg, North Carolina, and its function was to carry out the counterdrug missions delegated by JTF-6.

12. On February 2, after the briefing, an ATF coordinator at Operation Alliance prepared requests for military support of the planned operation which were sent to JTF-6 and the Texas National Guard. These letters were signed by a border patrol agent who served as the Operation Alliance Director of Resource Management, and sought assistance in “planning, training, equipping and command and control in serving a federal search warrant . . . to a dangerous

extremist organization believed to be producing methamphetamine.” These letters also stated “special assistance is needed in medical evacuation contingency planning and on site trauma medical support.” ATF dropped its earlier request for the Bradleys.

13. On or about February 3, the commander of the RSU, Major Mark Petree, began to question the propriety of fulfilling ATF’s request for military support. Specifically, he expressed concerns about ATF’s request for training which included assistance in planning ATF’s service of a federal search warrant and providing RSU medics on site during the execution of the warrants. He relayed his concerns to a Special Forces civilian employee who in turn contacted Major Philip Lindley, a military lawyer for the U.S. Army Special Forces Command at Ft. Bragg, North Carolina. Maj. Lindley concurred with Maj. Petree, believing that ATF’s request for assistance exceeded the level of active duty military participation in civilian law enforcement activities permitted by applicable federal statutes, case law, military regulations and policy. Maj. Lindley believed that the requested assistance as proposed “crossed the line” and exposed the active duty military members of the RSU carrying out this request to both civil and criminal penalties.

14. Maj. Lindley drafted a memorandum on February 3, 1993, which reflected his thought processes as events unfolded. In that memorandum, he stated his position on the ATF request as follows: “[a]t the point where the RSU assisted in the actual planning and rehearsal of the take down, participation in the arrest was ‘active’.” Therefore, it was not permissible under the *Posse Comitatus* Act. Maj. Lindley also expressed his concerns about the on-scene medical support requested by ATF. He believed that by treating injured Davidians, Special Forces medics would be

in danger of “direct participation in the search and arrest of the civilians.” Finally, Maj. Lindley also discussed in his memorandum the training capabilities of the RSU, stating that providing close quarters battle training was beyond the expertise of the unit. Based on these facts, Maj. Lindley concluded that ATF’s request “appeared to go beyond DoD guidance for these missions,” and he “advised against the operation” as initially planned.

15. Later on February 3, following discussions with Maj. Petree, Maj. Lindley received a call from Lt. Col. Ross Rayburn, legal advisor to JTF-6, who vigorously disputed Maj. Lindley’s assessment that the proposed RSU mission was improper, and accused Maj. Lindley of trying to “undercut” the counterdrug mission of JTF-6. Lt. Col. Rayburn also issued a legal opinion that ATF’s requested assistance was legal, in part because ATF had not requested RSU to accompany ATF to the complex to effectuate the search. Lt. Col. Rayburn wrote, “[t]here is no legal objection to providing ATF with instruction and training during the rehearsal phase of the operation.” Furthermore, Lt. Col. Rayburn stated “there is no legal prohibition” on providing medical care support. After further discussions with counsel at the Army Special Operations Command and the United States Special Operations Command, Lt. Col. Rayburn yielded and the military components involved reached a consensus that the RSU would not provide the assistance as initially requested.

16. During the following weeks, relevant military authorities worked on an “execution order” detailing the support that the RSU would provide, and they had the order reviewed by a military lawyer for possible violations of the law, including the *Posse Comitatus* Act. The execution order dated February 17, 1993, directed that the “RSU will not provide mission specific

advice . . . RSU teams will not accompany BATF teams on either the operation nor [sic] any site visit within the area of operation,” and “RSU personnel will not become involved in search, seizure, arrest or similar law enforcement related activities.” Subsequently, the commander of JTF-6, Brig. Gen. John Pickler, issued the order to the RSU, and members from one of the RSU’s six detachments, ODA 381, arrived at Ft. Hood on February 22 prepared to provide ATF the support authorized in the order. Over the next few days, members of ODA 381 and ATF officials met to identify the necessities for the ATF’s training and rehearsals.

17. Between February 24 and 26, ODA 381 constructed a portable door entry and re-useable window on a practice facility, helped ATF tape off an area that represented the Davidian complex, provided medical evacuation and radio communications training, and coordinated the use of the ranges at Ft. Hood. On February 26 and 27, ATF conducted rehearsals at Ft. Hood. ODA 381 provided safety advice and acted as human “silhouettes” during ATF’s room clearing exercises. As ordered, the ODA 381 let ATF define the parameters of its operation although one member of ODA 381 provided limited advice in an area of his expertise.⁸⁹ Most of ODA 381’s members left Ft. Hood on the evening of February 27. Four ODA 381 members remained at Ft. Hood until February 28 to assist in cleaning up the training site. Due to a flat tire and a severe thunderstorm, these four ODA 381 members were delayed in their return and arrived back at

⁸⁹As stated earlier, a weapons sergeant for ODA 381 stated he provided ATF general advice within his expertise in mounting and dismounting vehicles in a tactical manner, but he did not give specific advice to the ATF in mounting and dismounting the cattle trailers used in the February 28 raid.

McGregor Range, Ft. Bliss, Texas, on March 1. No ODA 381 members accompanied ATF to the Davidian complex on February 28.

18. Also in February 1993, ATF obtained permission from the Texas National Guard to utilize Guard helicopters and crews in connection with the planned search and arrest at the Davidian complex. In the last week of February, three members of the Texas National Guard, the commander of the Austin Army Aviation Facility, the State Aviation Officer, and one of the pilots who flew the mission on February 28, learned that ATF planned to use the Guard's helicopters as a diversion for ATF's raid. One person, the commander of the Austin Army Aviation Facility, expressed safety concerns to the State Aviation Officer about the plan. Nonetheless, the plan to use the Guard helicopters as a diversion did not change. On February 27, the Guard helicopters participated in ATF's rehearsals, and the remaining pilots and crew of the Guard helicopters learned for the first time that they would act as a diversion during the ATF raid the next day.

C. ATF Attempts to Execute Search and Arrest Warrants.

19. On February 25, ATF Agent Aguilera presented to a federal magistrate an affidavit in support of an application for warrants to arrest Koresh and to search the Davidian complex and the surrounding 77 acres. The affidavit had been reviewed by Assistant United States Attorney William Johnston. The affidavit alleged violations of 26 U.S.C. § 5845(f)— unlawful possession of a destructive device. The affidavit also contained a discussion of alleged child abuse. There was no mention of alleged drug activity at the complex. The federal magistrate issued the warrants that same day.

20. According to ATF, on February 28, while ATF prepared for the dynamic entry into the complex, Agent Rodriguez entered the complex and spoke to Koresh. While there, he learned that Koresh had heard about the planned execution of a warrant and that the operation had been compromised. Indeed, local media had also learned of the planned search and arrest and had preceded ATF to the complex to cover the entry. Rodriguez reported to his supervisors that Koresh knew about ATF's operation. ATF supervisors nonetheless decided to execute the warrant on February 28.

21. Members of ATF's warrant execution team departed a preset staging area at 9:20 a.m. on February 28 in cattle trailers. They arrived at the complex, entered the driveway, exited their vehicles, and approached the complex. According to Davidians Kathryn Schroeder, Victorine Hollingsworth and Marjorie Thomas, several Davidian males, including Koresh, were armed and prepared to fire on ATF agents. While there is some dispute as to who shot first— a matter outside the scope of the Attorney General's Order to the Special Counsel— there is no dispute that the Davidians were prepared for a gun battle and had ATF significantly outgunned.

22. A fierce and tragic gun battle ensued. Before a cease-fire could be arranged, the Davidians killed four and wounded 20 ATF agents. Additionally, ATF killed two and wounded five Davidians. At some point during or after the gun battle, the Davidians intentionally shot and killed three of their own at close range: Peter Hipsman, Perry Jones and Winston Blake.⁹⁰ All three

⁹⁰See "Forensic Pathology Evaluation of the 1993 Branch Davidian Deaths and Other Pertinent Issues," prepared for the Office of Special Counsel by its retained expert forensic pathologist, Michael A. Graham, M.D., at Appendix J.

Texas National Guard helicopters took fire and were forced to land, but personnel on board suffered no injuries. Witness interviews indicate that the Guard helicopters did not return fire.

23. At 9:48 a.m., Davidian Wayne Martin telephoned the Waco 911 emergency services and was put in contact with a deputy sheriff. Martin indicated that ATF agents were firing into the complex, but he soon hung up the phone. After Martin hung up, the deputy called the complex and yelled over an answering machine for someone to pick up the phone. The deputy eventually spoke to Martin but could not effectuate a cease-fire. At 10:35 a.m., undercover ATF agents provided an ATF Assistant Special Agent in Charge with the Davidians' phone number and, after an hour of negotiations with Koresh's second in command, Steven Schneider, the parties agreed upon a cease-fire.

24. Later that day, Davidian Michael Dean Schroeder and two others attempted to enter the complex. When ATF agents encountered them at the outer perimeter of the complex, Schroeder fired 18 shots at the agents. They returned fire and killed him. One of the others escaped, and the third was arrested. The death of Schroeder brought the total number of Davidians killed on February 28, 1993, to six.

D. ATF Transfers Control of the Standoff to the Department of Justice.

25. On March 1, after a series of meetings and teleconferences between senior officials of the Department of the Treasury (of which ATF is a component) and the Department of Justice (of which the FBI is a component), ATF turned control of the situation at the complex over to the

Department of Justice, and, more particularly, to the FBI. FBI Director Sessions then briefed President Clinton on the status of the standoff at Waco.

26. As of February 28, President Clinton had not formally appointed a new Attorney General. Stuart Gerson, a Bush Administration holdover, remained Acting Attorney General until Janet Reno was sworn in on March 12. Attorney General Reno had many people reporting to her on Waco-related matters. These included Associate Attorney General Webster Hubbell. Other reporting relationships were as follows. The Criminal Division at the Department of Justice normally reported to the Deputy Attorney General, but since there was no Deputy Attorney General in place during the entire Waco standoff, the Division reported directly to the Attorney General. John C. “Jack” Keeney was the Acting Assistant Attorney General who headed the Criminal Division. Under the Assistant Attorney General were several Deputy Assistant Attorneys General, including Mark Richard who supervised the activities of the Terrorism and Violent Crimes Section of the Criminal Division (“TVCS”). Section Chief James Reynolds and Deputy Chief Mary Incontro headed the TVCS. John Lancaster was a trial attorney in TVCS who later worked on the team that prosecuted some of the Davidians in 1994. The United States Attorney’s Office for the Western District of Texas had primary responsibility for prosecuting federal crimes at Waco, including the shooting of the ATF agents. Ronald F. Ederer was the United States Attorney for the Western District of Texas, headquartered in San Antonio, Texas. Several Assistant United States Attorneys including First Assistant James DeAtley, William “Ray” Jahn, LeRoy Jahn, John Phinizy, and William “Bill” Johnston reported to Ederer. Johnston and Phinizy worked out of the Waco office.

27. Day-to-day law enforcement activity during the 51-day standoff was under the direct control of the FBI. FBI Director William Sessions reported to the Attorney General. Deputy Director Floyd Clarke and Associate Deputy Director W. Douglas Gow reported to Director Sessions. Assistant Director Larry Potts headed the FBI's Criminal Investigative Division, which reported to Clarke. Reporting to Potts was Deputy Assistant Director Danny Coulson, and Michael Kahoe, the Section Chief for the Violent Crimes and Major Offenders Section of the Criminal Investigative Division.

28. The FBI assigned the Special Agent in Charge of the FBI's San Antonio office, Jeff Jamar, as the on-scene commander at Waco and assigned numerous agents and FBI Special Weapons and Tactics ("SWAT") teams to work under his command. The FBI also assigned Special Agent in Charge Robert Ricks and Special Agent in Charge Richard Swenson to assist Jamar in supervising his team of agents. On February 28, 1993, Jamar dispatched Supervisory Special Agent Byron Sage, a trained negotiator, to Waco. The FBI later assigned Special Agent Gary Noesner to lead the negotiation team. Several weeks later, Special Agent Clinton Van Zandt replaced Noesner as head of the negotiation team. The FBI also later assigned a fourth Special Agent in Charge, Richard Schwein, to its Waco team.

29. In parallel with the establishment of the negotiation team, the FBI deployed its tactical team. On February 28, senior FBI officials notified Richard Rogers, commander of the FBI Hostage Rescue Team ("HRT") that he should deploy to Waco. Among the HRT members who reported to Rogers (and whose activities proved relevant to the charter of the Office of Special

Counsel) were Supervisory Special Agent Steve McGavin and Special Agent David Corderman. The HRT also had sniper teams on site, one of which was led by Special Agent Lon Horiuchi.

30. The FBI personnel located themselves in three operations centers. In Washington, FBI leadership activated the Strategic Information Operations Center (“SIOC”) where the FBI had its command and control resources. At Waco, the FBI on-scene commanders established the rear Tactical Operations Center (“TOC”) located in a hangar at a former Air Force base on the campus of Texas State Technical College approximately five miles from the Davidian complex. The FBI on-scene leadership, negotiators, behavioral scientists, investigators, and agents monitoring the listening devices secretly inserted into the complex operated from the rear TOC. The FBI also established a forward TOC near the “Y” intersection, consisting of three mobile homes about 1000 yards from the front of the complex. This forward TOC served as the tactical operations center for the HRT and contained a communications center for equipment set up by the HRT, some with the assistance of the Army Special Forces.

31. The FBI designated areas of the complex by number and letter. It designated the front or south side of the complex as the white side, the back or north side of the complex as the black side, the right or east side of the complex as the red side, and the left or west side as the green side.⁹¹ The FBI referred to the first floor as “Alpha,” the second was “Bravo,” the third was

⁹¹The complex did not line up precisely on an east-west axis, but the Special Counsel uses these directional approximations for ease of reference.

“Charlie,” and the fourth was “Delta.” Window and door designations were identified by counting from left to right. See chart attached hereto as Exhibit 3.

32. The FBI HRT established sniper positions around the complex. The HRT Blue Sniper Team occupied Sierra-1 in the former ATF undercover house facing the white side of the complex. Upon their arrival at the Sierra-1 sniper position, members of the Blue Sniper Team observed spent shells in the undercover house. Sierra-1 Alpha was located in a house next door to Sierra-1 and housed assault team members and technical equipment. The HRT Gold Sniper Team occupied Sierra-2 in a structure on the green/black side of the complex. HRT also created Sierra-3, a sandbagged position on the red side which HRT snipers occupied on an as-needed basis.⁹² Prior to April 19, HRT assaulters also operated the Bradleys obtained from the National Guard from the sniper positions.

E. The FBI Obtains Additional Military Support.

33. Within hours after the gun battle between ATF and the Davidians on February 28, ATF and FBI made requests for extensive military support. Texas Governor Ann Richards saw the gun battle on television and immediately called the Commanding General of the United States Army’s III Corps at Ft. Hood to ask if he knew anything about the operation. The General informed the Governor that III Corps had no assets at Waco and did not know any details of the operation, but he dispatched Brigadier General Peter J. Schoomaker, from the First Cavalry Division at

⁹² Sierra-4 was a campsite on the green side occupied by SWAT teams. It was located along the fence line beyond the inner perimeter of the complex.

Ft. Hood, to Austin, Texas, to advise the Governor and the Adjutant General concerning the requests for military support that they had received from ATF and the FBI. After meeting with Governor Richards, Gen. Schoomaker drove to Waco, arriving early on March 1. He met briefly with HRT commander Rogers, discussed the situation in general terms, and then returned to Ft. Hood. He did not provide any advice to the FBI at that time.

34. The Texas National Guard immediately dispatched 10 Bradleys to the scene with their crews and trained HRT members in their use. The National Guard later provided five CEV's, a tank retriever, as well as trucks, jeeps and supplies. All of this equipment was operated by the law enforcement personnel, not by National Guard personnel. The National Guard also provided maintenance support personnel and liaison personnel to handle any further equipment requests.

35. The FBI also made several requests for the loan of equipment and related training from the active duty military. Members of the active duty military trained HRT members in the operation of the equipment and provided maintenance support, but they did not operate the equipment. During the standoff, the U.S. Army provided two Abrams tanks (after disabling their offensive capability), three UH-1 helicopters, unmanned ground surveillance vehicles, trucks, communications equipment, ammunition, and various military supplies. Furthermore, the U.S. Army provided crews for vehicle and helicopter maintenance, medical staff, and liaison officers to handle additional equipment requests. The Army at III Corps obtained a legal opinion from an Army lawyer that providing military equipment to law enforcement agencies was permissible, but the Army deviated from standard procedures by failing to execute a lease agreement with the FBI

for the equipment until after the standoff. The FBI reimbursed the military for this support, and none of it was premised on the existence of a drug nexus.

36. The U.S. Army Special Forces also supported the FBI. Its members provided surveillance equipment in the form of remote observation cameras which transmitted television images from locations around the complex to the FBI forward TOC and a thermal imager located on a water tower several hundred yards from the red side of the complex. The Special Forces also provided ground sensing equipment to assist with the security of the perimeter of the complex. In order to train the FBI on the use of the equipment, observe its use, and maintain it, the Special Forces provided a total of 10 personnel during the entire standoff, although usually only three or four were present at any given time. On two occasions prior to April 19, Special Forces personnel went to forward positions (still hundreds of yards away from the complex) to repair or install the equipment. The Special Forces observers gathered information about the performance of the FBI and the performance of the Special Forces equipment. The Air Force provided television jamming equipment that government contractors operated briefly during the standoff. A member of the British Special Air Service (“SAS”) was also present as an observer early in the standoff but had no active role in the FBI operation.

F. The FBI Attempts to Negotiate a Peaceful Resolution of the Standoff.

37. As the reports of other Waco investigations have set forth in detail, the FBI negotiation teams and the tactical teams ran different and sometimes conflicting operations. Most of this information is irrelevant to the charter of the Office of Special Counsel, but the following narrative

provides some context relevant to the Special Counsel's conclusions. The negotiators centered their activities in a Negotiations Operations Center at the rear TOC. The FBI negotiators worked with negotiators from ATF, the Texas Department of Public Safety, the Austin Police Department, and the McLennan County Sheriff's Department. Their principal objective was to secure the release of the children in the complex and eventually effectuate the peaceful arrest and departure of the adults. They worked in 12-hour shifts. Each shift utilized a primary negotiator and a secondary "coach" who maintained notes of the negotiations and provided prompts to assist the primary negotiator. FBI personnel recorded and, if possible, transcribed the contents of negotiation sessions. Each shift kept a negotiations log and handwritten chronology. The negotiators regularly prepared "situation reports" summarizing the status of negotiations. The negotiators also relied upon behavioral psychologists and religious experts for advice concerning the likely reaction of the Davidians to their negotiation strategy.

38. Over the 51 days, more than 40 law enforcement officers participated in negotiations, the objective of which was to get the Davidians to leave the complex peacefully. In order to effectuate a peaceful resolution to the standoff, Jamar made numerous concessions to Koresh based upon the recommendations of the negotiators. On February 28, the negotiators arranged the radio broadcast of a scripture message recorded by Koresh. Two days later, based on Koresh's promise to come out, they arranged for a 58-minute message from Koresh to be aired nationally on television and radio. The negotiators also allowed Davidians to exit the complex for such matters as the burying of Davidian Peter Gent, disposing of their dead dogs, and retrieving Bible study materials from one of their cars. The negotiators sent in medical supplies for the wounded, made

multiple deliveries of milk and food for the children, and provided the Davidians communications from family members outside the complex, as well as legal documents that Davidians had requested. Moreover, the negotiators took the unprecedented step of permitting criminal defense lawyers to enter the complex on several occasions to meet with Koresh and Schneider, even though the crime scene was unsecured.

39. The negotiators had some early success. Between February 28 and March 23, Koresh allowed 35 people to exit the complex. But Koresh also made repeated, well-chronicled and unfulfilled promises to exit the complex with the remaining Davidians, allowing only two people to exit after March 23. As early as March 3, a key behavioral psychologist, Dr. Park Dietz, advised the negotiators that Koresh would not leave the complex and would not allow anyone about whom he truly cared to leave, including his numerous biological children. FBI negotiators also obtained conflicting opinions on the likelihood of a mass suicide by the Davidians. The negotiators considered the possibility of a mass suicide either within the complex or as part of an assault against the FBI by exiting Davidians. On March 27, Schneider told negotiators that the FBI should set the building on fire. Eventually, after meetings with his attorney, Koresh promised that he would exit the complex after he had written an interpretation of the Seven Seals referenced in the Book of Revelation. The negotiators concluded that this was another empty promise because Koresh failed to turn over an interpretation of any of the Seven Seals.

40. The tactical group, led by the HRT, ensured the security of the perimeter of the complex and executed tactics designed to force the Davidians out of the complex. As the standoff wore on,

tactical actions— in which some negotiators concurred but others clearly did not— included cutting off the electricity, the unpredictable movement of vehicles, the use of flashbangs (loud, bright but non-lethal diversionary devices) to force Davidians venturing outside the complex without the intent to surrender to go back inside, and the use of disturbing sounds around the complex. The FBI logs and interviews indicate that the FBI utilized as few as seven and as many as 10 flashbangs near the complex during the standoff. Some negotiators believed that the activities of the tactical operators interfered with their efforts to get the Davidians to surrender peacefully. All tactical decisions were, however, approved by Special Agents in Charge, who received input from both the tactical group and the negotiators.

G. The FBI Develops a Tactical Solution to the Standoff.

41. As the release of Davidians slowed, and the prospects for the peaceful exit of the Davidians dimmed, the FBI stepped up efforts to develop a tactical resolution to the standoff. The FBI had developed the initial template for a tactical resolution at a time when the prospect for the voluntary surrender of Koresh was still high. The development of such plans during hostage situations was standard operating procedure for the FBI, and did not indicate an intent by the FBI to engage in a tactical resolution in the early stages of the standoff. The FBI would normally effectuate such a plan only in emergency situations such as suicide or murder within the complex.

42. In early March, HRT began the development of a tear gas insertion plan that the FBI could use to resolve the standoff even in a non-emergency situation. The “Proposed Operations Plan” dated March 10, 1993, provided that (a) CEV’s would clear all obstacles from the white and

red sides; (b) CEV's would approach the front of the complex; (c) the FBI would demand the surrender of the Davidians; and (d) if necessary, personnel inside the Bradleys would shoot projectible flashbangs wherever needed and deliver CS gas into the complex. CEV's would create escape routes by punching holes into the building structure. In contrast to the final plan, which required the gradual insertion of tear gas, this plan called for the FBI to insert as much tear gas as necessary to secure the exit of the Davidians.

43. On March 14, after discussions within the FBI on the contents of the March 10 draft plan, the HRT issued a "Proposed Operations Plan - Revision #2." The plan provided that CEV's would insert tear gas through canisters on booms on the vehicles, and made the first mention of the possible use of "ferret rounds"—non-pyrotechnic tear gas rounds fired from M-79 grenade launchers. Neither this revised plan nor the preceding one made any reference to the use of military or pyrotechnic tear gas rounds.

44. On March 16, at FBI headquarters in Washington, D.C., FBI Deputy Assistant Director Coulson sent an e-mail message to FBI Assistant Director Larry Potts addressing the tear gas insertion plan that the FBI leadership at Waco had developed and refined in the preceding days. The message discussed the possibility that the Davidians could engage in mass suicide or start a fire deliberately or by accident, but it concluded that personnel safety, among other factors precluded a firefighting response. The memorandum stated that the CEV's would make escape openings for the Davidians and then insert tear gas.

45. Despite concerns for the safety of firefighters, both Jamar and Sage contacted the Waco Fire Department, among others, to determine what fire response was possible. Waco Fire Chief Robert Mercer and Bellmead Fire Chief James Karl met with FBI agents several weeks prior to April 19 and were asked to prepare a plan to assist the FBI if needed. During this meeting, the fire chiefs used aerial maps to target water resources. Based on information provided by the departments, the FBI prepared a firefighting plan.

46. While the FBI negotiators tried to bring about a peaceful resolution to the standoff by providing telephonic suggestions to Koresh on how the Davidians could exit the complex and how the FBI would treat them thereafter, the negotiators began to lose hope that Koresh would ever leave voluntarily. An FBI memorandum dated March 22 prepared by the negotiation team indicated that the negotiators were willing to consider the tactical use of tear gas to end the standoff.

47. On March 23, following a request by HRT commander Rogers to implement the tear gas plan, Coulson wrote a memo critical of Rogers' request. He stated his opinion that HRT members at Waco were fatigued, noted the mistakes of the Ruby Ridge incident in which Rogers played a role, and advised Potts that both Potts and Kahoe should go to Waco to assess the situation for themselves.

48. On March 27, Jamar initialed "Proposed Operations Plan– Revision 3." This revised plan called for the removal of all obstacles, such as fences and vehicles, from the white side of the

complex the day before the tear gas insertion. The following day, the FBI would commence an all out insertion of tear gas into the complex. Two CEV's and four Bradleys would deliver tear gas into the complex without warning. The booms on the CEV's would penetrate the complex to deliver the tear gas and would also create exits for the Davidians. Attached to the plan were communications information and medical assignments, which involved the use of military personnel within the medical staging facility. The plan contained no reference to the use of flashbangs or pyrotechnic tear gas rounds.

49. Over the next several days, Coulson, Jamar and other FBI personnel debated the advisability of the tear gas insertion plan. Discussion centered around the concern that the Davidians might shoot at FBI agents immediately upon commencement of the operation. In Washington, D.C., Coulson expressed concern that the risk of Davidian gunfire was so high that the FBI should not implement the plan. At Waco, however, Jamar and others continued to advocate an all-out tear gas assault which differed substantially from the gradual insertion plan advocated by those in Washington.

50. On April 7-8, Clarke and Potts traveled to Waco in an effort to develop a consensus as to whether to recommend a tactical resolution to the standoff and, if so, what solution to recommend. After a series of meetings with Jamar, Rogers and others, they decided that a tactical resolution was appropriate and agreed on a plan that they would present for the review of Attorney General Reno on April 12.

51. On April 12, the FBI submitted to Attorney General Reno a “Briefing Book” which contained a revised operations plan as well as background information on the standoff and information from behavioral psychologists indicating that it was unlikely that Koresh would voluntarily surrender. Under this plan, from the outset the FBI would tell the Davidians (by telephone or loudspeaker) that it was inserting tear gas to force the Davidians out, that the FBI was not assaulting the complex, that the Davidians should not use their weapons, and that they must stay out of the tower area. Two CEV’s would deliver tear gas into the complex in a gradual, but systematic fashion. If the CEV’s took gunfire, the FBI would immediately accelerate the plan to an all out insertion of tear gas by using HRT personnel in Bradleys to shoot Ferret rounds into the complex. The CEV’s would continue to insert tear gas with canisters mounted to their booms. The plan provided that the tear gassing would continue for 48 hours or until all Davidians had exited the complex. The FBI’s standard deadly force policy, which allowed FBI agents to use deadly force only “in self-defense, the defense of another, or when they have reason to believe they or another are in danger of death or grievous bodily harm” would apply. If the Davidians had not exited after 48 hours, the FBI would use a CEV with a modified blade to peel back the walls and dismantle the complex.

H. The FBI Obtains Final Approval from Attorney General Reno to Implement the Tactical Plan.

52. On April 12, officials from the FBI met with officials from the Department of Justice to present the proposed tear gas insertion plan. Attorney General Reno participated in a second meeting at the FBI SIOC later in the day. Interviews regarding this meeting, along with contemporaneous notes, indicate that the FBI described the plan in detail. FBI officials presented

the plan as controlled and gradual, possibly lasting up to 48 hours. Attorney General Reno asked why the FBI had to act at that particular time. In response, the FBI emphasized that the Davidians were not coming out and the FBI had to increase the pressure on them. Participants at the meeting also discussed cutting off the water supply to the complex, but concluded that this tactic was not feasible. Attorney General Reno raised additional questions about the availability of gas masks, the effects of tear gas on Davidians, particularly on the children, and the availability of medical facilities. The FBI told her that there were probably no tear gas masks available for children, but that the tear gas would not cause them permanent harm. They discussed a plan to establish three detoxification units to help people who exited the complex, and told Attorney General Reno that pediatricians would be present during the tear gas operation. Other issues raised at the meeting included whether the plating on the tanks was sufficient to protect HRT personnel from .50 caliber weapons, what to do if the Davidians emerged from the complex shooting, what to do if they did not exit at all, and whether the plan should be delayed if Koresh's attorney requested more time. The meeting concluded without any resolution or decision by Attorney General Reno. During the next several days, Attorney General Reno and her staff sought additional information from numerous sources to supplement the responses provided to her by the FBI.

53. In accordance with the instructions of President Clinton that he be notified of changes in the FBI's strategy at Waco, Hubbell met with White House officials on April 13 to notify them of the proposed tear gassing plan. He informed White House officials that Attorney General Reno had not decided whether to implement the plan. White House Counsel Bernard Nussbaum briefed the President on the situation.

54. FBI Director Sessions convened a meeting on April 14 during which military experts addressed Attorney General Reno's questions and concerns regarding the tear gas plan. The FBI requested the presence of Gen. Schoomaker, a Special Forces colonel, and a toxicology expert employed by the Department of Defense. After Gen. Schoomaker's superiors approved the assignment, he drove to Waco where HRT commander Rogers gave him an aerial tour of the complex. They then landed at the forward TOC, and Rogers showed Gen. Schoomaker the communications center and the medical facilities. The two then flew to Ft. Bragg, picked up the Special Forces colonel, and continued to Washington, D.C. On the way to Washington, Rogers asked Gen. Schoomaker to review and comment on the tear gas insertion plan and Gen. Schoomaker told him that he could not do that.

55. During the April 14 meeting with Attorney General Reno and her staff, the toxicologist reported on the effects of CS gas, concluding that it posed no risk of permanent harm to the inhabitants of the complex. The discussion at this meeting is reflected in interview notes and in a memorandum prepared by the Special Forces colonel after the meeting. Attorney General Reno asked repeatedly about the dangers that tear gas posed to the children in the complex. The toxicology expert reassured her that the long-term danger to the children was minimal. The military personnel present noted, however, that the effects of CS gas were unpredictable, that the natural impulse would be to exit the building, but that people could behave irrationally when exposed to tear gas. When asked to comment on specific, tactical aspects of the plan, Gen. Schoomaker responded, "[W]e can't grade your paper." The military representatives did, however, note that a military operation would be quite different in that a military assault would be rapid,

violent, and would focus on killing the leaders. They further indicated that the military would insert the tear gas all at once.

56. The military experts also raised the possibility of a fire, noting that the British SAS had burned down a building during a tear gas operation in London. The FBI assured Attorney General Reno that the means of delivery of the tear gas would be non-pyrotechnic.⁹³ According to Attorney General Reno, either at this meeting or later in the week, she gave an express directive that no pyrotechnic tear gas was to be fired “at the compound”—a phrase that was never clearly defined to include such areas as the concrete construction pit, the pool, and the underground bus located outside the main structure of the complex, but which Attorney General Reno meant to cover all of these areas.

57. Finally, the participants at the April 14 meeting discussed the issue of timing. Attorney General Reno asked again, “Why now?” The FBI told her that (a) there was no reason to believe that Koresh would come out voluntarily, (b) the health and safety of the children was in jeopardy, and (c) the effect of a prolonged standoff on the HRT was an issue. The Special Forces colonel also suggested that the HRT may need to stand down for retraining. Rogers opposed this suggestion. He told Attorney General Reno that the HRT had breaks during the siege, and was not fatigued or in need of retraining. He agreed, however, that if the siege continued for several more

⁹³Some people at the meeting do not remember hearing the word “pyrotechnic” but it was clear that the means of delivery to be used would not start a fire.

weeks, it might be necessary to pull the HRT back for retraining. At the end of the meeting, Attorney General Reno still had not decided whether to approve the plan.

58. Following further discussions among her staff, Attorney General Reno called Assistant United States Attorney Ray Jahn to inquire about conversations picked up by the Title III intercepts which indicated that the water supply at the complex might be running low. FBI agents again assessed the water supply issue, and concluded that the Davidians had plenty of water and had enough food to last a year. Attorney General Reno also directed Hubbell to contact negotiator Sage directly to obtain his assessment of the likelihood of a negotiated resolution. On April 15, Sage advised Hubbell that negotiations were at an impasse, and that a negotiated solution was unlikely in the short term. Sage told Hubbell that the only people who had left the complex were people whom Koresh wanted to leave.

59. On Friday, April 16, Attorney General Reno advised Hubbell that she had decided not to approve the plan at that time. This decision set off a series of meetings among Department of Justice and FBI personnel. Ultimately, Director Sessions appealed directly to Attorney General Reno, and requested that she reconsider her decision. After further considering the issue, Attorney General Reno changed her mind. She indicated that she was inclined to approve the plan, but wanted to see an even more detailed discussion of the plan and substantial supporting documentation setting out the conditions inside the complex, the status of negotiations, and the reasoning behind the plan. According to Attorney General Reno, she ultimately changed her mind because she was convinced that the Davidians would not come out voluntarily. She felt that the

FBI would eventually have to go forward with some plan, and that it was better to proceed when the FBI was ready and best able to control the situation.

60. Senior Department of Justice and FBI officials worked together to prepare the documentation requested by Attorney General Reno. The materials that they prepared included the written opinion of behavioral psychologist Dr. Park Dietz that negotiations were not likely to resolve the crisis and that Koresh would probably continue to abuse the children. FBI and Department of Justice officials met again on April 17 to review the plan, the supporting documentation, and the rules of engagement. Attorney General Reno approved the plan at approximately 7:00 p.m. Waco time (8:00 p.m. Washington time), and Jamar notified Rogers that the plan had been approved at 7:17 p.m. Attorney General Reno informed President Clinton of her decision to approve the plan on Sunday, April 18.

I. Activities Inside the Complex During the Days Preceding the Execution of the Tactical Plan.

61. As mentioned above, during the final days before the execution of the plan, Koresh told negotiators that he was writing an interpretation of the Seven Seals. Koresh sent a letter out on April 14 indicating that he would surrender when he finished writing his interpretation of the Seven Seals. Even as Koresh claimed he had finished interpreting the First Seal, Schneider acknowledged to FBI negotiators that he had not seen any work product. FBI behavioral scientists concluded that Koresh's letter constituted another empty promise and, accordingly, Attorney General Reno did not put credence in the letter. Koresh would not give any credible or consistent

timetable for surrendering, leading to a consensus among FBI officials that he had no intention of exiting the complex.

62. On April 16, the Davidians displayed a sign outside a window on the east or red side of the complex that said, “The flames await Isaiah 13.” On April 17, Title III intercepts captured a conversation (unintelligible at the time) among Davidians concerning their plan to prevent fire trucks from reaching the complex: “You’re definitely right . . . I think all the time he knows it . . . nobody comes in here;” “. . . bring the fire trucks and they couldn’t even get near us;” “Exactly.” As the FBI cleared the area in front of the complex of cars and other obstructions on April 18, the Title III intercepts picked up a conversation between Davidians in which Schneider said, “[Y]ou always wanted to be a charcoal briquette.”⁹⁴ The other responded, “I know that there’s nothing like a good fire”

J. The FBI Initiates the Tactical Plan on April 19.

63. The events of April 19 are well-chronicled in numerous logs, timelines, audio, and video transmissions prepared contemporaneously, as well as numerous reports prepared after the fact. Throughout the standoff, including April 19, the agents kept a typed log of their observations of the activities at the command center in the rear TOC and a handwritten log at the forward TOC. The FBI negotiators kept logs, and the FBI leadership in Washington, D.C., kept a SIOC log. The following events are relevant to the Attorney General’s Order to the Special Counsel.

⁹⁴See Footnote 11 at page 7.

64. Prior to April 19, the FBI had equipped each of two CEV's with tear gas canisters mounted on a boom extending from each CEV. CEV-1 had four refillable canisters of tear gas. CEV-2 had two refillable canisters of tear gas mounted so that its boom could reach the second floor of the complex. In addition, a CEV was equipped with a rail which could be used to remove the siding from a building. The FBI also equipped HRT agents in four Bradleys with M-79 grenade launchers to shoot non-pyrotechnic Ferret tear gas rounds. HRT Supervisory Special Agent McGavin commanded a tank retriever, designated the Staff Command Vehicle. McGavin and his team established a rally point for exiting Davidians southeast of the complex, and raised a large flag containing a red cross at that location. Two additional Bradleys occupied blocking positions, and two others were on standby to be used for medical evacuation. HRT commander Rogers occupied an Abrams tank.

65. The operations plan called for the use of Ferret tear gas cartridges, plastic projectiles that would burst on impact, dispersing their liquid tear gas load. The Charlie Team also had a supply of military M651 tear gas rounds, which utilized a burning process to disperse the tear gas. The operators' manual accompanying the military tear gas round describes its contents as a pyrotechnic gas mixture. Upon impact, this mixture ignites and burns at a temperature of approximately 500 to 700 degrees Fahrenheit. An M651 fired into a fuel rich environment, such as the Branch Davidian living quarters, had the capacity to ignite a fire. Because of the nature of the M651, the FBI had no plans to utilize them in the gas plan.

66. The Sniper Teams remained at Sierra-1 and Sierra-2 where they were joined by machine gunners from the HRT Golf and Echo teams. A medical evacuation Bradley moved to Sierra-2 shortly after the commencement of the operation. Three FBI snipers occupied Sierra-3. The seven SWAT teams provided perimeter security and medical response security. According to the medical annex to the FBI's operational plan, the plan was "designed to provide the best care possible for mass casualties which could potentially result from an explosion or other catastrophic event" at the Branch Davidian complex. Attorney General Reno had requested that medical support be available for every man, woman and child in the complex. In short, the plan called for a "transfer point" near the "T" intersection where casualties were to be evaluated and initially treated before being transferred to a "medical staging area" located at the entrance of the Forward TOC area located near the "Y" intersection. From there, the plan called for helicopters to be available to rush critical patients to one of a number of civilian medical facilities. The FBI effectuated this plan on April 19.

67. The CEV's approached the complex at 6:00 a.m. Sage telephoned into the complex, eventually reaching Schneider, and telling him that a tactical operation was about to begin, but that it was not an assault. At that point, Sage made an announcement through a public address system (an announcement that he repeated many times during the morning), stating that the FBI had begun to insert tear gas, that the FBI was not assaulting the complex, and that the Davidians should exit the complex and walk toward the flag with the red cross.

68. In accordance with the operations plan, CEV-1 punched its boom into the complex and discharged the first canister of tear gas into the first floor at a location designed to prevent the Davidians from moving to the underground bus at the green side of the complex. CEV-1 then continued its tear gassing operation systematically as outlined in the plan.

69. As the first tear gas insertion occurred, at 6:05 a.m., HRT Sniper Lon Horiuchi stationed at Sierra-1, saw what he believed to be green tracer rounds emanating from the complex toward the CEV. He radioed to the FBI commanders the word “compromise,” meaning that the FBI was taking fire from the Davidians. Numerous FBI agents and other witnesses saw or heard gunfire coming from the complex, and some of these observations are recorded in the various FBI logs referenced above. Davidian gunfire continued sporadically throughout the morning. No logs or radio transmissions indicate that the FBI returned fire. At 6:17 a.m., the on-scene FBI leadership questioned the agents at various positions around the complex to learn whether they were returning fire. They all responded that they were not.

70. CEV-1 continued its insertion of tear gas, moving to the black side of the complex and eventually returning to a resupply area to refill its canisters. CEV-2 covered the red side, inserting tear gas until it too needed to refill its canisters. As a result of the calling of “compromise,” the Bradleys began firing non-pyrotechnic Ferret rounds into the main living quarters of the complex almost immediately after the operation began. The first targets were the tower and windows from which Davidians were firing at the CEV’s. Then the Bradleys began a more systematic process of attempting to fire Ferret rounds into all the windows at the complex.

71. By 6:27 a.m., the FBI had concluded the first round of the tear gassing operation, and Rogers announced that the FBI had tear gassed all windows in the complex. Due to the combination of high winds, the failure of some Ferret rounds to penetrate into the complex and/or discharge their tear gas, and the use of gas masks by some Davidians, the tear gas appeared to have little effect upon the inhabitants. No one exited. A Title III intercept recorded Davidians speaking without difficulty, indicating that they had suffered no seriously ill effects from the tear gassing operations at that time.

72. At 6:29 a.m., the FBI discovered that the CEV had accidentally cut telephone lines into the complex. At 6:41 a.m., the Davidians threw the phone outside the complex, probably because it had been disconnected when a CEV ran over the line. At 6:45 a.m., at the request of Rogers, Sage announced to the Davidians that, if they did not exit within two minutes, the FBI would resume tear gassing operations. When no one exited, Jamar and Rogers ordered a second round of tear gassing with Ferret rounds to begin. The FBI soon ran low on Ferret rounds and made efforts to locate additional rounds. The tear gassing continued throughout the morning, with planned breaks, and with repeated announcements by Sage that the Davidians should exit the complex. The FBI fired a total of 389 Ferret rounds into the complex during the entire April 19 operation; in addition, the FBI delivered 20 canisters of tear gas during the entire operation.

K. The FBI Fires Three Pyrotechnic Tear Gas Rounds at the Concrete Construction Pit on the Green Side of the Complex.

73. Early in the morning, the Charlie Team Bradley unsuccessfully attempted to deliver Ferret rounds into the concrete construction pit on the green side of the complex. The Charlie Team made the attempt to prevent Davidians from hiding in the concrete construction pit which was connected to the main structure by a buried bus and an underground tunnel. At approximately 7:45 a.m., the Charlie Team Leader requested permission from McGavin to fire military tear gas rounds– which had better penetration capability– toward the concrete construction pit on the green side of the complex. Unlike a Ferret round, a military tear gas round delivers the tear gas through pyrotechnic means.

74. At 7:48:52 a.m., McGavin radioed Rogers and told him that he thought that the FBI could penetrate the concrete construction pit with a military tear gas round. Rogers gave permission to McGavin to fire military tear gas rounds although he suggested that they may not work due to water in the structure. Rogers has subsequently claimed that he believed that firing pyrotechnic tear gas at the concrete construction pit did not violate the instructions of Attorney General Reno because the concrete construction pit was not part of the flammable wooden living structure of the complex. The Bradley moved into position, and the driver dropped the back door. Special Agent Corderman used the back door of the vehicle as a platform from which to fire the military tear gas rounds. He fired three rounds at approximately 8:08 a.m. but immediately saw that they had bounced off the roof of the concrete construction pit. Two of the projectiles landed in a trench on the right rear portion outside of the construction pit near the tunnel entrance and at least one of the rounds dispersed its gas, which created a tear gas cloud. This dispersal of gas was

recorded on videotape by news media on the scene and is visible in at least one aerial photograph taken during the day. The third projectile bounced off the roof of the construction pit and landed approximately 200 yards northwest of the water tower. The tear gas from this projectile drifted into Sierra-2 where HRT agents were located. All three rounds came to rest in no position capable of starting a fire in the complex. The firing of the military tear gas rounds was not recorded on any log on April 19. However, the radio transmission at 7:48:52 a.m. was recorded by the Nightstalker aircraft as follows:

HRT-2: HR-2 to HR-1

HRT-1: Go ahead, this is HR-1

HRT-2: Currently re-supplying Charlie-1 . . . there's relative safety er
utilizing the vehicle for cover and attempt to get . . . penetrate
the er construction project

HRT-1: You're talking about the black over top of the construction

HRT-2: Say again er HR-1

HRT-1: Are you saying he can penetrate the black covering over the
construction on the green side

HRT-2: 10-4 . . . He thinks we can get into position and relative
safety utilizing the track for cover and attempt to penetrate it
with er military rounds

HRT-1: Roger. Of course, if there is, er, water underneath, it's just
going to extinguish them, but you can try it

HRT-2: Yes 10-4 copy you can try it

HRT-1: Yeah, that's affirmative.

The FBI did not fire any other military tear gas rounds at Waco on April 19.

75. The three spent M118 shells from the firing of the three M651 projectiles were manually removed from the M79 grenade launcher used by Agent Corderman. The casings were presumably discarded on the floor of the Charlie Team's Bradley during the reloading of the grenade launcher. The grenade launcher could be used to fire both the pyrotechnic military rounds as well as the Ferret rounds. At some point on April 19, Charlie Team members cleaned out their Bradley in an area off the green side of the pit that became Sector E of the crime scene. The members discarded at least some of the shells from the Ferret and military rounds that accumulated on the floor of the vehicle during the tear gas operation.

L. The FBI Breaches the Complex.

76. At 9:01 a.m., Rogers radioed that he did not want the vehicles to insert tear gas into the front door of the complex because he wanted to create an escape route for the Davidians. At 9:12 a.m., a CEV pushed in the front door that the Davidians had blocked with a piano, after which, at 9:19 a.m., both Rogers and McGavin stated by radio to the vehicle drivers that the HRT should not insert tear gas into the front door so that the Davidians could avail themselves of the newly created exit route.

77. Between 9:30 a.m. and 10:00 a.m., Rogers, Jamar, and McGavin (and for some of the time Swenson) met at the "Y" intersection outside the complex to discuss the ineffectiveness of the

tear gas inserted thus far. They agreed that they would penetrate deeper into the complex in order to increase the effectiveness of their operation. While the plan only allowed for the systematic dismantling of the complex after the passage of 48 hours, the FBI on-scene leaders determined that they would need to penetrate the building to effectuate their tear gas delivery. Jamar and Rogers believed the occupants of the complex had taken shelter near the concrete bunker beneath the tower. Since the Bradley M-79 tear gas gunners could not otherwise reach this area, Rogers decided to order the breach of the building from the front and rear with the CEV's in order to deliver tear gas to this area.

78. After refilling the tear gas canisters the second time, CEV-2 lost its tread and its crew then occupied CEV-3, which was not equipped to deliver tear gas. CEV-3 drove to meet Rogers, who was in the Abrams tank, at which time Rogers instructed the crew to go to the black side of the complex and use the boom and blade to create a path to the tower. Rogers and the crew of CEV-3 have stated that the purpose of this operation was to create a driveway to the main tower so that CEV-1 could insert tear gas close to the tower.

79. The FBI Nightstalker surveillance aircraft captured the CEV penetration activity on its Forward Looking Infrared ("FLIR") thermal imaging system which had provided the audio recording of the radio transmissions concerning the authorization for the use of military tear gas rounds and the opening of an escape route through the front door. It also provided video of the front door being pushed in by the CEV. The video from the early morning FLIR was obscured by considerable cloud cover. By the time the operation to deliver tear gas to the tower began, the

cloud cover had lifted and the images were relatively clear. At 10:41 a.m., the beginning of the second shift, the operator failed to engage the audio, although the video remained operational.

80. At 11:18 a.m., CEV-3 made contact with the wall on the black side of the gymnasium. Its mission was to clear a path through the gymnasium (which the Davidians used as a storage area) to the tower, so that CEV-1 could then deliver tear gas. At 11:20 a.m., CEV-3 pushed through the wall of the gym, and then exited. At 11:21 a.m., the CEV entered again. The entries were slow and problematic because the driver feared a drop off or ledge, and encountered a large number of stored items that created obstacles. He also stated that he feared that Davidian snipers might be located in the catwalk at the top of the gymnasium. On the eighth entry, the CEV went completely inside the gym so that the front of the CEV (or the debris it was pushing) protruded from the front of the gym. At 11:27 a.m., the CEV clipped a beam, causing the gym roof to collapse.

81. The effort to reach the tower continued for over a half an hour longer, and included penetrations into the white side of the complex by CEV-1 as well, with portions of the structure continuing to collapse throughout the process. At about 11:30 a.m., the driver of CEV-1 penetrated the building on the white side perpendicular to the tower or concrete bunker area. Over the next twenty minutes, CEV-1 entered and backed out of the building three times. As the vehicle backed from the building, the operator used the blade to drag debris from the area. Again, the penetrations of the building were slow and methodical as the driver feared there may be a basement or drop off beneath the structure and the vehicle would become stranded. During this operation, the CEV-1 operator had swivelled the boom to the rear and, at 11:49 a.m., after repositioning the

boom, CEV-1 entered the structure once again to insert tear gas into the tower area. After inserting the tear gas, and on the command of Rogers, CEV-1 again penetrated this area and inserted a second canister of tear gas. At about 11:57 a.m., Jamar ordered the CEV to clear this area to allow the occupants to exit quickly and safely. CEV-1 then made several additional entries into the front door area. At 12:05 p.m., Rogers ordered the CEV to deliver tear gas to the white/red corner, and the CEV departed the area of the front door. Throughout this operation, the FBI FLIR tapes showed rapid “flashes” on and around the complex and the vehicles. These flashes were solar reflections off of certain types of debris, including glass, that was strewn around the complex.

M. The Davidians Prepare to Start the Fire.

82. During the early part of the execution of the FBI’s tear gas insertion plan, the Title III intercepts recorded Davidians making references to getting gas masks; and they recorded the sounds of people loading guns, and moving to different parts of the complex. The Davidians commented on the “good” wind dispersing the tear gas, and opened windows to ventilate the complex further. The Title III intercepts also recorded sounds consistent with gunfire emanating from within the complex to positions outside the complex.

83. As early as 6:05 a.m., the Title III intercepts picked up conversation indicating that the Davidians were pouring fuel and preparing to light the complex on fire. The Title III monitors at the rear TOC were unable to understand these conversations, which remained largely unintelligible until they were professionally enhanced after the standoff. Because these conversations bear directly on the issue of who started the fire, some of them are included below. They indicate that

the Davidians began pouring fuel early in the morning on April 19, and that they prepared to start a fire at several different times during the tear gassing operation.

84. At 6:09 a.m., the intercepts recorded the following conversation among a group of Davidians:

Unidentified Male: Have you poured it yet?

Unidentified Male: Hm.

Unidentified Male: Did you pour it yet?

Unidentified Male: In the hallway . . . yes.

Unidentified Male: David said pour it right?

Unidentified Male: D'you need . . .

Unidentified Male: Come on let's go.

Unidentified Male: David said we have to get the fuel on.

Unidentified Male: Does he want it poured already?

Unidentified Male: We want the fuel.

Unidentified Male: Yeah.

Unidentified Male: We want some here.

85. At 6:15 a.m., the intercepts recorded this conversation:

Unidentified Male: Have you got the fuel . . . the fuel ready?

Unidentified Male: I already poured it.

Unidentified Male: It's already poured.

86. At 6:22 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: Nobody comes in huh?

Unidentified Male: Nobody's supposed to come in.

Unidentified Male: Right.

Unidentified Male: They got some fuel around here.

Unidentified Male: Yeah . . . We've been pouring it.

Unidentified Male: Pouring it already.

Unidentified Male: We've got it poured already.

87. At 7:08 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: That's good . . .

Unidentified Male: Real quickly you can order the fire yes.

Unidentified Male: Yeah.

88. At 7:20 a.m., the intercepts recorded the following conversation among the

Davidians:

Unidentified Male: You've got to put the fuel in there too.

Unidentified Male: Is it dry?

Unidentified Male: Hey let's put loads of fuel in here.

Unidentified Male: Fuel.

89. At 7:21 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: Is there a way to spread fuel here?

Unidentified Male: OK . . . what we do You don't know.

Unidentified Male: I know that won't spread . . . get some more.

Unidentified Male: So we only light it first when they come in with the
tank right . . . right as they're coming in?

Unidentified Male: Right.

Unidentified Male: That's secure We should get more hay in here.

Unidentified Male: I know.

90. At 7:23 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: You have to spread it so get started OK?

Unidentified Male: Yeah . . . got some cans there.

Unidentified Male: Right here . . . two cans here . . . and that's . . . and the rest can
take em . . .

91. At 11:27 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: There isn't any reason to go out there.

Unidentified Male: No.

[Vehicle noise]

Unidentified Male: Do you think I could light this soon?

Unidentified Male: They're gonna go right through the middle here . . .

Unidentified Male: Whoa . . . whoa.

92. At 11:42 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: We're near the point where we oughta be . . .

Unidentified Male: We've no . . . we're not to blame for that We're not to
blame.

Unidentified Male: Looks to me that you gotta . . .

Unidentified Male: You'll have to deal with that.

Unidentified Male: Go and get the kids.

Unidentified Male: They'll go for the barn.

Unidentified Male: I want a fire on the front . . . you two can go . . .

93. Then, at 11:54 a.m., an unidentified male stated: "Keep that fire going . . . keep it."

This was the last statement intercepted before the listening device ceased operating.

94. At approximately 12:06 p.m., an FBI agent observed a white male wearing a gas mask just inside of the front door area of the complex. The individual had a long rifle in his right hand and was walking from east to west holding something in his left hand. An overturned piano obstructed the FBI agent's view of the individual's hands and body, but the agent later concluded that the individual's movements were consistent with those of a person spreading fuel within the

complex. Also, the FBI agent observed the unidentified individual ignite a fire in the front door area of the complex. The agent reported his observation contemporaneously.

95. An FBI agent, who had a clear view into the chapel area, observed two individuals making movements which were consistent with the spreading of fuel. The FBI agent was located at a sniper/observer position approximately 180 yards from the southeast corner of the complex. The FBI agent was using binoculars and a spotting scope at the time of his observation. Seconds before smoke became visible on the second floor of the southeast tower, a SWAT agent observed a white male repeatedly bending over in the second floor room of the southeast tower where the fire ignited. The agent was located at a position on a hill approximately 900 meters from the east side of the complex, and was using field glasses at the time he made his observation. From within the complex, Davidian Graeme Craddock observed an unidentified individual pouring Coleman fuel in the chapel area of the complex. Craddock also overheard Pablo Cohen tell the unidentified person to pour the fuel outside rather than inside. A few minutes later, Craddock heard Mark Wendell say "light the fire," and, in response, Cohen stated "wait, wait, find out." At that time, Cohen and Wendell then had a conversation which Craddock could not overhear.

N. Fire Starts at the Complex and Nine Davidians Exit.

96. At 12:06 p.m., CEV-1 moved from the southeast corner of the complex toward the road. Moments later, at 12:07 p.m., the FLIR tape shows a visible fire signature in a second floor room at the southeast corner of the complex. The FLIR tape shows a second visible fire signature

in the dining room area at 12:08 p.m. The FLIR video shows a third visible fire signature in the stage area at the rear of the chapel.

97. As the fire began to spread, FBI agents heard gunfire within the complex. They stated that some of the rounds sounded “cooked off” by the heat, but that others were rhythmic in nature, leading some of the agents to conclude at the time that the Davidians were committing mass suicide.

98. Shortly after the fire began in the southeast corner of the complex, Davidians David Thibodeau, Derek Lovelock, Jamie Castillo, and Clive Doyle exited the chapel. Doyle had injuries on both sides of his hands consistent with liquid fuel burns. Graeme Craddock exited the chapel area through a window, entered the rear courtyard, and concealed himself in a concrete structure at the base of the water tower. He was not arrested until 3:30 p.m. At approximately 12:10 p.m., Davidian Renos Avraam exited to the roof. HRT agents attempted to help him to safety, although he resisted. Similarly, Davidian Ruth Riddle jumped from the white side roof but then reentered the complex. Special Agent James McGee exited his secure position in a Bradley, ran into the flaming building, and rescued Riddle against her will. Once Riddle was safely outside of the complex, McGee questioned her regarding the location of the children within the complex, but Riddle refused to answer. Marjorie Thomas and Misty Ferguson, who fell or jumped from the second floor on the white side of the complex, were badly burned. According to one of the Secret Service paramedics who treated her, Marjorie Thomas was in respiratory arrest and would have died had she not received the immediate medical care provided to her. During the course of the

fire, a total of nine Davidians exited the complex. These Davidians were initially treated in the fortified medical position near the “T” intersection and then, transported to the rear medical area field hospital. The severely burned victims were flown by MedEvac helicopter to Parkland Hospital in Dallas, Texas.

99. The FBI combined log reports the first observation of fire at 12:10 p.m. At 12:13 p.m., fire department assistance was requested. Within 18 minutes of the first observation of fire, the entire complex was engulfed in flames. Jamar permitted firefighting vehicles to approach the complex at 12:34 p.m. He has stated that he waited until then because of fear for the safety of the unarmed firefighters. Rounds continued to cook off inside the complex after the firefighting trucks were on the complex premises putting out the fire.

100. At 1:00 p.m., several HRT agents entered the concrete construction pit, waded through waist high water contaminated with sewage and rats, and reached the underground bus to search for survivors. Several FBI searchers, including HRT commander Rogers, entered the concrete construction pit with the hope that the children were hiding in the underground bus. They found none. They also could not open the trap door leading from the underground bus to the living quarters because it was covered with debris.

O. The FBI and the Texas Rangers Investigate the Crime Scene.

101. At approximately 4:00 p.m. on April 19, the FBI permitted the Texas Rangers to begin their efforts to secure the scene and gather evidence. The Rangers maintained security

around the remains of the complex. Captain David Byrnes was in charge of securing the scene pending the implementation of a search protocol. Although the Rangers had principal responsibility for organizing the search for evidence, numerous federal and state agencies and their components participated in gathering and analyzing evidence from this enormous crime scene. They included representatives from the FBI Laboratory, the Tarrant County Medical Examiner's Office, the Houston Fire Department's Arson Division, the United States Attorney's Office for the Western District of Texas, the Texas Department of Public Safety Crime Laboratory, the Texas Highway Patrol, ATF, and the Smithsonian Institution.

102. FBI agents from the FBI National Laboratory arrived at the crime scene in the evening of April 19. The FBI's firearms and tool marks section assumed the commanding roles for the FBI Lab on the scene. A member of the FBI's explosives ordnance section acted as the FBI's on-scene explosives expert. Although the Rangers were technically in control of the scene, many of these FBI agents had unfettered movement within the area throughout the crime scene investigation.

103. Items discovered by the crime scene team were to be treated in one of three possible ways. First, crime scene personnel could decide that the items had no evidentiary value and either leave them on the scene or throw them in the dumpster. Second, they could pick up items of possible evidentiary value and later determine them to have no evidentiary value, in which case they would be discarded without further inquiry. Thus, at various times during the search of the crime scene, searchers picked up items and threw them into roll-outs or movable dumpsters located

on the scene. Third, they could put items in bags and take them to the recovery location for numbering and logging into the evidentiary database.

104. The use of three M651 rounds on the morning of April 19, 1993, by FBI HRT members generated six pieces of potential evidence relating to the incident— three spent shells and three spent projectiles. Of these six articles of evidence, only one casing (Ranger No. 160) was ever logged into evidence. There are no reports of anyone ever seeing the two remaining shells. However, as detailed below, FBI crime scene searchers encountered all three projectiles, but none of these items was logged into evidence.

105. On April 20, 1993, during an initial walkthrough of the scene intended to locate and disarm any explosive devices, Wallace Higgins, the FBI explosives expert, found two M651 projectiles in the trench next to the concrete construction pit. Believing that one of the rounds still contained tear gas, he asked for and received permission from his supervisor, James Cadigan, to shoot at one of the projectiles to ensure that it was spent. Higgins claims he then borrowed a pistol from a Texas Ranger and shot at the projectile. Although Higgins recalled that he may have picked up a projectile and looked at it after he shot at it, he did not retrieve any of the projectiles for evidence collection. Rather, he left the projectiles in the trench. Additionally, neither the FBI nor the Texas Rangers prepared a report of Higgins discharging a firearm on the crime scene.

106. On April 22, the crime scene search personnel met at Ft. Fisher Texas Ranger Museum to reach consensus on how to proceed with the evidence search. They decided to divide

the complex grounds into gridded sections so that people making use of the evidence in the future would know where each piece of evidence had been found. The grid contained 21 lettered sectors, from “A” to “W,” excluding the letters “Q” and “K.” Six teams, each lead by a Ranger, gathered and catalogued evidence. Photographers took pictures of key evidence before agents removed it. However, there were more sectors than photographers, so each photographer covered more than one sector. Although the outer most sectors were assigned letters A through F in a clockwise fashion, the designation of the inner sectors was done in a less organized manner, including some designations based on physical properties of the sector (for example, the pool sector was assigned letter P, the tower sector was assigned letter T, and the underground concrete construction pit sector was assigned letter U). This type of designation led to some confusion concerning the order of the searches and the boundaries of the sectors.

107. On April 23, 1993, during the search for evidence, Sergeant George Turner, a Texas Ranger, recovered an expended shell from a pyrotechnic tear gas round in Sector E, grid EC1. Sector E was located immediately adjacent to the left or green side of the concrete construction pit (Sector U). Sgt. Turner placed the M118 casing into a bag and logged it into the Rangers’ evidence list as item 160. Sgt. Turner recalled that he attempted to identify it by asking FBI Supervisory Special Agent Richard Crum if he knew what the item was. Crum indicated that he did not know what it was but would try to determine its origin. This shell (later designated by the FBI as Q1237) is one of two component parts of a 40 millimeter pyrotechnic tear gas round referred to as a military round or XM651E1. It is part of the evidence stored in Waco. The other two shells were never located.

108. Texas Department of Public Safety (“DPS”) lab employees recall that on or about April 28, 1993, they looked into (but did not formally search) the area of the trench beside the concrete construction pit. One technician said that she did not see the military tear gas projectiles that Higgins had previously seen there, and that she would not have missed them had they been there. The other technician said he went down into the trench and walked around, and that the projectiles were not there as of that date. Higgins also stated that he looked into the trench at the end of the crime scene search and did not see the projectiles.

109. The Rangers conducted a “line search” on April 30 involving 53 law enforcement officials who lined up fingertip to fingertip and searched the area outside the main structure of the complex. During this search, a member of the FBI special photographic unit and others found a third M651 military tear gas projectile approximately 200 yards northwest of the water tower. A Texas DPS photographer photographed the projectile, which had been flagged for recovery. The FBI agent summoned either Crum or Cadigan to the area to show him the projectile. This projectile was not inventoried as evidence, and extensive searches have never located the item. The photograph, however, is contained in the binders of photographs produced to the Branch Davidians’ criminal defense team.

110. On May 3, 1993, a search team led by Rangers Johnny Waldrip and Fred Cummings began to search Sector U. As it appears on the sector map, Sector U included the underground area of the concrete construction pit, the ground level area between the construction pit and the water tower and the ground level area to the rear of the construction pit. However, the search team

understood the sector to include only the underground area. The crime scene search report refers to the sector as an area underground and includes a drawing of the sector which excludes the ground level portion of the sector. Further, none of the crime scene searchers remembers searching the ground level portion of this sector. The ground level portion of Sector U was not subdivided by grids as were many of the other sectors. Finally, there are no articles of evidence contained in the evidence database reported as having been collected from this portion of Sector U. This limited search of Sector U did not yield the two projectiles that Higgins had previously seen adjacent to the concrete construction pit.

111. On May 6, 1993, the crime scene team concluded its search for evidence. The search had encompassed 77 acres and included the complex residence and the concrete construction pit. After an exhaustive 17 day search of this unprecedented crime scene involving over 200 law enforcement personnel, the team had recovered thousands of pieces of evidence weighing thousands of pounds. The searchers recovered the burned corpses of at least 82 bodies inside the complex. The Rangers recovered at least 300 rifles and shotguns, including two .50 caliber BGM rifles, 34 AR-15 assault rifles, 61 M-16 assault rifles, 61 AK-47 rifles, and 5 M-15 rifles. Additionally, the Rangers recovered 60 pistols and thousands of pounds of live and spent ammunition.

112. On May 12, the Rangers loaded the evidence into a truck and drove it to Washington, D.C., delivering the evidence to the FBI Crime Laboratory on May 15, 1993. On May 17, the chain of custody was formally transferred to FBI Special Agent Cadigan. The FBI examined only a

portion of the evidence and returned most of the items to the Rangers. The FBI did not examine the shell identified as Ranger item 160 which was delivered in May, and returned it to the Rangers as one of numerous “items of non-probative value.”

113. On April 19, 1993, at the direction of the Department of Justice, ATF had assembled an independent team of fire investigators. The team consisted of Assistant Chief Investigator Paul Gray, Houston Texas Fire Department; Senior Investigator William Cass, Los Angeles City California Fire Department; Investigator John Ricketts, San Francisco California Fire Department; and Deputy Fire Marshal Thomas W. Hitchings, Allegheny County Police Fire Marshal’s Office. Also, Drs. James Quintiere and Frederick Mower were retained in order to conduct a fire development analysis.

114. The fire investigation team conducted a nine-day on-site investigation beginning April 21, 1993. Prior to gaining access to the crime scene, the fire investigation team viewed news media video recordings of the fire and discussed the possibility that fires had ignited in three separate areas almost simultaneously. On April 23, 1993, the fire investigation team began the process of collecting potential evidence and identifying items to be sent to the laboratory for analysis. The fire investigation team used an accelerant detection dog to determine which items were to be sent for laboratory analysis. The accelerant detection dog alerted agents to debris in the southeast corner area, the dining room area, and the chapel area, and to a number of articles of Davidian clothing.

115. The fire investigation resulted in the recovery of numerous Coleman fuel cans (some of which were intentionally punctured), lanterns, and numerous articles of debris on which the laboratory detected the presence of flammable liquids. The laboratory was able to confirm the accelerant detection dog's alerts on debris in the chapel area and in the southeast corner area of the complex.

116. The fire team concluded that: the "fire was caused by the intentional act(s) of a person or persons inside the compound;" the "fires were set in three separate areas of the complex;" and "flammable liquids were used to accelerate the spread and intensity of the fire."

P. The Medical Examiners Determine the Cause of Death of the Davidians.

117. On April 19, 1993, the Tarrant County Medical Examiner's Office, led by Dr. Nizam Peerwani, the Chief Medical Examiner, prepared to conduct the autopsies of the Davidians. The Tarrant County Medical Examiner's Office first became involved with the events at Waco when Dr. Marc Krouse, the Deputy Chief Medical examiner, was called on February 28, 1993, and told to prepare for the autopsies of the four ATF agents killed during the initial gun battle. In early March 1993, Dr. Krouse and Dr. Peerwani performed these autopsies, and Dr. Peerwani conducted another autopsy on the body of Michael Schroeder, who had been killed in a gun battle with ATF agents late in the day on February 28.

118. On April 19, Dr. Peerwani activated his office's Mass Disaster Plan. Dr. Peerwani's office received the first body from the crime scene on April 19. On April 21, Dr. Peerwani and an odontologist from his office surveyed the crime scene. Between April 22 and April 29, Dr. Peerwani's recovery team, including a photographer, criminalist, pathologist, and an anthropologist, assisted in the recovery of bodies. They developed a procedure for flagging, photographing, and removing the human remains from the scene. Later Dr. Peerwani created a diagram showing the location where they found each of the bodies.

119. Over the next month, Dr. Peerwani and his staff conducted autopsies at the Tarrant County Medical Examiner's Office. Dr. Peerwani led a team of professionals including pathologists, anthropologists, FBI fingerprint examiners, and odontologists from various organizations. Until they could be examined, the bodies were kept appropriately cool to preserve any evidence suggesting their cause of death. After their examination, the bodies were kept in a freezer donated by the FBI to the Tarrant County Medical Examiner's Office.⁹⁵

120. The autopsy reports indicate that on April 19, at least 20 Davidians were shot including at least five children under 14. Of the 20, 12 were shot in the head, two others were shot in the head and chest, three more were shot in the chest only, two were shot in the back and one, Schneider, was shot in the mouth. In several additional instances, the pathologists could not

⁹⁵Sometime after the examination, the freezer malfunctioned.

confirm, but would not rule out death by gunfire, which indicates that more Davidians may have been shot. Additionally, one child was stabbed to death.⁹⁶

Q. The Department of Justice and Congress Investigate the Activities at Waco.

121. Immediately following the fire, FBI Special Agent in Charge and spokesman Robert Ricks announced at a press conference that the FBI had not used any pyrotechnic devices during the April 19 operation. Within days, Congress convened hearings, and on April 28, 1993, Attorney General Reno testified that she had been assured prior to the operation that the tear gas and its “means of use” were non-pyrotechnic. HRT commander Rogers sat behind her during this statement but did not inform her that the FBI had used pyrotechnic tear gas at the concrete construction pit. In addition, FBI Director Sessions testified that the FBI had chosen CS gas because the agents could deliver it without pyrotechnics. Rogers, also present during the testimony of Sessions, failed to correct any potential misimpression left by this statement.

122. Numerous investigations and inquiries followed, including a fire investigation and scientific fire analysis, congressional hearings in 1993 and 1995, a 1993 Department of Treasury Report about the ATF’s role in the Waco operation, and a 1999 GAO report on the use of the armed forces at Waco. Also, in 1993, the Department of Justice organized a series of inquiries into the Waco operation under the supervision of Deputy Attorney General Philip Heymann. This project was divided into four parts: (1) a factual review of the entire Department of Justice and FBI

⁹⁶See Appendix J for the Office of Special Counsel’s expert’s evaluation of the causes of the Branch Davidian deaths.

operation at Waco, (2) further review by a panel of experts who were asked to make recommendations based on the facts developed in the initial review, (3) a critical evaluation of the handling of the Branch Davidian standoff prepared by Edward S.G. Dennis, Jr., and (4) Deputy Attorney General Heymann's own report containing recommendations for changes to better handle similar situations in the future. None of these reports or investigations found evidence of criminal wrongdoing by the United States or its agents at Waco.

123. Attorney General Reno asked Richard Scruggs, an experienced federal prosecutor, to conduct the factual inquiry into the activities of the FBI and Department of Justice at Waco, including the April 19 operation. Scruggs was an acquaintance of Attorney General Reno's who came to Washington, D.C. from Miami at her request to assist her in her new role. Deputy Attorney General Heymann asked Assistant United States Attorney Steven Zipperstein and a Department of Justice Office of Professional Responsibility attorney, Robert Lyon, to work with Scruggs. The FBI's Inspections Division provided the investigative resources for the review. This effort was led by FBI Inspector Victor Gonzalez and Assistant Inspectors Herbert Cousins and Roderick Beverly. The FBI compiled memoranda of interviews and other documents. Scruggs and his team then drafted a summary of the beliefs of the Davidians and a narrative of the events occurring at Waco. Scruggs and his team did not conduct a formal investigation. They did not make efforts to determine or challenge the veracity of the statements of witnesses, nor did they test or challenge the FBI's widely publicized contention that it did not fire guns or use pyrotechnics during the standoff.

124. Scruggs and his team assumed from the outset that the Davidians, not the FBI, started the fire. While the Scruggs team did not specifically ask witnesses whether they used pyrotechnic devices at Waco, one FBI pilot told Scruggs' investigators that he had heard a radio conversation about the use of "some sort of military round" at the concrete construction pit. The other pilot in that same plane told Scruggs' investigators that he observed a tear gas cloud form over the concrete construction pit. The investigators apparently attributed no significance to these statements. Scruggs issued his report, entitled "Report to the Deputy Attorney General on the Events At Waco Texas February 28 to April 19, 1993," on October 8, 1993. In a section entitled "False Accusations that the FBI Started the Fire," the report stated that "a nationally recognized team of arson experts [concluded that] . . . the gas delivery systems that the FBI used were completely nonincendiary." Further, the Scruggs report stated that the arson team "noted that the tear gas delivery methods that had been selected evidenced the FBI's concern for eliminating fire hazards." The report, while discussing military involvement at Waco, did not analyze the legality of the use of the Armed Forces of the United States.

R. The Department of Justice Prosecutes the Davidians.

125. On August 6, 1993, a federal grand jury returned a ten-count superceding indictment charging twelve Davidians with various crimes arising out of their activities at the complex prior to February 28, during the 51-day standoff, and on April 19. The indictment named Kathryn Schroeder, Brad Branch, Kevin Whitecliff, Clive Doyle, Jaime Castillo, Livingstone Fagan, Paul Fatta, Woodrow Kendrick, Norman Allison, Graeme Craddock, Renos Avraam, and Ruth Riddle as defendants. The Davidians faced different charges, which included conspiracy to murder federal

agents, aiding and abetting the murder of federal agents, using and carrying a firearm during and in relation to a conspiracy to murder federal agents, aiding and abetting an attempted murder of federal agents, illegally carrying an explosive grenade, conspiring to possess and manufacture machine guns illegally, and aiding and abetting Koresh in the illegal possession of machine guns. As part of the conspiracy count, the government alleged that the Davidian defendants had deliberately set fire to the complex on April 19. One Davidian, Kathy Schroeder, pled guilty to one count of armed resistance of a federal officer; the remainder prepared to go to trial.

126. Assistant United States Attorney Ray Jahn was the lead prosecutor on the case. His principal assistant on the case was his wife, Assistant United States Attorney LeRoy Jahn. Assistant United States Attorneys Bill Johnston and John Phinizy assisted them, along with Department of Justice attorney John Lancaster and paralegal Reneau Longoria.

127. From August 23 to 25, 1993, the prosecution team met in Waco with several members of the Texas Rangers and FBI Crime Lab personnel to discuss the ongoing analyses of evidence. During the meetings, LeRoy Jahn asked FBI Special Agent Richard Crum to have the 40 millimeter shell analyzed to determine its nature. On August 25, Crum hand carried the casing to the FBI lab in Washington for analysis. Crum identified the casing as a “grenade launcher cartridge case.” This casing, item 160, was labeled by the FBI lab as Exhibit Q1237. On December 6, 1993, a 49 page FBI lab report was issued identifying Q1237 (Item 160) as a “fired U.S. Military 40 MM casing which originally contained a CS gas round.” The lab report made no mention of the pyrotechnic nature of the ordnance.

128. In November 1993, the government's criminal prosecution team made a trip to Quantico, Virginia, to interview members of the HRT who had participated in the events at Waco earlier that year. Before making the trip, the trial team viewed a recently released film produced by Linda Thompson entitled, *Waco: The Big Lie*. The film contained news footage showing an FBI agent shooting a grenade launcher from the back of a Bradley and, moments later, a cloud of tear gas rising from the area of the concrete construction pit. Thompson claimed in the film that this footage showed that the FBI started a fire in the concrete construction pit early on the morning of April 19. One reason for interviewing HRT members at Quantico was to hear their explanation of what was occurring in this footage.

129. The prosecutors showed the film to a large group of HRT members and then interviewed them in smaller groups. During the interview of the Charlie Team, Corderman told members of the trial team that the smoke shown in the film was not due to fire, but rather was a tear gas cloud from a military tear gas round that he had fired at the concrete construction pit. Corderman described the round as incendiary. Longoria misspelled the word "incendiary" in her notes next to the description of the military round. Both Lancaster and Johnston also have this information reflected in their notes which were recorded either during the Charlie team interviews or during a subsequent meeting of the prosecution team. Lancaster's notes state, "fired 1-4 incendiary rounds" and "1 military" round at the "ce-ment [sic] underground deal." Johnston's notes state, "Charlie—one green military (incind) smoke."

130. Members of the trial team also met with HRT commander Richard Rogers. LeRoy Jahn's notes reflect that Rogers told them that the FBI had used a "cupcake" round at the concrete construction pit, that he knew there was water in the concrete construction pit, and that the cupcake round had greater "penetrator" power than the Ferret rounds that had bounced off the plywood and tar paper covering of the concrete construction pit. Lancaster recalls that LeRoy Jahn asked Rogers what a cupcake round was and that Rogers explained that it was a military or pyrotechnic round. Longoria's notes from the same interview reflect that Rogers referred to the use of a "military tear gas round."

131. On its return to Waco, the criminal prosecution team prepared outlines and witness charts reflecting that the HRT had fired "military" rounds at the concrete construction pit during the early morning hours of April 19. These documents indicate that the trial team decided to save this information for rebuttal in the event that the Davidians attempted to claim that the "smoke" in the concrete construction pit was the result of an igniting fire, rather than the use of tear gas.

132. The government's trial team did not disclose the use of the military tear gas rounds to the lawyers for the Davidians under *Brady v. Maryland*, which requires prosecutors to provide the defense with exculpatory information. In the "Government's Response to Defendant Castillo's Specific Brady Requests," Ray Jahn stated, "[T]he government has no evidence that government agents fired gunshots on April 19, 1993, other than ferret tear gas rounds." However, the government provided the criminal defense team with a 49-page FBI lab report which referenced Q1237, the shell from a military tear gas round that the Rangers had located at the scene, and they

also provided the defense with numerous photographs, including the photograph of a spent military tear gas projectile taken by the crime scene photographer at the crime scene.

133. During the trial, the prosecution sought to prove that the Davidians started the fire. Dr. Quintiere, the government's fire expert, testified that the fire started in three or four locations simultaneously, and another expert testified that the Davidians had spread accelerants throughout the complex. None of the prosecutors mentioned the FBI's use of pyrotechnic rounds several hours before the fire started. They continued to view this evidence only as rebuttal evidence. They did provide testimony that the FBI had used Ferret rounds, and FBI HRT member Thomas Rowan testified accurately that a Ferret round was "not a pyrotechnic." The criminal prosecution team did not call as witnesses any members of the HRT members who knew about the firing of pyrotechnic tear gas rounds.

134. Ranger Turner recalled that on January 13, 1994, as he was preparing to testify in the Davidian criminal trial, FBI Special Agent Crum approached him and advised him that the shell that Turner had shown him earlier (labeled 160 and later Q1237) belonged to the FBI, that it was from an explosive military round, and that the FBI had the authority to use it to penetrate a door.

135. On February 26, 1994, the jury acquitted the defendants of the conspiracy and murder counts but convicted five defendants of the lesser included offense of manslaughter. Those convicted of manslaughter were Renos Avraam, Brad Branch, Livingstone Fagan, Jaime Castillo, and Kevin Whitecliff. Brad Branch, Kevin Whitecliff, Jaime Castillo, Livingstone Fagan, Graeme

Craddock, Renos Avraam, and Ruth Riddle were each convicted of using or carrying a firearm during a conspiracy to murder federal officers. Graeme Craddock was convicted of possessing an explosive grenade, and Paul Fatta was convicted of conspiring to illegally possess and manufacture machine guns and aiding and abetting the illegal possession of machine guns. Three Davidians, Clive Doyle, Woodrow Kendrick, and Norman Allison, were acquitted of all charges.

136. On June 17, 1994, the Honorable Walter S. Smith, Jr. sentenced Avraam, Branch, Castillo, Fagan, and Whitecliff to 40 years each in prison. Judge Smith sentenced Craddock to 20 years in prison, Fatta to 15 years, and Riddle to five years. Schroeder was sentenced to three years on July 8. The United States Court of Appeals for the Fifth Circuit affirmed the convictions on August 2, 1996. On June 5, 2000, the Supreme Court remanded the case to the District Court for resentencing, holding that the Davidians convicted of using or carrying firearms during and in relation to the ATF raid were improperly sentenced to 30 years for possession of machine guns because the jury had not found specifically that the defendants possessed machine guns. Judge Smith reduced from 30 years to five years the sentences imposed on Fagan, Whitecliff, Castillo, Avraam and Branch in 1994. Craddock's sentence was reduced by five years.

S. Congress Holds Additional Hearings in 1995.

137. In July and August 1995, the United States House of Representatives held additional hearings on the Waco incident. The hearings were convened jointly by the Judiciary Committee's Subcommittee on Crime and the Committee on Government Reform and Oversight's Subcommittee on National Security, International Affairs, and Criminal Justice.

138. Upon learning that Congress intended to hold the hearings in 1995, Attorney General Reno asked Scruggs and Zipperstein to lead the Department of Justice effort to prepare for these hearings. The lawyers in the Department of Justice preparing for these hearings viewed them as a highly partisan effort to impugn the actions of Attorney General Reno and her staff.

139. On June 8, 1995, Congress submitted document requests to the Department of Justice, which included a request for “all records of or concerning pyrotechnic devices and incendiary weaponry, including a listing of all pyrotechnic and incendiary devices . . . used on April 19 . . . against the residence of Koresh and the Branch Davidians,” as well as a request for the names of persons who employed these devices. In response to an inquiry from the Department of Justice to the FBI concerning these requests, a member of the FBI’s Office of Public and Congressional Affairs wrote to Scruggs that “[t]here were no incendiary or pyrotechnic devices used against the Branch Davidians on 4/19/93.” Numerous other documents prepared by the FBI and the Department of Justice to brief Attorney General Reno for her testimony, including a set of “Waco Fact Sheets,” indicated that the FBI did not fire pyrotechnic devices on April 19, 1993. Attorney General Reno was not asked about pyrotechnic devices during the 1995 hearings, but the “Waco Fact Sheets” used to prepare for her testimony were produced to Congress. In addition, FBI and Department of Justice officials told congressional staffers, and possibly even members of Congress, that the FBI had used no pyrotechnic devices at Waco. The Department of Justice attorneys preparing for the hearings obtained the misinformation that the FBI had used no pyrotechnic devices from three separate sources at the FBI: James Atherton, an HRT explosives expert who had been at Waco on April 19; Monty Jett, an FBI munitions expert who had

assembled the tear gas delivery systems to be used at Waco; and Tony Betz, Unit Chief of the FBI's Domestic Terrorism Unit, who had been involved at Waco throughout the standoff and on April 19. None of these people knew that the FBI had in fact used pyrotechnic devices at Waco.

140. In response to the document requests, Congress received the notes of Reneau Longoria from 1993 that reference the use of a military round and describes it as "incendiary," Longoria's notes from Rogers' interview which refer to a military round, and the criminal prosecution team's witness chart that references Corderman's statement to the criminal prosecution team in 1993 that the FBI had fired a military round/bubblehead. These documents do not use the word "pyrotechnic" to describe the military tear gas rounds.

141. Congress also requested that the Department of Justice produce the FBI FLIR tapes recorded from 6:00 a.m to 6:00 p.m. on April 19, 1993. In response to this request, the Department of Justice produced only tapes from the second shift, beginning at 10:42 a.m., maintaining that the government did not have tapes from earlier in the morning. The Department of Justice and FBI took a similar position in response to a lawsuit filed under the Freedom of Information Act seeking access to the FLIR tapes. An FBI supervisory special agent submitted a sworn declaration which detailed all of the files that the FBI had searched for responsive information, and erroneously stated that the "earliest FLIR videotape recorded on April 19, 1993, occurred at approximately 10:42 a.m."

142. During the 1995 congressional hearings, prosecutor Ray Jahn submitted a written statement to Congress that “the FBI did not fire a shot, other than the nonlethal ferret rounds which carried the CS gas.” No one questioned him about this statement, and the issue of the use of pyrotechnic devices did not surface during the course of the hearings.

143. The congressional committees issued a Report on August 2, 1996, which concluded, among other things, that the FBI’s strategy decisions during the 51-day standoff were flawed and “highly irresponsible” and the Attorney General’s decision to assault the complex on April 19, 1993, was “premature, wrong, and highly irresponsible.” The report also concluded, however, that the ultimate responsibility for the deaths at Waco lay with Koresh, and that the evidence indicated that some Davidians intentionally set fire to the complex. The Report stated that there was no evidence that the FBI discharged firearms on April 19 or intentionally or inadvertently caused the fire. The Report also exonerated the armed forces of any wrongdoing relative to the *Posse Comitatus* Act.

T. The Surviving Davidians and Relatives of Deceased Davidians File a Wrongful Death Lawsuit.

144. On March 21, 1994, the first of seven groups of surviving Davidians and relatives of deceased Davidians filed a wrongful death lawsuit against the United States and certain individual FBI and Department of Justice employees in the United States District Court for the Southern District of Texas, Houston Division. The seven cases were consolidated on January 16, 1996, and the various groups of plaintiffs filed a single consolidated complaint. Upon motion by the United States on April 4, 1996, the Court transferred the case to the Western District of Texas, Waco

Division. The plaintiffs alleged that agents of the United States used excessive force on February 28, during the siege, and on April 19, and that they had failed to provide adequate emergency services and committed other intentional acts of misconduct or gross negligence in connection with their handling of the Davidian standoff at Waco in 1993. One such act alleged by the plaintiffs was that the government defendants caused “a fire in the Church which trapped and killed the [Davidians.]”⁹⁷

145. In January 1996, the plaintiffs in the civil suit filed a declaration by their fire expert, Richard Sherrow, in support of their opposition to the government’s motion to dismiss the

⁹⁷On July 14, 2000, after a four week trial, an advisory jury returned a verdict in the civil case. In its verdict, the advisory jury answered “no” to each of the following questions:

Did the plaintiffs prove by a preponderance of the evidence that the Bureau of Alcohol, Tobacco and Firearms (ATF) used excessive force on Feb. 28, 1993, in either of the following respects?

1. by firing at Mount Carmel without provocation.
2. by using indiscriminate gunfire at Mount Carmel on Feb. 28, 1993.

Did the plaintiffs prove by a preponderance of the evidence that the Federal Bureau of Investigation acted negligently on April 19, 1993, in one or more of the following respects?

1. by using tanks to penetrate Mount Carmel other than in accordance with the approved Plan of Operations on April 19, 1993.
2. by starting or contributing to the spread of the fire at Mount Carmel on April 19, 1993.
3. by affirmatively deciding to have “no plan to fight a fire” at Mount Carmel, despite Attorney General Reno’s directive that required “sufficient emergency vehicles to respond both from a medical and any other point of view.”

The Court concurred with these findings in its opinion of September 20, 2000. The Court further concluded in its amended opinion of September 27, 2000 that the FBI did not fire gunshots at Waco on April 19, 1993.

complaint and specifically its motion to dismiss the plaintiffs' claims regarding the fire. Sherrow stated that:

Besides the SGA-400 Ferret cartridges, information from documents obtained from the FBI through the United States Department of Justice indicates that military pyrotechnic munitions may have been fired into Mount Carmel. Documents disclosed indicate that agents could not penetrate either the underground shelter roof or the top of the rear four-story tower with Ferrets. Therefore, they fired at least one "military" round and referred to this munition as a "bubblehead."⁹⁸

146. Marie Hagen, the Department of Justice attorney heading the civil case asked FBI attorney Jacqueline Brown for help in responding to these allegations. Brown in turn faxed the Sherrow declaration to Monty Jett at the FBI, along with a note asking for assistance in responding to the declaration. HRT Special Agent Robert Hickey also received a copy of the declaration. On February 15, 1996, Hickey sent a memorandum to Brown, stating in relevant part, that the FBI HRT Charlie Team had fired "[a] total of two (2) or three (3)" military rounds at the roof of the underground shelter outside the complex. He stated that the rounds were fired shortly after 6:00 a.m.,⁹⁹ bounced off the roof, and landed in the field behind the complex. Hickey noted that "the military CS rounds were prohibited from being fired into the main structure due to their potential for causing a fire." Brown read the memorandum and made notations regarding this paragraph.

⁹⁸Document discovery in the civil case did not begin until July 1999. Therefore, the "documents" referred to by Sherrow came from other sources. Most likely, the documents were Longoria's notes which were produced to Congress in 1995, and the criminal prosecution team's witness chart which was produced to Congress in 1995 and to the plaintiffs in a related Davidian civil case in 1994. Both of these documents contain the term "bubblehead."

⁹⁹In fact, the rounds were fired at approximately 8:08 a.m.

147. The Department of Justice did not file a responsive pleading to the Sherrow Declaration in 1996 because it did not consider the allegations germane to the main issues in the case. In 1997, the plaintiffs filed a supplemental declaration by Sherrow which again alleged that the HRT had used military tear gas rounds on April 19. In a brief filed on March 19, 1998, the government dismissed Sherrow's statement that the FBI fired pyrotechnic rounds on April 19, 1993, with a footnote stating that Sherrow "ignores the virtual arsenal gathered by the Davidians," clearly suggesting that the Davidians had fired the military tear gas rounds at the FBI. Brown reviewed the brief before it was filed. After the FBI publicly acknowledged using military tear gas rounds in August 1999, the Department of Justice filed a pleading withdrawing this statement.

148. As the civil lawsuit proceeded, Dan Gifford and Michael McNulty (among others) produced and released the film *Waco: Rules of Engagement*. The film included portions of the FLIR tapes from after 10:42 a.m. The producers noted the flashes emanating from the complex and around government vehicles which they claimed evidenced a gun fight between the government and the Davidians. The producers also noted objects on the FLIR tapes which they claimed were persons exiting the government vehicles and assuming positions to fire shots into the complex. The plaintiffs in the civil lawsuit seized upon this information to support their allegations that the government had contributed to the deaths of the Davidians by shooting into the complex, pinning the Davidians down, and preventing their escape. The government continued to assert that the FBI had not fired a single shot at Waco on April 19, 1993. Its experts stated that the flashes on the FLIR tapes were reflections from debris on the ground, a theory dismissed as impossible by the plaintiffs' experts.

149. In 1997, as part of the preparation of the defense in the civil litigation, various Department of Justice and FBI officials debated internally the desirability of conducting a test of the FBI's Nightstalker FLIR equipment to determine whether gunfire could appear on a FLIR tape and to determine whether debris could cause flashes on a FLIR tape. Those favoring the test noted that the FBI intended to upgrade its FLIR system soon and recommended that the test occur immediately. The test never occurred, and the FBI upgraded the equipment.

U. Events in 1998 and 1999 Lead to the Appointment of the Special Counsel.

150. On August 21, 1998, after consulting with Department of Justice public affairs officials, Assistant United States Attorney Johnston allowed McNulty, who was working on another Waco film, access to the Waco evidence storage facility. McNulty inspected the evidence on this and three to five subsequent occasions. During one of his visits, McNulty located the military tear gas shell (Exhibit Q1237) referenced earlier. McNulty already had the photograph of the missing military tear gas projectile which had been produced to the Davidians in the criminal trial, and recognized it as a pyrotechnic device. McNulty did not initially disclose his findings to the public but continued to seek additional information from the Department of Justice and other sources through correspondence.

151. On June 14, 1999, the Texas Department of Public Safety began an evidence review in the course of preparing a motion to transfer custody of the Waco evidence to the Court. The Ranger leadership assigned Sergeant Joey Gordon to conduct the review and instructed him to review carefully evidence that the Rangers had made available to McNulty. While reviewing the

evidence, Sgt. Gordon initiated an investigation of the 40 millimeter military tear gas round shell, Exhibit Q1237.

152. On July 28, 1999, *The Dallas Morning News* published an article reporting that the head of the Texas Department of Public Safety had stated that evidence held in the custody of the Rangers called into question the federal government's claim that its agents used no incendiary devices on April 19, 1993. A spokesman for the Department of Justice dismissed the allegation as "more nonsense." Attorney General Reno responded at her weekly news conference, as quoted by *The Dallas Morning News* in an article published July 30, 1999, that "I have gone over everything, and I know of no such evidence."

153. On August 19, 1999, while preparing for the civil trial, Department of Justice civil attorney James Touhey conducted a database search for the term "bubblehead" which he had seen in the Sherrow Declaration. He found the 1996 Hickey memorandum to Brown discussing the use of the pyrotechnic military tear gas rounds by the FBI at Waco, as well as Longoria's notes from the Corderman interview and the witness chart referring to the use of "military rounds" and "bubblehead." Touhey contacted Brown, but she said that she had no recollection of the Hickey memo. Touhey faxed a copy of the memorandum to Brown on August 19, 1999.

154. *The Dallas Morning News* continued to report on the release and surrender of custody of the Waco evidence. In response to a request for comments on the allegations regarding pyrotechnics, a Department of Justice spokesman told *The Dallas Morning News* on August 23,

1999, that “[W]e are aware of no evidence to support the notion that any pyrotechnic devices were used by the federal government on April 19.” *The Dallas Morning News* reported this statement on August 24, 1999, along with the news that former FBI Deputy Assistant Coulson now confirmed that the FBI had fired pyrotechnic devices on April 19, 1993. On August 25, the FBI confirmed that it “may have used a very limited number of military-type CS gas canisters on the morning of April 19” In the following days, the national media picked up the story and began to raise serious questions about whether the Department of Justice had been forthright with the American people concerning the conduct of the FBI on April 19, 1993. In addition, on August 27, 1999, *The Dallas Morning News* reported the presence of military Special Forces personnel at Waco, stating a source had indicated that members of a secret Army unit were “present, up front and close” during the FBI operation of April 19, 1993.

155. On August 30, 1999, Johnston wrote Attorney General Reno, claiming that he had been unfairly chastised for letting McNulty view the physical evidence in the possession of the Texas Rangers and suggesting that Attorney General Reno had been misled about the FBI’s use of pyrotechnic devices on April 19, 1993. [REDACTED]

[REDACTED]

156. In August 1999, in response to a request from Jacqueline Brown dated August 14, 1999, several FBI agents gathered all Waco-related materials that had been held at HRT headquarters and took the materials, with an inventory, to Brown on August 26, 1999. These materials included a FLIR tape which the inventory tag described as “Night Stalker 4/19/93 Tape

#1 5:57 am - 8:00 am.” Within a few days Brown recognized that she had not previously seen this tape and brought it to the attention of her supervisor at the FBI.

157. On September 1, 1999, FBI attorney Elizabeth Beers called the Unit Chief for the Aviation Special Operations Unit (“ASOU”) Isaac Nakamoto and asked him to search again for April 19, 1993, FLIR tapes. In the subsequent search, the FBI located two additional FLIR tapes in an unlocked ASOU filing cabinet in the office of the Supervisory Aviation Specialist. These tapes are from 5:59 a.m. to 7:56 a.m. and from 7:57 a.m. to 9:28 a.m.

158. In early September 1999, the FBI disclosed publicly the existence of additional FLIR video recordings which it had previously claimed did not exist. On September 2 and 3, 1999, the FBI press office released the morning FLIR recordings, including the audio, which confirmed the firing of the pyrotechnic military tear gas rounds at the concrete construction pit shortly after 8:00 a.m. on April 19, 1993.

159. As a result of the public release of information from the newly discovered FLIR tapes, the public disclosure of the military tear gas casing and the photograph of the military projectile, and new information about the presence of Army Special Forces personnel at Waco, on September 1, 1999; at the suggestion of FBI Director Louis Freeh, Attorney General Reno sent U.S. Marshals to the FBI to confiscate Waco-related evidence. Then, after first considering allowing the FBI to investigate the matter, she decided to appoint a Special Counsel to investigate questions about the conduct of the FBI at Waco, and whether any government official had covered up information

about the incident. On September 9, 1999, Attorney General Reno appointed former United States Senator John C. Danforth as Special Counsel, issued Order No. 2256-99 defining his charter, and recused herself from further involvement in the Waco matter.

* * * * *

This concludes the Special Counsel's Final Report to the Deputy Attorney General.

The Office of Special Counsel attaches hereto:

Exhibit 1 (Order of the Attorney General);

Exhibit 2 (Statements of Individuals Named in the Report); and

Exhibit 3 (Diagram and photographs of Davidian Complex), and the following appendices:

Appendix A, Branch Davidian History;

Appendix B, Summary of Expert Findings;

Appendix C, Chronology of Events;

Appendix D, The Final Report of Office of Special Counsel Expert, Walter Wetherington;

Appendix E, The Final Report of Office of Special Counsel Expert, Dr. Ulf Wickström;

Appendix F, The Final Report of Office of Special Counsel Expert, Dr. Jerry Havens;

Appendix G, The Final Report of Office of Special Counsel Expert, Chris Mills;

Appendix H, The Final Report of Office of Special Counsel Experts, Lena Klasén and Sten Madsen;

Appendix I, The Final Report of Office of Special Counsel Experts, Vector Data Systems (U.K.) Ltd.;

Appendix J, The Final Report of Office of Special Counsel Expert, Dr. Michael Graham;

Appendix K, The Final Report of Office of Special Counsel Expert, Dr. George Lucier;

Appendix L, The Final Report of Office of Special Counsel Expert, Dr. Uwe Heinrich;

Appendix M, The Final Report of Office of Special Counsel Expert, William George;

Appendix N, The Final Report of Office of Special Counsel Experts, Dr. Gerry Murray and David Green.