THE UNWARRANTED WARRANT:

THE WACO SEARCH WARRANT AND THE DECLINE OF THE FOURTH AMENDMENT

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The starred numbers (such as *3) indicate the beginning of a new page of the published text.

*1 Criticism of federal law enforcement actions at Waco has not been in short supply. But the criticism has generally focused on how the Bureau of Alcohol, Tobacco and Firearms (BATF) conducted its February 28, 1993 raid on the Branch Davidian compound, and how the Federal Bureau of Investigation (FBI) conducted the fifty-one day siege that culminated in the tank and chemical warfare assault of April 19, 1993. Missing from the discussion of how the federal government handled the Waco disaster is how the government got into the problem in the first place. In particular, how and why did the government procure the search and arrest warrants which the BATF was attempting to "serve" with its unsuccessful raid? A careful study of the Waco search warrant reveals numerous flaws, not just with the warrant application but with search and seizure law as it has developed in the 1990s.

In this article, we examine in detail how the Waco warrants were procured and use the flaws in the Waco warrants to illustrate broader trends which have encroached the Fourth Amendment and other parts of the Constitution in the 1980s and 1990s. Part one of this article sets forth the background to the BATF investigation of the Branch Davidian residence at the Mount Carmel Center, outside of Waco, Texas, and suggests that there is no good reason for the federal BATF to have jurisdiction over the tax offenses it was allegedly investigating. Part two studies the warrant application and reveals how the application was riddled *2 with errors of law and fact, and offers reforms for how to reduce false or misleading statements in future warrant applications. Part three investigates the possibility that the lawful exercise of First Amendment rights may have been a key element in the BATF's determination that there was probable cause for the Waco raid. Part four proposes two broader reforms to reduce the poor quality law enforcement work of which the Waco warrant was symptomatic: first, replacing the *Gates* [3] "totality of the circumstances" standard for judging the sufficiency of a warrant application with the two-part *Aguilar* [4] test to offer magistrates better guidance; second, reinvigorating the Exclusionary Rule.

I. How the Investigation Began

A. "Zee Big One"

In mid-November 1992, personnel from the 60 Minutes television program began contacting BATF officials regarding a story that 60 Minutes was producing about sexual harassment within the BATF. [5] At the same time, the BATF knew that a new President was coming to power--a President who had pledged to fight sexual harassment on every front, to "reinvent government," and to cut the federal budget deficit.

The BATF had already been on the defensive about discrimination. In 1990, black agents had filed suit in federal court claiming that the BATF racially discriminated in hiring, promotion and evaluation. [6] A fresh round of discrimination complaints by black BATF agents came in October 1992, the month before 60 Minutes began setting up interviews for the sex discrimination story. [7] The 60 Minutes report, which *3 would air on January 10, 1993, put the BATF in a vulnerable position for the Congressional budget hearing that would take place in early March, given the new administration's concern with sexual and racial harassment, and with reorganizing the government.

The 60 Minutes report was devastating. A BATF agent, Michelle Roberts, told the television program that after she and some male agents finished a surveillance in a parking lot, "I was held against the hood of my car and had my clothes ripped at by two other agents." [8] Agent Roberts claimed she was in fear for her life. The agent who corroborated Ms. Roberts' accusations recounted that he was pressured to resign from the BATF. Another agent, Sandra Hernandez, said her complaints about sexual harassment were at first ignored by the BATF, and she was then demoted to file clerk and transferred to a lower- ranking office. BATF agent Bob Hoffman said "the people I put in jail have more honor than the top administration in this organization." [9] Agent Lou Tomasello told the television audience: "I took an oath. And the thing I find totally abhorrent and disgusting is these higher-level people took that same oath and they violate the basic principles and tenets of the Constitution and the laws and simple ethics and morality." [10]

The BATF had investigated David Koresh in the summer of 1992. The BATF investigation began about a month after an Australian tabloid television program produced a story about Koresh. [11] Having lain moribund since the summer, the BATF investigation perked up in mid-November. [12] By early December, the BATF was planning the raid on a seventy-seven acre property outside Waco, the Mount Carmel Center, *4 which the Branch Davidians called their communal home. [13]

A BATF memo written two days before the February 28, 1993 raid explained "this operation will generate considerable media attention, both locally [Texas] and nationally." [14] The BATF public relations director, Sharon

Wheeler, called reporters to ask them for their weekend phone numbers. The reporters contend, and Wheeler denies, that she asked them if they would be interested in covering a weapons raid on a "cult." Wheeler, on the other hand, states that she merely told them, "We have something going down." [15] After the raid, the BATF at first denied there had been any media contacts. [16] Journalist Ronald Kessler reports that the BATF told eleven media outlets that the raid was coming. [17] The Department of the Treasury has refused to release the pre-raid memos which deal with publicity, asserting that they are exempt from the Freedom of Information Act. [18]

In any case, the BATF's public relations officer was stationed in Waco on the day of the raid ready to issue a press release announcing the raid's success. [19] A much-publicized raid, resulting in the seizure of hundreds of guns and dozens of "cultists" might reasonably be expected to improve the fortunes of BATF Director, Stephen Higgins, who was scheduled to testify before the U.S. Senate Appropriations Subcommittee on Treasury, Postal Service, and General Government on March 10, 1993. Investigative reporter Carol Vinzant wrote:

*5 In the jargon of at least one ATF office, the Waco raid was what is known as a ZBO ("Zee Big One"), a press-drawing stunt that when shown to Congress at budget time justifies more funding. One of the largest deployments in bureau history, the attack on the Branch Davidians compound was, in the eyes of some of the agents, the ultimate ZBO. [20]

60 Minutes rebroadcast the BATF segment a few months later. Host Mike Wallace opined that almost all the agents he talked to said that they believe the initial attack on that cult in Waco was a publicity stunt--the main goal of which was to improve ATF's tarnished image. [21] The codeword for the beginning of the BATF raid was "showtime." [22]

B. Initial Investigation

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

The driver found it suspicious that some attempted deliveries to a place known as the Mag Bag, a garage rented by the Davidians near Waco, resulted in the driver being instructed to deliver the packages to Koresh's residence at the Mount Carmel Center. [23] According to the UPS driver, his suspicions were heightened when boxes broke open by *6 accident, and he could tell their contents were inert hand grenade hulls and a quantity of blackpowder. [24] The Waco Sheriff's Office was informed of the "suspicious" deliveries, and the sheriff's office in turn notified the BATF. [25]

Koresh had a number of raising funds schemes for the Branch Davidians: mounting inert grenade hulls as plaques and selling them at gun shows was one of their biggest money-makers. [26] Custom-sewn magazine vests in tall and big sizes, under the "David Koresh Brand" label, were another specialty. [27] Koresh also used gun shows as a way to make a profit on selling surplus meals-ready-to-eat (MREs). In addition, the Davidians assembled gun parts into complete guns, which they sold to the public through a licensed dealer. The Davidians also bought many semi-automatic rifles as an investment, assuming that an anti-gun President would act in such a way as to increase their value dramatically; just as President George Bush's ban on the import of such rifles had increased their value in 1989. [28] On the day of the BATF attack, many of the Davidian guns were on display miles away at a gun show.

While most guns owned by the Davidians were for investment purposes, the Davidians did own guns for protection. Koresh was concerned about a possible attack from George Roden, the former Branch Davidian leader, with whom Koresh and his followers had a shoot-out in 1987. [29] Roden, who escaped from an institution for the criminally insane and was later recaptured, had
reportedly threatened, "I'm not going to come back with BB guns." [30] They also feared attacks from other persons who regularly sent hate mail to Koresh.*7

C. The National Firearms Act

Ownership of machine guns in the United States is legal, but the owner must pay a federal tax and file a registration form with the Bureau of Alcohol, Tobacco and Firearms. [31] The BATF's legal reason for the Branch Davidian investigation was to see if the Davidians were manufacturing machine guns illegally. If, on the other hand, Koresh had simply bought machine guns that were made before 1986, rather than allegedly manufacturing them, and if Koresh had paid the proper tax of $200 per gun and filed the appropriate paperwork, he would have been in full compliance with the law. In other words, the legal cause for the BATF investigation was not machine guns per se, but ownership or manufacturing of machine guns without registration and taxation. The seventy- six person BATF Mount Carmel raid was, ultimately, a tax collection case.

The federal law requiring machine guns to be taxed and registered is the National Firearms Act of 1934 (NFA), which was enacted with little controversy after the National Rifle Association stated that it had no objection to the law. [32] If not for the National Firearms Act, there would probably have been no BATF investigation or raid on Mount Carmel, and needless deaths would not have occurred.

As part of the Branch Davidian investigation, the BATF checked its records to determine whether "Vernon Howell" (which was the birth name of the

Branch Davidian prophet, who had been using the name "David Koresh" for the past several years) or Paul Fatta (who ran the *8 Branch Davidian table at gun shows) had federal machine gun licenses. The BATF also checked its records to determine whether Vernon Howell, David Koresh, David Jones (one of Koresh's in- laws), or Paul Fatta were federally-licensed firearms dealers. [33] The records said they were not. [34]

On the other hand, the BATF knew that its records of registered machine gun owners were grossly incomplete. When a person is charged with possessing an unregistered machine gun, federal prosecutors call as a witness a BATF employee who testifies that the National Firearms Registration and Transfer Record (NFR&TR) database was checked, and the defendant was not listed as a registered machine gun owner. The federal database of machine gun owners, the NFR&TR, is maintained by the BATF. In October 1995, on a BATF agent training videotape, Thomas Busey, who was then head of the National Firearms Act Branch at the BATF, in charge of the machine gun records, made a startling admission. [35] Busey explained, "when we testify in court, we testify that the database is one hundred percent accurate. That's what we testify to, and we will always testify to that. As you probably well *9 know, that may not be one hundred percent true." [36] He elaborated: "when I first came in a year ago, our error rate was between forty-nine and fifty percent, so you can imagine what the accuracy of the NFRTR could be, if your error rate's forty-nine to fifty percent. The error rate is now down below eight percent . . . ." [37]

In other words, for many years BATF employees have testified many times per year in NFA prosecutions that the NFR&TR database is one hundred percent accurate. That testimony has been consistently false.

Ever since the United States Supreme Court's 1963 decision in *Brady v. Maryland*, prosecutors have been obliged to turn over to defendants any exculpatory material which is known to the prosecution. [38] The United States Department of Justice, whose United States Attorneys prosecute all NFA cases, has commendably lived up to this obligation. In late 1996, the Department of Justice made a mass mailing to attorneys of convicted NFA defendants, admitting that false evidence may well have been used to convict those defendants. The Department of Justice eventually found out that the BATF had known about the serious problems with the NFR&TR database since the 1970s, but BATF had failed to correct the problem. [39]

The first case dismissed as a result of the BATF's disclosure of false testimony came in May 1996. A Virginia machine gun manufacturer, John D. LeaSure, had received proper BATF authorization to manufacture and transfer five machine guns to a particular customer. After making the guns, LeaSure decided he wanted to keep them for himself, as a machine gun manufacturer is legally allowed to do. He voided out the transfer forms ("Form 3") to his customer, and faxed the voided forms *10 to the BATF

office. Thus, he ensured that the machine guns would be properly registered as belonging to him. [40]

Long afterward, the BATF raided LeaSure's home, and charged him with possessing the five machine guns without proper registration. The BATF stated that the Form 3s showed that the machine guns were registered to someone else. LeaSure replied that the Form 3s had been voided, and the voided forms had been faxed to the BATF. Telephone company records showed a twenty-one minute toll call from LeaSure's fax line to the fax line for the BATF's NFA Branch on the day that LeaSure said he had faxed the voided Form 3s. [41]

At trial, a BATF records custodian testified for the prosecution that the BATF's official records did not show any voided transfers. But at a rehearing, the witness admitted that two BATF employees in the NFA Branch had received punitive transfers because they had thrown away faxed NFA registration documents in order to reduce their personal workload. After LeaSure's attorney produced a transcript of Busey's training session, the trial judge dismissed the charges against LeaSure. [42]

The simplest step to prevent a repetition of the Waco disaster would be to repeal the National Firearms Act of 1934 (NFA). States are perfectly capable of enacting their own laws regarding machine gun possession. Simple possession of an object within the boundaries of a single state is not usually an issue of legitimate federal concern. Repeal of the NFA would not mean that machine guns would be unregulated; state laws would remain in force, and states could enact additional regulations or even prohibitions. State and local police would enforce state and local laws regarding machine guns; but the repeal of the NFA would mean that the federal BATF would not be in the business of enforcing a federal machine gun law. The BATF would have to assign its personnel to more important matters, such as interstate gun-running, and the risk of people being assaulted by the BATF for violating a tax and paperwork statute would be reduced as the BATF's jurisdiction *11 was reduced.

It is entirely possible to support registration and taxation of machine gun ownership, while also believing that the federal government is not the proper entity to keep the registration records and collect the taxes. There is little public safety benefit from having a very troubled federal bureau perform a regulatory function which could easily be performed by state governments.

D. First Results of the Investigation

The BATF investigation of Koresh quickly led to Henry McMahon, doing business as Hewitt Handguns, Koresh's favorite gun dealer. The lead BATF agent on the Koresh case, Davy Aguilera, listed in his affidavit for the search and arrest warrants all of the relatively recent purchases by Koresh, including flare launchers, over one hundred rifles, an M-76 grenade launcher,

various kits, cardboard tubes, blackpowder, and practice grenades. [43] All of those items may be lawfully owned without the government's permission. [44] Accordingly, the purchases, while listed in the affidavit, did not in themselves establish probable cause that Koresh or his followers had violated or were planning to violate any federal law.

To people who hate firearms, the idea of many dozens of firearms being in the same place is repulsive. Such people have every right to lobby for changes in current firearms law, so as to make it illegal to possess large numbers of firearms without special government permission. But in the absence of such legislation, there is nothing criminal about owning a large number of guns. While the Branch Davidians did accumulate a huge cache of ammunition, the main reason they seemed to have a large number of guns was because they lived together in the same large building. If the Branch Davidians had, as they did from their founding in 1935 until the late 1980s, lived in separate houses on the same ranch, their gun ownership rate would have been unremarkable by Texas standards. Further, there are many gun collectors in the United States who personally *12 own more firearms than did the Branch Davidians collectively. A large gun collection is entirely lawful and is not evidence of criminal activity.

Obviously, it is not illegal to exercise one's First Amendment rights by believing in a false messiah such as David Koresh. Equally important, to exercise one's Second Amendment rights to the fullest degree is not against the law. Yet the BATF warrant application insinuated that the simple possession of a large number of guns was somehow evidence of crime. [45] Such insinuations are not consistent with a federal agent's oath to uphold the Constitution. For an agency to tolerate such behavior on the part of an agent is a significant sign of the agency's own disregard for the Constitution.

The question for the magistrate was not whether the Branch Davidians were normal and righteous, or weird and sinful, but whether the warrant application presented probable cause to believe that evidence of a crime would be found at the Mount Carmel Center. Under our Constitution, an observation that people are heavily exercising their constitutional rights must not be an element in creating probable cause.

II. The Warrant Application

*12 In evaluating the warrant application and the magistrate's issuance of the warrant, the only facts that are relevant are those presented in the application. If a warrant application presents enough facts to create probable cause, but the resulting search turns up no evidence of a crime, the magistrate should not be criticized. The fact that nothing was found does not retroactively prove that there was not probable cause to search. Conversely, a bad warrant cannot be retroactively validated by the lucky discovery of evidence. Otherwise, there would be no point to the Fourth Amendment's

requirement that searches must have a valid warrant based on probable cause.

The BATF affidavit in the warrant application was filled with assertions which were misleading in the extreme. These flaws should not have been present in an affidavit prepared with the aid of two assistant United States attorneys. [46] The federal magistrate's acceptance of the affidavit*13 as the basis for one warrant to arrest Koresh and another warrant to search the entire seventy-seven acre property and the entire house, including the living quarters of over one hundred persons not mentioned in the affidavit, may be partly due to the fact that the warrant application was presented to a relatively inexperienced magistrate. The magistrate, Dennis G. Green, spent much of his legal career as a prosecutor. [47] The Supreme Court requires that the magistrate must "perform his "neutral and detached' function and not serve merely as a rubber stamp for the police." [48] In a warrant affidavit filled with information irrelevant to the question of whether Koresh and his followers had violated any federal firearms laws, [49] most of the information was misleading regarding the law, guns, gun parts, gun publications, what Koresh and his followers had bought or not bought, and what would or would not constitute a violation of federal laws.

A. Ignorance of the Law and of Firearms

1. Legal Errors

The arrest and search warrant applications both misapplied the law. The search warrant alleged violations of two federal statutes, but the arrest warrant alleged that only one statute was violated: 26 U.S.C. S 5845(f). This statute merely defines destructive device; it does not establish anything as a crime against the United States. A "destructive device" is defined as a bomb, grenade, mine, poison gas, or similar device. In Waco, the destructive devices at issue were grenades. [50] The statute does not say that it is lawful or unlawful to manufacture, possess, use, or do anything else in relation to destructive devices. A different provision establishes unlawful activities related to destructive devices. [51]

Naming the wrong statute would not invalidate a warrant. [52] But the*14 error does indicate either agent Aguilera's ignorance of the law or his carelessness, and it set the stage for more misleading statements to the magistrate. The error also suggests that Magistrate Green did not even open the federal statutes to determine whether the BATF had asserted facts which fit within the definition of a federal offense. The error also suggests that the Assistant United States Attorneys who helped Aguilera prepare the affidavit did not bother to check the law.

The items to be searched for at Waco included "machinegun conversion parts, which, when assembled, would be classified as machineguns." [53] In fact, machine gun conversion parts are classified as machine guns even when not

assembled. Under federal law, a "machine gun" is a functioning machine gun, or all the parts needed to make a machine gun, or the parts used to convert a regular gun to a machine gun. [54] In other words, if a person possesses a machine gun conversion kit, but does not possess any type of actual firearm, the person is considered by federal law to possess a machine gun. Similarly, if a person owns in one place all the parts necessary to assemble a machine gun, then the person is a machine gun owner under federal law. [55]

Further misstating the law, Aguilera, immediately after asserting that he was familiar with federal laws, [56] asserted that a "machinegun conversion kit" is a combination of parts "either designed or intended" to convert a firearm into a machine gun. [57] Actually, federal law defines a conversion kit as a combination of parts designed and intended to convert an ordinary gun into a machine gun. [58]

Also on the search list were items "from which a destructive device may be readily assembled." [59] Again, Aguilera and his two Assistant United*15 States Attorneys were demonstrating that they did not even open the statute books. Potential assembly, while part of the definition of machine gun, is not part of the definition of destructive device. [60] Possession of all the parts necessary to make a grenade is not considered possession of a grenade. [61]

The legal distinction is eminently sensible. If one possesses all the parts necessary to make a machine gun, then one possesses an auto sear, the internal component that makes the machine gun fire repeatedly. There is no purpose to possessing an auto sear except for use in a machine gun. In contrast, millions, perhaps the majority, of American homes have all the components that are necessary to assemble a destructive device, since simple bombs can be assembled from common household goods and chemicals.

The above definitions are technicalities, but the fact that two Assistant United States Attorneys and one BATF agent made these sloppy errors in a case which they all knew would be very high profile may be indicative of the poor quality of work that is apparently tolerated by some BATF and United States Attorney offices in criminal cases. If the government's lawyers will not even look up a statute, it is unlikely that they are exercising appropriate diligence and care in regard to other matters on a warrant application.

Legal carelessness is apparently endemic at the BATF. The Bureau publishes a guide to federal firearms laws: the 1995 version contains twenty-three different errors and misstatements; all but one of the errors falls on the side of overstating the scope of federal gun laws, and of describing various legal acts as criminal. [62]

The warrant application listed no actual machine guns or destructive devices among the items to be searched for, except for "Sten guns" and "pipe bombs." [63] But the affidavit did not offer any evidence about pipe bombs. [64] The only allegation about a Sten gun, a type of machine *16 gun, [65] was a

report of a conversation alleging that there was a drawing of a Sten gun on "an Auto Cad Computer located at the residence building at the compound. The computer has the capability of displaying a three dimensional rendering of objects on a computer monitor screen." [66] Rendering a gun on a computer monitor screen is no more a crime than playing with grenades on video games. There are published books which consist entirely of schematics of machine guns and unusual weapons which are restricted by federal law. [67] Owning such drawings in a book (or an equivalent computer drawing) is not evidence that the owner has illegal machine guns or other weapons. No evidence asserted that the Sten gun went beyond the computer stage. Yet BATF would later describe its discovery of the computer drawing as one of the last pieces of evidence that supported probable cause.

2. Factual Errors

The legal errors in the affidavit were compounded by much more serious factual errors. Besides asserting knowledge of federal weapons laws, Special Agent Aguilera asserted a knowledge of firearms. [68] He then went on to claim that Koresh had ordered M16 "EZ kits." [69] Aguilera did not note that the kit is called an "E2" kit, not "EZ" (as in "easy" convertibility). The E2 kit is a spare parts kit, not a kit to convert a semi-automatic to full automatic. The E2 kit contains the same spare parts that fit in a semi- automatic Colt AR-15 Sporter or an automatic Colt M16 assault rifle, since the two guns use many common parts.

If the parts from the E2 kit are combined with the receiver from an AR-15 Sporter semi-automatic rifle, the result is a complete AR-15 E2 model semi-automatic rifle. [70] The reason that the E2 kit is not regulated by federal law is that it is not a gun, nor is it a kit designed to convert an ordinary gun to full automatic. [71] Yet the BATF affidavit gave the false impression that the "EZ" kit was made for turning semi-automatic *17 guns into machine guns. Again, none of the spare parts actually alleged to have been delivered to Koresh were conversion kits. [72]

There are two distinct ways of turning an ordinary gun into a machine gun, and Aguilera confused the two. The easy way is to install a conversion kit. As noted above, possession of a conversion kit is subject to the same legal requirements as possession of an actual machine gun. [73] Installation of a conversion kit can be accomplished by anybody who has the patience and dexterity to disassemble a gun down to its very smallest parts (the trigger assembly) and then re-assemble the gun with new parts, according to directions. [74]

The hard way to create a machine gun--the way that must be used by persons without a conversion kit--is to perform extremely high-precision milling and lathing, in order to manufacture the necessary internal components for a machine gun. [75] Aguilera stated accurately that, in unrelated cases,

persons have turned semi-automatic AR-15 rifles into machine guns using milling machines and lathes. [76] He also stated accurately that the Branch Davidians had "machinery and implements used or suitable for use in converting semi- automatic weapons to fully automatic weapons and for constructing various destructive devices. . . ." [77] What Aguilera did not tell the magistrate is that hundreds of thousands, perhaps millions, of Americans have access to such basic machine tools in their home workshops or at work. Conversions could be accomplished with an ordinary power drill, if the person doing the conversion were extremely skilled, patient, and careful.

*18 The Aguilera affidavit bounced back and forth between the two entirely different methods of creating a machine gun: conversion using a kit, and fabrication via milling and machining. [78] Perhaps Aguilera was confused about the distinction between the two different processes; a magistrate unfamiliar with firearms manufacture would almost certainly be confused.

Months after the Branch Davidian residence was burned to the ground, the Treasury Department conducted a review of the conduct of its subdivision, the BATF, at Waco. The opinion of a firearms expert reprinted in the Treasury Department report noted: "None of the many pieces of information available to me is sufficient, by itself, to answer the question as to whether Koresh and his followers inside the compound were engaged in assembling automatic weapons in violation of the National Firearms Act." [79] The expert noted that the various parts *19 Koresh ordered "do not convert the rifle to automatic fire, except in combination with an automatic sear. There is no automatic sear listed in the accounting . . . . [80] The material made available does not indicate that the Branch Davidians received shipments containing automatic sears." [81]

To suggest that Koresh was intending to convert AR-15 Sporters and semi-automatic imitations of the AK-47 into machine guns, Aguilera's affidavit asserted that Koresh made purchases from a South Carolina company which had all the necessary parts to "convert AR-15 rifles and semi-automatic AK-47 rifles into machine guns if their customers had the upper and lower receivers of those firearms . . . . I know that Howell possesses the upper and lower receivers for the firearms which he is apparently trying to convert to fully automatic." [82] It was highly unlikely, however, that Koresh really did possess "upper and lower receivers" for "semi-automatic AK-47 rifles." Such rifles have a solid block receiver, not separate upper and lower receivers. [83] In any case, Aguilera here was merely hinting that Koresh may have purchased the parts, since there is no allegation that those necessary parts were purchased from the South Carolina firm.

In short, the only evidence that the BATF offered the magistrate that the Davidians were converting semi-automatic guns into machine guns appears to be:

(a) the Davidians had bought the E2 spare parts kit, which BATF falsely claimed was an "EZ" conversion kit;
*20 (b) the Davidians had made unspecified purchases from a company that sells conversion kits, and which also sells thousands of items which are not conversion kits; and
(c) the Davidians owned home workshop equipment such as lathes which can, in addition to many legal uses, be used for illegal fabrication of machine gun components.

Following the raid, Aguilera filed a new affidavit with more details about purchases from South Carolina. [84] Aguilera explained that Koresh had bought various spare parts for automatic M16 rifles. Aguilera incorrectly asserted that these spare parts are "used to convert an AR-15 semi-automatic rifle into a M-16 machinegun rifle." [85] To the contrary, all the parts were simply replacement parts, and have nothing to do with conversion. If Aguilera did not know exactly what the parts were for, he should have asked the BATF technical staff.

Although not indicating evidence of illegal conversions, the purchase of the M16 spare parts might suggest that the Davidians owned automatic M16 rifles. On the other hand, most M16 spare parts are interchangeable with the AR-15 Sporter. A few M16 spare parts, such as those for the automatic sear on the M16 are unique to the M16. The affidavit did not disclose whether the spare parts were the parts that were interchangeable with semi-automatic rifles, or the parts that are unique to the M16. [86]

And again, it should be noted that BATF only checked the names of a few of the many persons living at the Mount Carmel Center to see if they were registered owners of M16s; and the name check did not even involve running "David Koresh" through the computer file of registered machine gun owners. [87]

The only time the investigation reached the point where it might *21 have found probable cause that Koresh had purchased parts really capable of converting a semi-automatic into a machine gun, the investigation, amazingly, was not followed through. "Because of the sensitivity of this investigation, these vendors have not been contacted by me for copies of invoices indicating the exact items shipped to the Mag-Bag," said the Aguilera affidavit. [88] Curiously, the decision not to investigate was later praised by the Treasury Department, which noted that agent Aguilera "sharply circumscribed his inquiries about Koresh to third parties, including arms dealers . . . for fear
of alerting the Branch Davidians that they were under scrutiny." [89] It is hard legally to establish probable cause when the only source which might supply it is not pursued. If items purchased might have been lawful or might have been unlawful, some reason has to be given for presuming the items to have been unlawful.

In sum, the affidavit insinuated that there was something illegal about the practice of buying a large number of guns and spare parts for those guns, and that there was something illegal about possessing a computer drawing of a machine gun. The evidence of conversion of the legal guns into illegal (unregistered) machine guns was Aguilera's false claims that various spare parts were actually conversion kits.

Liberty magazine summed up the evidence in the warrant application:

Let us suppose that you and your spouse had a horrible fight, characterized by fervent anger, ugly words and nasty accusations, resulting in your spouse moving out of the home. Let us suppose your spouse goes to the Bureau of Alcohol, Tobacco and Firearms and tells them that you are distilling alcohol without a proper license. The ATF checks with your supermarket and learns that you have over the past few years on numerous occasions purchased sugar and on a few occasions purchased yeast, and verifies with your local utility that you have purchased water. You have acquired all the ingredients needed to manufacture alcohol. The ATF also checks the Treasury's records and verifies that you have *22 never acquired a license to make alcohol.
In every detail, this situation is identical to the Davidians': there is testimony from an angry former close associate anxious to cause you trouble, there is evidence that you acquired the means to manufacture a product whose manufacture requires a license and there is evidence that you had not obtained the license. Is this evidence--"probable cause'--sufficient for you to lose your right to privacy in your home as guaranteed by the Fourth Amendment? [90]

Actually, the analogy is not quite identical to the Branch Davidian situation. There was no evidence that the Branch Davidians possessed auto sears or conversion kits, which are essential for converting a semiautomatic into an automatic.

B. Explosives

Besides attempting to convince the magistrate that there was something illegal about Koresh's purchases of legal firearms parts, the affidavit also intimated that Koresh had sinister purposes in his acquisition of blackpowder. The affidavit quoted a BATF expert to the effect that blackpowder is routinely used when making grenades and pipe bombs. [91] The statement is not totally false because some pipe bombs use blackpowder as the filler material; however, an equal amount of pipe bombs contain smokeless powder [92]--the gunpowder used in most modern ammunition. Most persons would recognize the acquisition of modern smokeless powder as evidence only of intent to manufacture modern ammunition. Home manufacture is legal, and not regulated by federal law. Likewise, blackpowder is routinely used as gunpowder for antique and replica firearms which do not use commercially-manufactured *23 ammunition.

While a tiny percentage of modern smokeless powder and old-fashioned blackpowder is criminally misused, there is nothing suspicious about the acquisition of blackpowder, which is largely unregulated by the federal government. Aguilera misled the magistrate into thinking that such ownership was unusual except in association with criminal manufacture of destructive devices.

The evidence regarding grenades was, however, much stronger than the evidence regarding machine guns. For machine guns, Aguilera never showed that Koresh possessed an automatic sear or a conversion kit--without which it is impossible to have a machine gun. In contrast, the affidavit did show that Koresh had all the ingredients necessary to manufacture destructive devices, such as grenades. Besides owning blackpowder and grenade hulls, Koresh had also purchased various explosives ingredients, such as magnesium metal powder and potassium nitrate. [93]

But Aguilera never offered evidence that Koresh either had intended to, or in fact did, create a destructive device, or that he had even expressed such an interest. Significantly, the affidavit left out an obvious, and innocent, reason for the possession of explosives: [94] the Branch Davidians were building a tornado shelter. [95] Perhaps the magistrate would have concluded that, despite the possible innocent explanation, there was probable cause regarding destructive devices. But the magistrate was never informed of all the facts.

C. Widely Available "Clandestine" Publications

Given the weak state of the evidence against Koresh, the authors of the affidavit bolstered their assertions with a wide variety of accusations which were either patently false or presented in a misleading way.

The affidavit reported that a witness who had been at Mount Carmel in March through June 1992, and was subsequently interviewed by the BATF in January 1993, had "observed at the compound published *24 magazines such as, the *Shotgun News* and other related clandestine magazines." [96] There is nothing remotely clandestine about *Shotgun News*. *Shotgun News* is listed in the *Gale Directory of Publications and Broadcast Media* as being a tri-monthly publication, with a reported circulation of about 165,000. Published by Snell Publishing Company of Hastings, Nebraska, subscriptions are available by mail or telephone; [97] VISA and MasterCard are accepted. [98] The BATF headquarters and various field offices had subscriptions to the "clandestine" publication [99] because the magazine advertises firearms and accessories, as well as many types of other weaponry and collectibles. None of the other alleged "clandestine" publications were identified. [100]

It should be noted that lying on a sworn warrant affidavit is a federal felony. [101] A warrant based on deliberately falsified information is generally invalid. [102]

In addition, the same witness reportedly "heard extensive talk of the existence of the Anarchist Cook Book," but apparently saw no evidence of the entirely legal book. [103] There was no evidence that Koresh or anyone else in Mount Carmel Center actually owned a copy of *The Anarchist Cookbook.* [104]

While there is no law against owning *Shotgun News* or *The Anarchist**25 *Cookbook*, BATF agent Aguilera did think *The Anarchist Cookbook* was illegal. [105] His ignorance of the law says much about the poor quality of training given to some BATF agents and their ignorance of Constitutional law.

D. Unreliable and Ignorant Witnesses

Search and arrest warrants must be based upon reliable evidence; thus, government agents should assert that the witness interviewed is believed to be reliable. The Supreme Court has noted that "an informant's "veracity,' "reliability,' and "basis of knowledge' are all highly relevant in determining the value of his report." [106] Aguilera's affidavit did not assert that the sources were reliable. In fact, they were not.

Marc Breault, Koresh's angry former lieutenant, provided much of the information about Koresh. The fact that Breault is legally blind [107]--a fact which could undercut Breault's reliability about his alleged observations--was never mentioned to the magistrate. [108]

Moreover, the warrant application never mentioned "that Breault left the compound as an opponent of Koresh," and, indeed, devoted his life to a vendetta against Koresh, a fact which would certainly have affected a responsible magistrate's judgment of Breault's veracity. [109] As a reform, affiants should be required to disclose evidence affecting the reliability or credibility of witnesses.

The affidavit repeated statements from several people who said they had heard or seen machine guns at Mount Carmel. With one exception *26 discussed below, there was no reason to believe that any of these witnesses possessed reliable or verifiable information.

The allegations that Koresh owned machine guns were made by persons who were clearly ignorant of firearms and could not reliably testify to whether the guns, or the pictures of guns they saw, were legal semi-automatic firearms or illegal automatic machine guns. Aguilera attempted to establish that he believed one witness, Jeannine Bunds, who had once been one of Koresh's wives, was able to identify an AK-47. Based on her descriptions, "she knew it was a machinegun because it functioned with a very rapid fire and would tear up the ground when Howell shot it." [110] In fact, almost any gun will tear up the ground when bullets are fired into the ground. Most guns which are not machine guns can be fired at the rate of over one shot per second, if the shooter does not bother aiming. Such a rate of fire would likely sound like

a machine gun to a person who knows little about guns; a BATF agent ought to know better. Only slightly more credible was Deborah Sue Bunds' recollection of hearing guns firing more rapidly than the guns she was used to from regular firearms training sessions. [111]

Other witnesses in the affidavit provided even weaker evidence. Robyn Bunds (an adult daughter of Debbie Bunds) stated that her brother, who "has some knowledge of firearms," [112] had once seen something that he thought was a conversion kit. However, Aguilera did not interview the brother. [113]

In 1932, the United States Supreme Court, concerned about the invasions of private homes that resulted from federal alcohol prohibition laws, unanimously ruled that search warrants must be based upon evidence that would be admissible in court. [114] Hearsay evidence is generally not admissible. [115] Unfortunately, the Court changed its mind seventeen *27 years later. [116] It would be appropriate for the Supreme Court to reinstate its rule against the use of hearsay and other legally inadmissible evidence to obtain search warrants. Alternatively, Congress could statutorily forbid the use of such evidence in federal courts for any purpose, including search warrants. The prohibition on hearsay evidence in warrant application should include the same exceptions as does the courtroom rule against hearsay. For example, hearsay can be used if the actual witness is unavailable by reason of death or incapacity. [117]

Further, when a witness' knowledge of a particular subject (i.e. the difference between a real machine gun, and a gun which just looks like a machine gun) is necessary to establish probable cause, the warrant application should disclose the basis of the witness' knowledge. This requirement would have forced Aguilera to disclose that most of the persons who claimed that they had seen machine guns at Mount Carmel would freely admit they knew almost nothing about guns.

Although agent Aguilera presented reports from plainly ignorant witnesses to the magistrate as if they knew what they were talking about, Aguilera did not hesitate to impeach an informant's knowledge when impeachment suited Aguilera's purposes. "Mr. Block," Aguilera wrote, "told me that he observed a .50 caliber rifle mounted on a bi-pod along with .50 caliber ammunition. However, what Mr. Block described to ATF agents was a British Boys, .52 caliber, anti-tank rifle (a destructive device)." [118] A firearm with a caliber larger than .50 is a "destructive device" under federal law, and can only be possessed if registered; hence the significance of whether the gun was a .50 or .52 caliber. [119]

The affidavit goes on to assert that Block heard talk of additional *28 . 50 caliber rifles and the possibility of converting the .50 caliber and other rifles to machine guns. [120] This conversation did provide some evidence supporting probable cause. Since warrants are not to be judged retrospectively, the value of the evidence in support of the warrant is not

undercut by the fact, discovered much later, that the .50 caliber rifles had not been converted.

The subsequent Treasury investigation of the BATF's activities makes it clear that the BATF and agent Aguilera should have known that some of Aguilera's witnesses were unreliable. This knowledge would have undermined the validity of the witnesses' evidence as a basis for a search or arrest warrant. Two of the six key witnesses who had at some point lived at Mount Carmel mentioned twenty-four hour armed guards. [121] Yet the raid planners "concluded that neither armed guards nor sentries were posted at the Compound at any time." [122] The planners' conclusions demonstrate that the BATF doubted the reliability of the witnesses--but never shared those doubts with the magistrate. [123]

*29 The one witness whom Aguilera quoted in the affidavit who actually did know something about guns was a farmer with property near the Mount Carmel ranch. This individual stated that he knew machine gun fire when he heard it, and that he had heard the Branch Davidians shooting machine guns. [124]

Later, he offered law enforcement authorities his residence to be used as a surveillance post. [125] What the BATF affidavit did not report to the magistrate was that the farmer had already complained to the Sheriff's office. In response to this complaint, the Sheriff's office investigated and found that the supposed machine gun fire actually involved something similar to the "Hellfire device," an unregulated trigger attachment that makes guns sound like machine guns. The BATF's affidavit also failed to note that the farmer may have been hostile toward Koresh because they were allegedly involved in a dispute regarding property lines. [126] Affiants should be required to divulge exculpatory evidence, such as the sheriff's investigation of alleged machine gun fire at Mount Carmel Center.

E. Stale, Irrelevant, and Absurd Allegations Against Koresh

1. Stale

A valid warrant may not be based on stale information; a magistrate should conclude that what the government agents are searching for is there now, not that it was there at some time in the past. [127] Thus, a key requirement of warrant applications is that they give some indication that the evidence is fresh. [128] Most of the Aguilera affidavit involves an investigation conducted in June and July 1992. Most of the investigation conducted in December 1992 and January 1993 involved reports of activities said to have occurred between 1988 and June 1992. *30 Even such essential issues as whether Koresh or his followers were registered owners of machine guns or "destructive devices" such as grenades were determined only in June 1992 and the determination was only regarding a few of the persons residing at the Mount Carmel Center. Indeed, there was apparently never a check to determine whether

David Koresh had destructive devices registered to him under his chosen name. The check involved only Koresh's birth name, Vernon Howell. [129] It would have been perfectly lawful for Koresh to acquire items in the first half of 1992, which might be made into destructive devices, if the actual manufacture did not occur until after an appropriate federal license had been acquired or registration occurred. The federal law requires a license for manufacture, not for acquisition of parts in preparation for manufacture. The BATF affidavit did not claim any effort to determine whether any machine guns or destructive devices had been registered between June 1992 and February 1993. [130]

Unfortunately, while the Supreme Court has announced a clear rule that warrants may not use stale information, many lower federal courts have been lax in enforcing this rule, and have allowed search warrants based on information that was many months, or even two years, old. [131] To give courts appropriate guidance, federal law should specify a cutoff period, such as six months, beyond which information should automatically be considered stale.*31

2. Irrelevant

Among the more prominent irrelevant issues in the warrant application are reports involving the abuse of children [132] committed by Koresh. Whether or not the allegations were valid, they did not involve the federal government. However, the investigations of allegations of child abuse by Koresh conducted by the State of Texas are featured in the affidavit of BATF agent Aguilera. The Aguilera affidavit does not mention, however, that the child abuse investigation had been closed for lack of evidence on April 30, 1992, [133] nearly ten months before the assault on Mount Carmel Center.

Another irrelevant and possibly misleading assertion in the affidavit was that a deputy sheriff heard a loud explosion and observed "a large cloud of grey smoke dissipating from ground level." [134] Aguilera was presumably attempting to strengthen the notion that "explosive devices" were possessed by Koresh. The explosion was quite possibly related to the construction of the tornado shelter that the Branch Davidians were building. Aguilera's statement fails to note whether the deputy sheriff who told Aguilera of the explosion also told him if he had investigated the matter and what he had found, or why he had not bothered to investigate.

Other allegations were even weaker, such as a claim by Marc Breault, Koresh's disaffected former lieutenant who had left the residence in 1989, that Koresh had falsely imprisoned a woman in June 1991. [135] The warrant application does not disclose that the FBI had investigated the case in April 1992, and closed the case in June 1992. [136]

After the BATF attack on Mount Carmel, Aguilera returned tocourt *32 to ask for an expanded search warrant. In the second warrant application,

Aguilera reported an incident of child sexual abuse by Koresh which had been alleged by a Texas social worker. No time frame for the alleged abuse was given. [137] Even after the massive shoot-out, Aguilera was apparently still determined to prejudice the courts by bringing up possible violations of Texas state law which, nearly a year before, the State of Texas had found no cause to pursue further. [138]

The September 1993 Treasury Department review offers justification for why BATF--which is not a child welfare agency--kept bringing up stale charges from the child abuse investigation: "While reports that Koresh was permitted to sexually and physically abuse children were not evidence that firearms or explosives violations were occurring, they showed Koresh to have set up a world of his own, where legal prohibitions were disregarded freely." [139] The Treasury Department theory would allow law enforcement agencies to use all allegations of any serious criminal activity to establish probable cause that other crimes were also being committed.

3. Absurd

The Texas investigation of child abuse did, however, lead to the only bit of information in the warrant application which suggested that Koresh represented a danger to anyone except other Branch Davidians. *33 According to the Texas social worker who had investigated child abuse allegations at Mount Carmel, Koresh "told her that he was the "Messenger from God,' that the world was coming to an end, and that when he "reveals himself the riots in Los Angeles would pale in comparison to what was going to happen in Waco, Texas.' Koresh stated that it would be a "military type' operation and that all the "non-believers' would have to suffer." [140] The social worker claims that this statement was made on April 6, 1992. Thus, the statement was allegedly made some three-and-a-half weeks prior to the start of the Los Angeles riots. [141]

III. The Final Element of Probable Cause

*33 Despite the concerted BATF investigation, as of December 1992 the Bureau believed that it had failed to amass enough evidence to create probable cause for a search warrant. [142] According to a confidential source, a memorandum from the FBI's San Antonio office dated five days prior to the BATF raid noted that "ATF intends to execute a warrant on 3/1 [143] . . . to date no information has been developed to verify the allegations." [144]

The Fall 1993 Treasury Department review of the BATF investigation asserts that probable cause existed much earlier. Assistant U.S. Attorney Bill Johnston determined that the threshold of probable cause *34 had been met by late November 1992. [145] Yet even the chronology of events in the Treasury Department report contradicts the post hoc assertion that probable cause existed by December 1992. The Treasury Department chronology notes that in January 1993, Aguilera had been seeking additional evidence to

establish probable cause. [146] The chronology further notes that a reporter was told by one of Aguilera's superiors in February 1993 that "he had not yet obtained warrants and was not sure he would be able to get any." [147]

Regardless of the Treasury Department's retrospective assertion of probable cause, the BATF's belief that probable cause did not exist until February 1993 helps to explain the approach taken by the BATF affidavit for a search warrant. Much of agent Aguilera's affidavit appears intended to convey a dislike and suspicion of Koresh and his followers without formally asserting that anything unlawful had been done. Some irony in the effort to condemn Koresh regardless of what he did appears in the final paragraph of the affidavit, where it is asserted both that persons engaged in violating the gun laws "employ surreptitious methods and means," and that they also "maintain records of receipt and ownership." [148]

Lacking probable cause, the BATF began an undercover operation at Mount Carmel in early 1993. On January 10, 1993, BATF agents set up surveillance cameras at a house three hundred yards away from the Davidian residence. After less than two weeks, the agents decided that "we weren't getting what we wanted" and decided to send an undercover agent into Mount Carmel. [149] The remote and undercover surveillance revealed no evidence of anything illegal. [150]

Unsuccessful efforts were also taking place away from Mount Carmel. In the December 1992 and January 1993 interviews, the only informants whom the BATF could find were disenchanted ex-Davidians *35 with very stale information. Three members of the Bunds family, who had left Mount Carmel before 1992, were interviewed. In these interviews, the Bunds described events occurring between 1989 and 1991. The Bunds were not knowledgeable about firearms and identified firearms by looking at pictures and remembering how rapidly the guns fired. All of the information from the Bunds was stale and unreliable. [151]

One witness, Marc Breault, did indicate that Koresh thought "gun control laws were ludicrous, because an individual could easily acquire a firearm and the necessary parts to convert it to a machinegun, but if a person had the gun and the parts together they would be in violation of the law." [152] Koresh was not quoted as having confessed to any such conjunction of events. Koresh was wrong about the law; acquiring the crucial parts to assemble a machine gun is as difficult under federal law as is acquiring an automatic machine gun.

[153] Still, Koresh's incorrect belief that the machine gun law was easy to evade might be considered by some people as evidence of an interest in the evading law.

All of the other interviews in the revived investigation were completed by January 25, 1993. [154] The BATF sent an undercover agent, Robert

Rodriguez, inside Mount Carmel this information was the only information obtained during the month of February. Rodriguez was never really a covert agent; Koresh was on to him from the start. [155]

Koresh played the guitar for Rodriguez, read from the Bible, and invited him to take training preparatory to joining the group. Koresh warned Rodriguez that "if he joined the Branch Davidians, he would be disliked because the Government did not consider the group religious and that he (Koresh) did not pay federal or local taxes because he felt he did not have to." [156] Aguilera went on to explain what seems to have been the basis for the BATF's belief that probable cause existed:

David Koresh told Special Agent Rodriguez that he believed in the *36 right to bear arms but that the U.S. Government was going to take away that right. David Koresh asked Special Agent Rodriguez if he knew that if he (Rodriguez) purchased a drop-in-Sear for an AR-15 rifle it would not be illegal, but if he (Rodriguez) had an AR-15 rifle with the Sear that it would be against the law. David Koresh stated that the Sear could be purchased legally. [157]

David Koresh stated that the Bible gave him the right to bear arms. David Koresh then advised Special Agent Rodriguez that he had something he wanted Special Agent Rodriguez to see. At that point he showed Special Agent Rodriguez a video tape on ATF which was made by the Gun Owners Association (G.O.A.). [158] This film portrayed *37 the ATF as an agency who violated the rights of Gun Owners by threats and lies. [159]

Based on the rambling fifteen-page affidavit by Aguilera which climaxed with the report of agent Rodriguez, Aguilera announced, "I believe that Vernon Howell, also known as David Koresh, and/or his followers . . . are unlawfully manufacturing and possessing machineguns and explosive devices." [160] Magistrate Green apparently agreed, and on February 25, 1993, issued a search warrant for machine guns and destructive devices and an arrest warrant for Vernon Howell, a.k.a. David Koresh, for possession of destructive devices. [161] The key evidence appears to have been Koresh's religious views, pro-gun rights views, criticism of federal gun laws, and hostility toward the BATF, all of which are protected by the First Amendment.

On March 19, 1993, as part of the negotiations between the government and Koresh, Koresh was allowed to see the original search warrant. Accordingly, any law enforcement purpose for keeping the warrant secret from the public vanished. Nevertheless, the warrant remained sealed until after the April 19, 1993 fire at the Branch Davidian compound. [162] Had the warrant been dissected while the siege was in progress, the fact the warrant was built on falsehoods and distortions might have become an important topic of discussion in the media, and might have created pressure for the federal government to pursue only peaceful outcomes. By the time the warrant was

released, however, Mount Carmel was in ashes and the warrant was irrelevant.

Although federal courts have agreed that search warrants and supporting affidavits should be open to inspection by the public, a warrant may remain sealed when the government demonstrates a compelling *38 state interest in maintaining secrecy. [163] Even in such a case, as much of the warrant and affidavit as possible is supposed to be released, while confidential portions can be redacted. [164]

At Waco, once the government voluntarily gave the warrants and warrant application to the Branch Davidians, there was no longer any law enforcement interest in keeping the warrant hidden from the American people and the media. While the magistrate's decision to allow the warrant to be kept secret appears inconsistent with established case law, there was nothing that could be done to reverse the decision at a time when reversal could have mattered.

As a prophylactic to future abuse of the sealing process, it is necessary for Congress to amend the Federal Rules of Criminal Procedure to specify that after the service of a search warrant, the warrant and all supporting documents should be made available to the public within twenty-four hours, unless the government demonstrates by clear and convincing evidence that there is a substantial risk that specific harm may result from unsealing the warrant. Mere generalized assertions by the government that unsealing the warrant would compromise an investigation should not be sufficient.

Many days after the BATF assault, Magistrate Green issued another sealed warrant which dramatically expanded the items to be searched for at Mount Carmel Center. Some of the expansion was to items relevant to investigation of the possible charges related to the Branch Davidian resistance to the BATF's serving of the first warrant (spent cartridges, bullets, bullet holes, blood, and the like), but the new warrant was also for video-and audiotapes which would indicate criticism "of firearms law enforcement and particularly the Bureau of Alcohol, Tobacco and Firearms (ATF)," as "evidence of Howell or other cult members' motive for wanting to shoot and kill ATF agents." [165]*39

IV. Restoring the Fourth Amendment

Magistrate Green was apparently quite sloppy, but his decision to issue the warrant was not necessarily incorrect. Because Green relied on Aguilera's false statements that Koresh's spare parts purchases were actually purchases of conversion kits, it was not unreasonable for Green to conclude that Koresh might be converting semi-automatics into machine guns. On other hand, if Magistrate Green had been careful, he might have immediately noticed small problems with the warrant application (such as getting statutory definitions wrong), which might have led him to interview Aguilera thoroughly enough

to find the big problems with the warrant, such as Aguilera's often misleading presentation of the facts.

The framers of the Fourth Amendment envisioned an independent judiciary exercising oversight of the executive branch, making sure there existed probable cause before privacy rights could be infringed by government. In conformity to the Fourth Amendment, the Supreme Court has long insisted that a warrant may only issue upon the determination of a neutral and detached magistrate that probable cause exists to believe that the search will yield evidence of crime. [166] The magistrate is to serve as something more than a rubber stamp. [167]

Magistrate Green did not so much as open the United States Code *40 to determine that the statute Koresh was alleged to have violated was merely a definition of "destructive device." He apparently did not notice that virtually no one who claimed to have seen or heard Koresh's machine guns was alleged to have knowledge of firearms, or that most of the allegations did not assert possible violations of federal law, or that almost all the evidence was over six months old.

Defenders of the BATF's raid took heart in the testimony of Gerald Goldstein, president of the National Association of Criminal Defense Lawyers, that the warrant application was probably valid under existing federal law:

It . . . is not terribly atypical . . . it is chock full of irrelevant, highly inflammatory material. That's not unusual . . . . It definitely has matters that fall well beyond . . . either the expertise or jurisdiction of the particular agency . . . . The fact that the warrant may lack probable cause . . . quite frankly. To the lawyers that were out there in the trenches trying this case, it didn't make a hill of beans. [168]

Goldstein also noted that deliberately inflammatory statements would not matter, nor would the fact that outright lies and perjured statements were used: "the judge would simply excise that out, and *41 you'd redact it." [169] He went on to complain that virtually none of the flaws in the warrant, including staleness and overbreadth, were uncommon or would be used to exclude evidence in most real-world situations. [170]

A. The Exclusionary Rule

The most important reform, Goldstein suggested, was to eliminate the "good faith" exception to the exclusionary rule. The exclusionary rule, first announced in 1914, prohibits the use of evidence seized as a result of government conduct in violation of the Constitution. [171] The exclusionary rule has four purposes: first, it deters illegal conduct by the police, since they know evidence that is illegally seized cannot be used. [172] Second, the rule protects "the imperative of judicial integrity," by ensuring that courts do not become "accomplices in the willful disobedience of a Constitution they are sworn to uphold." [173] Third, the exclusionary role reinforces "popular trust

in government" by "assuring the people--all potential victims of government conduct--that the government [will] not profit from its lawless behavior." [174] This third purpose is distinct from the first purpose (to affect government behavior), in that it aims to reassure the people about how the government will behave, so as to increase popular confidence in government. Fourth, besides promoting popular support for the government, the exclusionary rule promotes popular adherence to the rule of law. As Justice Brandeis wrote: "If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law, the end justifies the means . . . would bring terrible retribution." [175]

All of these purposes were undermined by the 1984 Supreme Court decision in *United States v. Leon*. That decision allows the introduction of evidence seized by police relying in "good faith" on a search *42 warrant, even when the warrant is later found to lack the Constitutionally required probable cause. [176] Since the BATF agents conducting the Waco raid were acting in "good faith" on a warrant issued by a neglectful magistrate, no evidence they found could be excluded--even if there was no probable cause.

When creating the "good faith" exception, the Supreme Court majority reasoned that the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges. [177] Since there exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment, there would be only marginal or non-existent benefits to excluding evidence found as a result of good-faith reliance on a warrant. [178]

Whatever appeal the Supreme Court majority's reasoning may have had in the abstract in 1984, the Leon rationale has been disproved by the sad experience of law enforcement since then, including at Waco. First, Leon argued that judges and magistrates do not seek to subvert the Fourth Amendment. [179] Yet while judges or magistrates may not be hostile to the Fourth Amendment, many are indifferent to it. [180] Like Magistrate Green, they make little effort to review a warrant application for accuracy. Observed Koresh's attorney, Dick DeGuerin:

As practicing lawyers, we know that usually judges rubber stamp the applications for search warrants . . . . [T]he way we made progress in the jurisprudence of this country, was requiring search warrant applications to be accurate and to have enough probable cause in them to justify a supposedly neutral and detached magistrate into authorizing a search. But Leon wipes that out.

If you have got some judge that doesn't carefully read such warrants--and, cynically I say, that happens all the time--then he just rubber stamps it and that's the end of the inquiry. [181]

*43 Leon removes the incentive for a magistrate to be sure that he only issues search warrants when there is probable cause, since his issuance of the warrant cannot be meaningfully challenged later.
Second, Leon promotes police misconduct. The "good faith" means that there is little incentive for officers seeking search warrants to tell the whole truth, and not to rely on informants' tips which they suspect to be lies. When other officers conduct a search resulting from the warrant, all the evidence will be admitted, since they were acting in "good faith" on the warrant. The "good faith" exception does not apply if the police knowingly or recklessly misled the magistrate, but proving that a police officer actually knew an informant was lying is nearly impossible. Whether the magistrate issues the warrant because he is too lazy to examine it carefully, or because he does examine the warrant application carefully, and is deceived by an informant's lies in support of the application, the evidence will still be admissible.

The third purpose of the exclusionary rule--promoting popular confidence in government--has also been undermined. Waco is merely the tip of the iceberg of persons subjected to violent "searches" and "dynamic entries" into their homes as a result of warrants that are based on lies and which lack probable cause. [182] Such constitutional misconduct has played a major role in creating the current climate of mistrust of government.

Finally, it is true that many criminals purport to excuse (to themselves) their own criminality by telling themselves that the government also commits crimes. The criminals who perpetrated the heinous bombing of the federal building in Oklahoma City may fall in this category. [183]

DeGuerin was correct to tell Congress: "If you can undo Leon, that would be a giant step in the right direction." [184] While the Supreme Court sets the minimum standards for what kind of evidence can be admitted in court, Congress can set higher standards for federal courts. *44 Thus, Congress should enact a statute which prohibits all use in federal courts of evidence seized in violation of the Constitution. If a search was illegal, the product of the search should not be allowed in court.

Unfortunately, some persons in Congress, wrapping themselves in the mantle of "law and order," are pushing legislation which would go even further than Leon in promoting bad faith, lawless police conduct. For example, a 1995 bill sponsored by then Senator Robert Dole would wipe out the exclusionary rule entirely in federal courts. [185] Instead, persons victimized by illegal searches would be allowed to sue the government, although the suit could recover no more than $30,000 in actual damages, no matter how great the damage that was caused by the illegal search. [186] In other words, evidence would be admitted, even when it was clear that the police acted in bad faith and in knowing violation of the Constitution.

Another bill, H.R. 666, [187] which passed the House but never came up in the Senate, went further than Leon, but not as far as the Dole bill. H.R. 666

would allow use of evidence when the police officer reasonably believed that seizing the evidence was lawful, even when the police officer did not first obtain a search warrant. Amendments to the bill specified that the expansion of immunity from the exclusionary rule would not apply to the BATF and the IRS. [188]

Supporters of legislation such as Dole's bill claim that they are only objecting to the exclusionary rule, which they deride as a "technicality." But really, their objection is to the Fourth Amendment itself. The exclusionary rule merely establishes a practical mechanism to enforce the Fourth Amendment. The Fourth Amendment is not a "technicality." Government conduct in violation of the Constitution is a far more serious breach of law and order than is the conduct of a lone individual who violates a mere statute or regulation.

The proponents of exclusionary rule destruction assert that allowing the victims of illegal searches to sue the government will actually be a better deterrent to police misconduct than is the current exclusionary *45 rule. It is difficult to believe that they take this argument seriously, when they propose tort remedies which do not even allow the victims of illegal conduct to recover their actual damages. An effective tort remedy would be a good supplement to the exclusionary rule, especially if it forced rogue agencies to pay the full cost of their misdeeds. But because most victims of illegal searches would rather put the incident behind them rather than spend years in court and thousands of dollars in attorneys fees suing the most powerful litigant in the world (the United States government), it is implausible to suggest that a tort remedy could fully replace the benefits of the exclusionary rule.

Persons hostile to the Fourth Amendment exclusionary rule are wrong when they tell the public that keeping illegal evidence out of court harms law enforcement. A 1979 study (conducted before the weakening of the exclusionary rule that took place in the 1980s and 1990s) found that in only a small percent of federal prosecutions was even a single piece of evidence excluded as a result of the exclusionary rule. [189] The impact is even lower in violent crimes, for search and seizure violations disproportionately cluster in the investigation of victimless crimes, including possession of firearms without proper paperwork.

A streamlined administrative action should be established to allow victims of illegal searches to recover their damages without having to go through the long process of a lawsuit in federal court. This administrative remedy should supplement, not replace, the exclusionary rule. [190]

B. Providing Better Guidance to Courts

Until 1984, the Supreme Court required that warrants based on tips from informants must pass a two-prong test, as set forth in the case of *Aguilar v.*

Texas. [191] The first prong was the informant's basis of knowledge. For example, if the informant claimed that somebody possessed unregistered machine guns, how did the informant know about the machine guns? Had he gone shooting with the gun-owner and actually *46 fired the machine guns (a very strong basis of knowledge) or had he just heard somebody else say that the gun-owner had expressed interest in machine guns (a very weak basis of knowledge, used in the Waco warrant). If illegal activity, such as drug sales, was allegedly going on inside someone's home, had the informant been inside the home and seen activity (strong basis of knowledge), or seen a suspicious pattern of people coming and going to the home (a moderate basis of knowledge) or just heard a rumor about the drug sales (weak basis of knowledge)?

The second prong of the two-part test was the informant's veracity. Was there reason to believe that the informant, even if he had a good basis of knowledge, was telling the truth? The veracity prong was frequently examined for two factors: credibility and reliability. Regarding credibility, was the informant someone with a strong personal motive to lie such as a criminal who was working as an informant in order to receive more lenient treatment for his own crimes? Conversely, did the informant have nothing personal to gain by conveying the information?

The reliability factor examined whether the informant, even without a motive to lie, was a good observer of events. One way to test reliability would be for the police to corroborate some of what the informant had said. For example, if the informant said that a suspect lived at a particular address, the police could verify the information, either by using a phone book, or by observing who came and went at the *47 particular address.

Verification of suspicious activity would be more important than verification of innocent activity. For example, if an informant said that someone ran a crack house at a particular address, the police could corroborate the tip by observing many persons coming and going from the house at unusual hours, but only spending a few minutes, and coming out with a glassy look in their eyes; this corroboration would be much stronger than merely corroborating that the suspect happened to live at the house in question.

The Supreme Court's two-part test provided structured guidance to magistrates who were asked to issue warrants based on informant tips. The two-part test likewise guided law enforcement officers who were seeking to obtain a search warrant. They knew that they should investigate the informant's basis of knowledge and veracity, and that corroborating incriminating information from the tip would be especially important. The net effect was that informant tips would rarely be the only basis for a search warrant. Instead, informant data would be the starting point for a more thorough investigation to build probable cause. The two-prong test promoted good police work.

But like many other civil liberties protections, the Aguilar two-prong test fell victim to the drug war. In 1983, the Supreme Court heard *Illinois v. Gates* involving a search warrant which three lower courts had ruled clearly failed the two-part test. [192] Someone had written an anonymous poison-pen letter accusing a married couple of being drug dealers. [193] The letter indicated no basis of knowledge. [194] The writer did not even know the couple's address. [195] The police did attempt to corroborate some information from the tip, but the only information corroborated was of innocent conduct. The husband flew down to Florida where he met his wife, and the two were observed driving north, in the direction of Disneyworld. [196]

Issuing a search warrant for the couple's home was plainly wrong *48 under the Aguilar two-prong test, as a trial court, intermediate court of appeals, and the Illinois Supreme Court all found. [197] The United States Supreme Court did not disagree. Instead, the Court majority, in an opinion written by Justice Rehnquist, scrapped the two-prong Aguilar test (without actually overruling Aguilar), and replaced it with a "totality of the circumstances" test. [198]

In contrast to the structured Aguilar test, the amorphous "totality of the circumstances" test allows search warrants even if there is no evidence regarding the informant's basis of knowledge or no demonstration of the informant's veracity. [199] In theory, magistrates should still consider basis of knowledge and veracity in assessing the totality of the circumstances. If all magistrates were as conscientious as Justice Rehnquist, replacing the two-part test with the totality test would not make a major difference. But in real-world law enforcement, where many magistrates are inclined to rubber-stamp warrant applications, the totality standard means that magistrates are less likely to take a serious look at the informant's basis of knowledge and reliability.

For example, in the Waco warrant application, the magistrate made no inquiry into the credibility or reliability of the BATF agent Aguilera's informants. If the magistrate had, he might have discovered that Aguilera's principal informant, Marc Breault, had very poor credibility (he was a self-described "cult-buster" with what he called a "vendetta" against Koresh [200]) and even worse reliability (he was legally blind [201]).

An example of the kind of searches which the Gates standard (which has been adopted by many state courts) encourages was the search that led to the death of the Reverend Accelyne Williams. Reverend Williams was a substance abuse counselor in a poor neighborhood in Boston. [202] An informant gave the police the address of a drug dealer, *49 but the address did not include an apartment number. Freed by Gates from any requirement to corroborate anything the informant said, the police promptly obtained a search warrant. Of course, if the police had attempted corroboration, they

would have found that the apartment the police believed to be in question belonged to a seventy-year-old retired Methodist minister, and there were no signs of drug activity at the apartment. Armed with the search warrant, and plenty of firearms, the Boston police executed a dynamic entry, breaking into the Reverend Williams' apartment, chasing him into his bedroom, shoving him to the floor and handcuffing him while pointing guns at his head. He promptly died of a heart attack. [203]

Given the real-world impact of Gates' lowering of standards for police work, including the many BATF cases built on informants, the United States Supreme Court should overrule Illinois v. Gates. Further, Congress should exercise its power to set standards for federal courts, and should enact a statute mandating that the two-prong test be used when magistrates are asked to issue warrants based on informants. Congress should bar the use of evidence in federal courts which is obtained in violation of the two-prong test.

C. Statutory Reform

The search warrant changes we have proposed would not alter the substance of the law. They would simply enforce the Fourth Amendment's promise that Americans should not be subjected to searches without genuine probable cause.

Combining most of the policy suggestions in this article, we propose the following Fourth Amendment enforcement statute:

Chapter 205 of title 18, United States Code, is amended by adding the following new section:

(A) Section 3104A. Issuance of Search Warrants

(a) Notwithstanding the provisions of Title 28, Section 2072 or any *50 other law or rule, no warrant for search and seizure shall issue:

(1) unless the application for such warrant and affidavit has been reviewed, approved, and signed by an attorney for the government and, in the case of a warrant based upon sworn oral testimony, unless the attorney for the government:

(A) is a party to any telephonic or other communication between the magistrate or state judge and each person whose testimony forms a basis for the warrant and each person applying for the warrant, and
(B) verifies to the magistrate or state judge that such attorney approves the issuance of the warrant;

(2) unless supported by affidavit or sworn oral testimony of one or more credible and reliable persons with personal knowledge of the facts set forth in the affidavit or sworn oral testimony and such affidavit or sworn oral testimony establishes the factual basis for the person's or persons' knowledge and veracity and reliability;
(3) based in any part upon hearsay evidence which would not be admissible in

federal court pursuant to the Federal Rules of Evidence;
(4) unless the facts establishing probable cause became known or are verified not more than thirty days prior to the issuance of the warrant, except where an offense is to be committed at a specific future time;
(5) unless the law enforcement officer applying for the warrant provides, as part of the application, an affidavit or sworn oral testimony containing any known evidence which would tend to support denial of the application;
(6) unless the affidavit or sworn oral testimony of a person who qualifies as an expert sets forth such person's qualifications and the basis of his conclusions, if the evidence upon which the application is based involves scientific, technical, or other specialized knowledge regarding whether an item or items is a firearm or other item as defined in 18 U.S.C. S 921(a) or 26 U.S.C. S 5845.

(b) An order to seal a warrant, affidavit, record of testimony, related papers, or voice recording shall not extend beyond the shorter of: thirty (30) days from the date of entry of such order; or the execution of the warrant. Such order may be renewed upon a showing of good *51 cause. An order to seal may only be based on a demonstration, by clear and convincing evidence, that
there is a substantial risk of injury to persons or property if an order to seal is not granted.

(c) Notwithstanding any other law or rule, evidence which is obtained as a result of the execution of a warrant, but which warrant was issued without compliance with all provisions of subsection (a) shall not be admissible in any court of the United States and shall not be used by the United States for any purpose.

(B) Federal Rule of Criminal Procedure 41(f) of title 18, United States Code, is amended by adding: "Evidence that would otherwise be suppressed may not be admitted based on a government official's good faith in conducting the search and seizure or in obtaining or relying on the warrant."

The Waco warrant application was deeply flawed, and riddled with misleading or false statements of law and fact. The warrant application illustrates the low standards to which some federal law enforcement agencies, and United States Attorney's offices, have declined as a result of lax attitudes towards warrants in too much of the judiciary, including a majority of the United States Supreme Court. As a remedy, Congress should enact legislation restoring search and seizure standards to full strength.

Footnotes

1. Research Director, Independence Institute, J.D. 1985, University of Michigan Law School; B.A. in History, 1982, Brown University. This article is based on, but revised from, a chapter of the authors' book No More Wacos:

What's Wrong with Federal Law Enforcement and How to Fix It (1997). The Independence Institute world-wide web site includes a Waco page offering a wide variety of Waco resources, including, inter alia, a link to the search warrant application discussed in this article. Independence Institute (visited Feb. 7, 1997).

2. Research Coordinator, National Rifle Association, Ph.D. in Government, 1970, University of Virginia; B.A. in Political Science, 1964, University of California at Riverside.

3. Illinois v. Gates, 462 U.S. 213 (1983).

4. Aguilar v. Texas, 378 U.S. 108 (1964).

5. Daniel Wattenberg, *Gunning for Koresh*, Am. Spectator, Aug. 1993, at 39. An internal Treasury Department investigation, which was later obtained by the Associated Press pursuant to the Freedom of Information Act, confirms that the BATF failed to prevent sexual harassment and disciplined employees who complained about it. For example, one criminal investigator who had filed a sexual harassment complaint was threatened with a thirty-day suspension for "engaging in repeated criminal conduct." The "repeated criminal conduct" consisted of three separate guilty pleas to failure to control his barking dog. *Treasury Report Confirms BATF Harassment*, Gun Week, June 24, 1993, at 3.

6. *ATF Settles Race Suit*, Nat'l L.J., July 22, 1996, at A8. The suit was settled in 1996 with the BATF agreeing to pay 5.9 million dollars in damages to 241 current and former agents. Id.

7. Stephen Labaton, *Saved from Extinction, Agency Faces New Peril*, N.Y. Times, Mar. 4, 1993, at A5.

8. 60 Minutes (CBS television broadcast, Jan. 10, 1993). See also Bob Lesmeister, *Bad Influence: Corruption within the Ranks of BATF*, American Firearms Industry, May 1995, at 40, 61.

9. *Id.*

10. *Id.*

11. Stuart A. Wright, Armageddon in Waco: Critical Perspectives on the Branch Davidian Conflict 88 (1995).

12. Affidavit of Davy Aguilera, Feb. 25, 1993, reprinted in Activities of Federal Law Enforcement Agencies Toward the Branch Davidians: Joint Hearings Before the Subcomm. on Crime, and the National Security, International Affairs, and Criminal Justice, 104th Cong. 996-1002 (1995)

[hereinafter Aguilera]. A copy on the internet is also available at <http:// www.shadeslanding.com/firearms/ read6.html> (visited Mar. 7, 1997).

13. U.S. Dept. of Treasury, Report of the Bureau of Alcohol, Tobacco, and Firearms, Investigation of Vernon Wayne Howell also known as David Koresh 32, 37 (Sept. 1993) [hereinafter Treasury Report].

14. Interoffice Memorandum from Christopher Culyer to Michael D. Langan, Office of the Assistant Secretary for Enforcement (Feb. 26, 1993) reprinted in Treasury Report, supra note 13, at E-3.

15. Activities of Federal Law Enforcement Agencies Toward the Branch Davidians: Joint Hearings Before the Subcomm. on Crime and National Security, International Affairs, and Criminal Justice, 104th Cong., 1st sess. 762-63 (1995) [hereinafter Joint Hearings]; James R. Lewis, From the Ashes: Making Sense of Waco 92 (James R. Lewis, ed. 1993); Clifford L. Linedecker, Massacre at Waco, Texas 168 (1993) (Wheeler contacted NBC and ABC affiliates in Dallas the day before the raid, and told them that something big was shaping up).

16. *Id.*

17. Ronald Kessler, The FBI 420 (1993).

18. Joe Rosenbloom, III, *Waco: More than Simple Blunders?* Wall St. J., Oct. 17, 1995, at A20.

19. *At cultists' Trial, Fights and Tears*, N.Y. Times, Jan. 24, 1993, at A9. (BATF Agent Barbara Maxwell's testimony at the January 1994 Branch Davidian trial).

20. Carol Vinzant, *ATF-Troop*, Spy, Mar. 1994, at 47.

21. 60 Minutes (CBS television broadcast, May 23, 1993).

22. The BATF's public information officer, Sharon Wheeler, emphasized in testimony that "showtime" was not the name of the operation, but the word "to be used to alert everyone that the agents had stepped off the trucks." Joint Hearings, supra note 15, at 795.

23. There is a fairly simple, non-suspicious explanation: The deliveries not accepted at the Mag Bag were Cash on Delivery (C.O.D.). Aguilera, supra note 12, at 996. Firearms components ordered in quantity cost money. The safer place to keep the large sum of money for which to pay for a delivery which might come at any time was at the Mount Carmel Center, rather than at the Mag Bag, which was just a rented garage. Apparently there was cash at the Mt. Carmel Center because as soon as the siege began, Koresh sent out $1,000 to take care of the children, and promised more money if and as needed. Transcripts of BATF Audio Tapes of the Negotiations between Federal Law Enforcement and the Branch Davidians (Mar. 20, 1993) (on file with author Kopel).

24. Treasury Report, *supra* note 13, at 17, 74.

25. *Id.* at 17.

26. Jim McGee & William Clairborne, *The Transformation of the Waco "Messiah,"* Wash. Post, May 9, 1993, at A19; Committee on Government Reform and Oversight, Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians, H.R. No. 104-749, at 13 (Aug. 2, 1996). [Hereinafter Committee Report]. Download full text of Report. Or to read on-line, go the Library of Congress "Thomas" site, and enter the Report number, 104-749.

27. Ken Fawcett, Blind Justice: A Chronology of the Historic Trial of Eleven Branch Davidians in January 1994, at 26 (2d ed. 1994) (testimony of Karen Kilpatrick).

28. Interview by the National Rifle Association with Henry S. McMahon, Jr. & Karen Kilpatrick, Washington, D.C. (May 25, 1993), at 3, 26 (on file with author Blackman) [hereinafter Interview]; James L. Pate, *Waco: Behind the Cover-Up*, Soldier of Futune, Nov. 1993, at 38. The expectation of skyrocketing prices was also given as the reason for investing in a huge quantity of ammunition. *Id.*

29. Interview, *supra* note 28, at 105-08.

30. *Id.* Roden's first escape was in 1993, and he was quickly recaptured. Carol Moore, The Davidian Massacre 18 (1995) (an earlier version of the book is available on the Internet at <http:// www.shadeslanding.com/firearms/waco.massacre.html> (visited Jan. 31, 1997)); Pete Slover & Diane Jennings, *Source of Money for Davidian Sect Remains a Mystery*, Dal. Morn. News, Mar. 8, 1993, at A1. Roden escaped again in September 1995, speedily picked up some cash (perhaps from his ex-wife, who currently gives tours of the Mount Carmel Center), and headed for New York. He was apprehended at the Israeli consulate, attempting to obtain a visa to Israel. Carol Moore, Update on Waco, Oct. 8, 1995 (email broadcast) (on file with author Kopel).

31. Some states, but not Texas, prohibit machine gun ownership entirely. About 15,500 machine guns are lawfully owned by Texans. Alan Korwin & Georgene Lockwood, The Texas Gunowner's Guide 84 (1996). A 1986 federal law bans possession of most machine guns manufactured after May 19, 1986, but does not prevent acquisition of machine guns manufactured before that date. 18 U.S.C. S 922(o) (1994).

32. The original bill had proposed regulating handguns the same as machine guns, and the NRA objected. When this provision was removed, the bill was speedily enacted.

33. Aguilera, *supra* note 12, at 1000.

34. A Federal Firearms License is legally required in order to sell guns as a business; no license is required to sell merchandise at guns shows, as long as the merchandise is something other than guns. *See* 18 U.S.C. SS 921, 922 (1994).
The BATF apparently did not check whether Mike Schroeder (one of the regular recipients of UPS packages) was a licensed machine gun owner or a licensed gun dealer. (He was not.) In the official Treasury Department Report of the BATF investigation, the Treasury Department misleadingly suggested that Aguilera checked lots of names--"neither Koresh nor any of his known followers owned such a registered machinegun"--whereas Aguilera's affidavit only suggested a few names know and few checked. Treasury Report, *supra* note 13, at 24. BATF Directory Higgins later reported (inconsistent with Aguilera's affidavit) in a letter to Rep. Jack Brooks on June 17, 1993, that on January 25, 1993, the BATF checked the names of all adults known to be a Mount Carmel to determine whether they were licensed to deal in firearms or registered National Firearms Act weapons owners, with negative results. It is possible that Aguilera's initial check of a small number of names was supplemented later with an incomplete but longer list, perhaps based on intelligence gleaned by the undercover agent. The accuracy of Higgins' statement, however, seems dubious, not only because of inconsistency with the affidavit, where it would have strengthened it. In addition, however, the poor surveillance work (Committee Report, *supra* note 26, at 11-12) and the FBI negotiators' unfamiliarity with the names and spelling of names of residents of Mount Carmel, argue against the possibility of such a thorough check. In addition, the BATF records custodian testifying at the eventual trial of the surviving Branch Davidians, noted only 14 names having been checked. Trial Transcript, United States v. Brad Branch, Crim. No. W-93-CR-046 at 4955-4958 (W.D.Tex., 1994) [hereinafter "Trial Transcript"], It should be noted, however, that BATF underestimated the number of persons at the ranch by about one-third, and thus could not run checks on a large number of persons at the ranch.

35. Roll Call Training (visited Feb. 21, 1997) <http:// www.machinegunnews.com/busey.html> (providing a transcript of Tom Busey's remarks and other BATF statements that the database is now reliable). *See generally* James H. Jeffries, III, FOIA Produces Evidence of BATF Institutional Perjury, Gun Week, Sept. 10, 1996, at 4; James L. Pate, *Shadows of Many Doubts*, Soldier of Fortune, Sept. 1996, at 48-49, 70.

36. Roll Call Training, *supra* note 35; Jeffries, *supra* note 35, at 4.

37. *Id.* According to the agenda for a BATF "Firearms and Explosives Data Integration Meeting" held in Martinsburg, West Virginia, Nov. 9-10, 1994, two months before, an NFR&TR error rate was found to be fifty percent; that rate had been reduced to two percent for common errors. *Id.*

38. Brady v. Maryland, 373 U.S. 83 (1963).

39. Jeffries, *supra* note 35, at 4; Pate, *supra* note 35, at 49.

40. *Id.*

41. *Id.*

42. *Id.* (citing United States v. LeaSure, criminal no. 4:95CR54 (E.D. Vir., Newport News Div., May 21, 1996)).

43. Aguilera, *supra* note 12, at 1001.

44. The only unlawful item would be the grenade launcher if it were an M-79.

45. See Aguilera, *supra* note 12.

46. Treasury Report, supra note 13, at 73.

47. Ann L. Brownson, 1993 Judicial Staff Directory 726 (7th ed. 1992).

48. Aguilar v. Texas, 378 U.S. 108, 111 (1964).

49. Most of the federal machine gun laws are nominally tax laws, because they date from 1934. At the time, Congress did not imagine that the Interstate Commerce Clause gave Congress a general police power to regulate simple firearms possession. Accordingly, the machine gun registration laws were enacted as supposedly necessary to carry out Congressional power to tax machine
gun transfers.

50. 26 U.S.C. S 5845(f) (1994).

51. 26 U.S.C. S 5861 (1994).

52. Gerald Goldstein, of the National Association of Criminal Defense Lawyers would later testify: "No question, it's sloppy. I would suggest that day in and day out courts affirm arrests of individuals even though the citation to the Code is wrong ... convictions are even upheld when an indictment contains the wrong citations." Joint Hearings, supra note 15, at 165.

53. Aguilera, supra note 12, at attachment D.

54. 26 U.S.C. S 5845(b) (1994).

55. 26 U.S.C. S 5845(b).

56. Aguilera, supra note 12, at 996.

57. *Id.*

58. 26 U.S.C. S 5845(b). The "designed or intended" language is applicable to "destructive devices" (such as bombs), which are an entirely separate legal category. 26 U.S.C. S 5845(f).

59. Aguilera, supra note 12, at 996.

60. 26 U.S.C. S 5845(f).

61. 26 U.S.C. S 5845(f).

62. See Letter from Mark Barnes, Attorney, to William T. Earle, Deputy Assoc. Dir. for Regulatory Enforcement Programs, BATF (Mar. 8, 1996) reprinted in Testimony of Tanya K. Metaksa Before the House Appropriations Subcomm. on Treasury, Postal Service and General Government (April 25, 1996) (describing alleged errors).

63. See Aguilera, supra note 12.

64. *Id.*

65. A "Sten Gun" is a type of British submachine gun used during World War II. Ian V. Hogg, The Illustrated Encyclopedia of Firearms 288-89 (1978).

66. Aguilera, supra note 12, at 1008-09.

67. See, e.g., Gerard Metral, A Do-It-Yourself Submachine Gun (1995).

68. Aguilera, supra note 12, at 996.

69. *Id.* at 1000.

70. Properly speaking, an "AR-15" refers only to a machine gun. There are a large number of semi-automatics which use designs derivative of the AR-15, but the guns are never formally designated as simply an "AR-15." Rather, the designation usually includes "AR-15" as part of a longer name (i.e., "Colt AR-15 Sporter"). It is common, although inexact, for the semi-automatic guns to be called AR-15s. Such imprecision in gun magazines, where semi-automatics are often called automatics, is more acceptable than in legal documents where different words suggest different legal restrictions.

71. Lewis, supra note 15, at 83-84.

72. The Treasury Report got the kits' name right, but still insisted that they were conversion kits: "The parts in the kit can be used with an AR-15 rifle or lower receiver to assemble a machinegun .... The parts in the E-2 kit also can be used to convert an AR-15 into a machinegun." Treasury Report, supra note 13, at 23-24. The statements are plainly false. The Treasury is required by law to regulate actual conversion kits as if the kits were machine guns. 26 U.S.C. S 5845(b). The Treasury so regulates actual conversion kits, but does not apply the regulation to E-2 kits.

73. 26 U.S.C. S 5845(b).

74. *See, e.g.*, Duncan Long, The AR-15/M16: A Practical Guide 93-103 (Paladin Press1985).

75. A machine gun expert explains the complexity of converting a semiautomatic rifle to automatic:

If time and effort are of no consequence, any firearm, even a lever-action rifle, can be converted to fully automatic fire. Converting a semiautomatic- only AK to automatic fire requires a great deal of skill and knowledge and no small amount of effort and equipment. Without being too specific, the procedure is more or less as follows:

1) A portion of the receiver must be modified. A hole through each side of the receiver (larger on one side than the other) must be precisely located (to within 0.0015") and drilled to accept the axis pin for the auto safety sear and its coil spring. This special coil spring also retains the hammer and trigger pins. If not installed correctly, the hammer and trigger axis pins will not be retained, and these components will fall out of the receiver. A slot must also be carefully milled into the rightside bolt- carrier rail to accept the auto safety sear. The three new components required are not easily procured or fabricated.
2) The hammer must be built up by welding and then with great skill re-shaped to provide a notch not present on the semiautomatic-only version.
3) An extension must be added at the rear of the sear by welding and then re-shaped to contact the selector lever.
4) A portion of the selector-lever stop on the rightside exterior of the receiver must be removed and another detent milled into the receiver for the new semiauto position.
5) The bolt carrier must be built up by welding and then re-shaped to actuate the auto safety sear.
If welded components are not subsequently and properly heat-treated, wear will be accelerated and these parts will fail in a short period of time, often with dangerous consequences. Furthermore, if this conversion is performed on an AKM type with a sheet-metal receiver, failure to install a completely unavailable five-component, anti-bounce mechanical drag device on the hammer (especially if the firing pin is not spring-retracted) will probably result in a disastrous ignition out of battery.

Peter G. Kokalis, *Full Auto*, Soldier of Fortune, Dec. 1989, at 16.

76. Aguilera, supra note 12, at 998. As discussed above, Aguilera's use of the phrase "AR-15" to identify a semi-automatic firearm was a technical error. See supra note 70.

77. Aguilera, supra note 12, at attachment D.

78. See Aguilera, supra note 12.

79. Treasury Report, supra note 13, at B-164.

80. The expert goes on to point out that automatic sears (which are the key component for turning a semi-automatic into an automatic) could have been manufactured by the Branch Davidians; alternatively, the lower receivers of a semi-automatic could be unlawfully modified to allow automatic operation. Id. at B-164 to 165. The BATF affidavit, it should be remembered, provides no evidence of the Davidians building their own automatic sears, or illegally modifying the lower receivers of any firearm.

The sear is a pivoting bar that forms the link between the trigger and the hammer. In an automatic, the hammer falls repeatedly, even though the

trigger is not pressed repeatedly; accordingly, automatic firearms require a special sear.

81. *Id.* at B-182.

82. Aguilera, supra note 12, at 1008.

83. Lewis, supra note 15, at 84. The receiver is the part of a rifle or shotgun that holds the bolt, firing pin, mainspring, trigger group, and ammunition feed system. R.A. Steindler, The Firearms Dictionary 189 (1970).

84. These details obviously could not retroactively validate the warrant for the initial raid.

85. Earl Dunagan, Application and Affidavit for Search Warrant (April 13, 1993) (copy on file with author Kopel).

86. *Id.*

87. Aguilera, *supra* note 12, at 1000.

88. *Id.* at 1002.

89. Treasury Report, *supra* note 13, at 123.

90. R.W. Bradford, *There's No Kill Like Overkill*, Liberty, Aug. 1993, at 31. There are actually some differences, since a license is not needed to produce small quantities of alcohol for personal use.
Professor Albert W. Altschuler's defense of the warrant used almost the same example as justifying a warrant for bootlegging. The example was changed to subtract the hostile wife, and to add a suspect who denounced alcohol taxation and the BATF, and who expressed a love of moonshine. Joint Hearings, *supra* note 15, at 811.

91. Aguilera, *supra* note 12, at 1006-07.

92. Bureau of Alcohol, Tobacco and Firearms, 1992 Explosives Incidents Report 22 (1992).

93. Aguilera, *supra* note 12, at 1001.

94. Explosives may be legally purchased, but may not be assembled into destructive devices such as grenades.

95. See Treasury Report, *supra* note 13.

96. Aguilera, *supra* note 12, at 1009.

97. 1-800-345-6923.

98. Gale Directory of Publications and Broadcast Media (1994).

99. Personal Communication from Publisher to Blackman (Sept. 1993). In 1993, the publication was 47 years old. Gale Directory, supra note 98, at 1272.

100. Statements made by Koresh's gun dealer, Henry McMahon, suggest that Gun List, a publication similar to Shotgun News, was also used by Koresh and might be the, or one of the, other "clandestine" publications seen in Koresh's house. Interview, supra note 28, at 122.

101. 18 U.S.C. S 1621 (1994).

102. Franks v. Delaware, 438 U.S. 154, 171 (1978).

103. William Powell, The Anarchist Cookbook (1971) (available from Paladin Press in Boulder, Colorado at 1-800-392-2400 or 1-800-872-4993). The book can also be ordered by mail from Paladin Press.

104. *The Anarchist Cookbook* includes recipes for growing, harvesting, and cooking with marijuana, information on various drugs, and the admonition: "When going to make a deal for dope, do not take a weapon with you. This is provoking violence and legal hassles. If you don't trust the guy, then don't deal with him." *Id.* at 40. The book also provides information on firearms. But there is no information on converting semi-automatic firearms to fire full auto. There is, however, extensive information on making explosives, but (a) with many admonitions against doing so for safety reasons unless one knows more than is in the pages of the book, and (b) generally not with the materials Aguilera established that Koresh owned. *See id.* at 111-52.

105. Marc Breault & Martin King, Inside the Cult 305 (1993).

106. Illinois v. Gates, 462 U.S. 213, 230 (1983).

107. Wattenberg, *supra* note 5, at 34; Joint Hearings, *supra* note 15, at 178 (testimony of Davidian David Thibodeau).

108. Joint Hearings, *supra* note 15, at 178-79. Thibodeau also testified that, in general, Breault had a reputation as a person who liked to "tell some whoppers." Id. It is not clear whether Aguilera knew or had reason to believe Breault had such a reputation. Breault, who fancied his conflict with Koresh to be a cloak and dagger suspense similar to a Robert Ludlum novel, reports his meetings with Davy Aguilera as rendezvous with the BATF agent "Derek Anderson (not his real name)." Breault & King, *supra* note 105, at 294. The warrant application gave the impression that Breault had been one of Koresh's combat troops. Breault "participated in physical training and firearm shooting exercises conducted by Howell. He stood guard armed with a loaded weapon." Aguilera, *supra* note 12, at 1007. Being blind, Breault would probably have been more a threat to fellow Davidians than to intruders.

109. Committee Report, *supra* note 26, at 13.

110. Aguilera, supra note 12, at 1004.

111. *Id.* at 1005.

112. *Id.*

113. *Id.* at 1004.
Bunds reported having found some gun parts in her parents' Los Angeles, California, home. Id. Three members of Koresh's group eventually came to pick them up. Id. No reason is given why Aguilera did not interview the brother, David Bunds.

114. Grau v. United States, 287 U.S. 124, 128 (1932). For the Court s increasing concern about the civil liberties price exacted by prohibition, see Kenneth M. Murchison, Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition (1994).

115. Fed. R. Evid. 802.

116. Brinegar v. United States, 338 U.S. 160 (1949) (holding that the evidentiary standard restricting the use of hearsay evidence in a criminal case will not be applied to supporting the issuance of a warrant).

117. Fed. R. Evid. 803, 804 (listing numerous exceptions to the rule against hearsay).

118. Aguilera, *supra* note 12, at 1009. Treasury Department review said the gun was "either a .50-caliber rifle mounted on a bi-pod or a "British Boys' . 52-caliber antitank rifle." Treasury Report, *supra* note 13, at 33.
Block had been in the Mount Carmel Center during the spring of 1992, and had attended gun shows with Koresh, McMahon (Koresh's gun dealer), and other Branch Davidians. Block was unfamiliar with and uncomfortable around guns, and it was the gun activities which caused him to leave in June of 1992. Interview, *supra* note 28, at 50-52.

119. There are some exceptions to the .50 caliber rule, not relevant here, for "elephant rifles" and other "sporting" weapons. The Boys' rifle was initially produced in .55 caliber, not .52; it is unlikely there is such a version as the . 52. Hogg, *supra* note 65, at 94.
When the Gun Control Act of 1968 was enacted, defining rifles of caliber above .50 as "destructive devices," must guns like the Boys were rebarreled in .50 caliber to remove then from the highly regulated "destructive device" category. Thus, if Koresh owned a Boys, there would be no reason, absent other evidence, to believe it to be an illegal version rather than the much more readily available .50 caliber version--especially since Aguilera's witness described it as a .50 caliber gun. At the 1994 trial of the Davidians, the prosecution introduced evidence showing that the Davidians owned two .50 caliber rifles. Apparently, there was no evidence introduced regarding .52 caliber firearms.

120. Aguilera, *supra* note 12, at 1009. Koresh's .50 caliber rifles were Barretts. According to Barrett Firearms Manufacturing, "It's designed as a rifle and not as an automatic weapon. Converting it would require major design changes." Lee Hancock, *Gun Dealer, Koresh called Partners*, Dal. Morn. News, Mar. 10, 1993, at A1.

121. Aguilera, *supra* note 12, at 1004, 1007.

122. Treasury Report, *supra* note 13, at 53. The Treasury goes on to note that the raid planners determined that Koresh never left the residence, but the source for that information was Joyce Sparks, who investigated the allegations of child abuse, and the Treasury "was unable to identify a reliable source for this common assumption." *Id.* at 136. In other words, the Treasury concluded
that Sparks, who was Aguilera's key witness on the violence Koresh supposedly intended for the Waco area, was not reliable.

123. It was only after the raid that a supplemental affidavit at last recognized the desirability of claiming a witness was reliable. Some of the information in the post-raid affidavit relates to items which are lawful to own, like m10 and m11 semi-automatic pistols, as well as the unlawful manufacture of silencers and live grenades, and the possession of machine guns. Earl Dunagan, Application and Affidavit for Search Warrant (April 13, 1993) (copy on file with author Kopel).

124. Aguilera, *supra* note 12, at 999.

125. *Id.*

126. Interview, *supra* note 28, at 46-50. The devices were ACTs, according to McMahon, but Koresh referred to them as Hellfire devices in talking to FBI negotiators. And he said that he told BATF's undercover agent Robert Rodriguez about them, and that the issue had been cleared up with the sheriff. Transcript of BATF Audio Tapes of the Negotiations Between Federal Law Enforcement and the Branch Davidians (Mar. 20, 1993) (on file with author Kopel).

127. See Sgro v. United States, 287 U.S. 206 (1932); United States v. Ruff, 984 F.2d 635 (5th Cir. 1993).

128. See United States v. Ruff, 984 F.2d 635 (5th Cir. 1993).

129. Aguilera, *supra* note 12, at 1005.

130. Whether Koresh did or did not acquire such licenses is irrelevant to whether the February warrant could validly presume that he did not have such licenses, based on a June 1992 records check that did not look at his legal name.

131. At the 1995 Congressional hearings, defenders of the Waco warrant pointed to the following cases: United States v. McCall, 740 F.2d 1331 (4th Cir. 1984) (seven months, possession of a handgun); United States v. Brinklow, 560 F.2d 1003 (10th Cir. 1977) (eleven months, firearm); United States v. Rahn, 511 F.2d 290 (10th Cir. 1975) (two years); United States v. Mariott, 638 F. Supp. 333 (N.D. Ill. 1986) (thirteen months). Joint Hearings, *supra* note 15, at 267 (testimony of AUSA William Johnson). See also Joint Hearings, *supra* note 15, at 812 (letter to Rep. John Conyers, Jr.

from Univ. of Chicago Law Professor Albert W. Altschuler) (arguing that whether evidence is "old" is distinct from whether it is "stale"; in contrast to drugs, which are consumed, guns observed in a building are relatively likely to still be in the same building months later).

While it is true that guns are much more durable than drugs, evidence that is more than half a year old is stale enough so that it simply should not be allowed. if there is some real threat to public safety, the federal government ought to be able to finish an investigation in half a year.

132. The affidavit stated that ex-Davidian Jeannine Bunds said Koresh had sex with girls as young as eleven years old, and fathered children with girls as young as twelve. Aguilera, *supra*note 12, at 1004-05.

133. Wattenberg, *supra* note 5, at 37. The County "had not found sufficient reliable evidence to press child or sexual abuse charges against Koresh or any of his followers." Treasury Report,*supra* note 13, at 30.
Evidence of child abuse discovered after the BATF raid is not relevant to determining the correctness of the warrant applicaiton. At the least, Koresh was guilty of statutory rape, as well as treatment of the children in a manner which many persons would consider abusive. See David B. Kopel & Paul H. Blackman, No More Wacos: What's Wrong with Federal Law Enforcement and How to Fix It (1997).

134. Aguilera, *supra* note 12, at 1002.

135. *Id.* at 1006.

136. Carol Moore, The Davidian Massacre 61 (1995). The woman, who claimed to hear a disembodied voice telling her that she was the only person worthy of bearing Koresh's children, was either (1) seriously mentally ill, or (2) possessed by a demon, depending on one's interpretive framework. Kenneth Samples, et al., Prophets of the Apocalypse: David Koresh & Other American Messiahs 72-75, 191-92 (1994).

137. Joint Hearing, *supra* note 15, at 149 (testimony of Kiri Jewell) (testimony gives year of incident as 1991). According to the Justice Department review of Waco, the social worker's interview occurred on February 22, 1993. The girl reported feeling "scared but privileged," and was unwilling to testify against Koresh. Treasury Report, *supra* note 13, at 64; U.S. Dept. of Justice, Report on the Events at Waco, Texas, February 28 to April 19, 1993, at 215, 219 (Oct. 8, 1993) [hereinafter Justice Report].

138. Dunagan, *supra* note 85, at 4. Assistant U.S. Attorney Johnston stated that he refrained from making the original affidavit even more deliberately irrelevant: "Had I wanted to prejudice the affidavit and the warrant ... I knew Kiri Jewell's story before the affidavit, and I would have put in all the details, the gory details about ... what he did to her. I didn't want to prejudice the magistrate, but I did want to put [in] the context of Ms. Sparks' visit." Joint Hearings, *supra* note 15, at 212.

139. Treasury Report, *supra* note 13, at 27.

140. Aguilera, *supra* note 12, at 1004. The comment is consistent with Koresh's overall theology. If he made the comment, he was two-thirds right. Deaths at Waco were greater than in the Los Angeles riots, and it was a "military type operation," with extensive military involvement in the February 28, 1993 BATF raid and the April 19, 1993 FBI tank assault. See Kopel & Blackman, *supra* note 133. Johnston did not explain why he did not want to prejudice the magistrate two weeks later, by putting the Kiri Jewell incident in a post-raid warrant application. *Id.*

141. The witness stands by her statement that Koresh made the threat, if that is what it was. She disapproved of her agency's decision to close the case and continued to have telephone contact with Koresh.
Wattenberg, *supra* note 5, at 37. The Treasury Department explanation is that the statement was not made before the riots, but on the day after the riots began and the day the investigation was closed despite the social worker's objection. Treasury Report, *supra* note 13, at 126.

142. According to Marc Breault, on Dec. 15, 1992, Aguilera stated that there was "circumstantial" evidence about Koresh, but Aguilera "could not do anything because he lacked direct evidence." Breault & King, *supra* note 105, at 299-300.

143. James L. Pate, *Gun Gestapo's Day of Infamy*, Soldier of Fortune, June 1993, at 51. The date of the assault was moved from a weekday to a Sunday, February 28, because the Waco newspaper began an expose of Koresh, "The Sinful Messiah," earlier than BATF had expected or wanted. *Id.* at 51, 53.

144. *Id.*

145. Treasury Report, *supra* note 13, at 37.

146. *Id.* at 44.

147. *Id.* at 71.

148. Aguilera, *supra* note 12, at 1010.

149. Sue Anne Pressley, *Federal Agent Describes Undercover Role before Deadly Texas Raid*, Wash. Post, Jan. 28, 1994, at A3.

150. Committee Report, supra note 26 at 11-12; James L. Pate, *We Have Truth on Our Side: Jailhouse Interviews with Branch Davidians*, Soldier of Fortune, July 1994, at 48.

151. See Aguilera, *supra* note 12, at 1004-05.

152. *Id.* at 1007.

153. 26 U.S.C. S 5845(b) (machine gun is defined to include "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machine gun").

154. Aguilera, *supra* note 12.

155. Lewis, *supra* note 15, at 17; Dick J. Reavis, The Ashes of Waco: An Investigation 67-68 (1995).
Rodriguez was one of eight "college students" who moved into an undercover house across the street from Mount Carmel. The supposed student leader, Rodriguez, was over forty, but he and the others were chosen for their youthful appearances. Treasury Report, supra note 13, at 51. The "students" were supposed to have come from west Texas to attend Texas State Technical College. But they drove new cars. The Branch Davidians checked the registration of the three vehicles and found, surprisingly for students, "no ownership liens. All were registered to the same address in Houston-a long way from West Texas." Reavis, supra note 155, at 67. Wayne Martin, a Davidian with a Harvard Law degree there were no such students. Joint Hearings, supra note 15, at 174-75. Several days later, Koresh told a neighboring family that lived next door to the undercover agents that

156. Aguilera, *supra* note 12, at 1009-10.

157. Koresh, who owned AR-15 Sporters, did not acknowledge to agent Rodriguez that he owned a sear. Checks with the various companies the BATF identified as having done business with Koresh indicated no purchase by Koresh of a sear. None of the gun-part company representatives who testified at the Branch Davidians' trial indicated sale of such a sear, or of enough other parts to convert a semi-automatic to full-auto capability, aside from the significant exception of one "grandfathered" pre-1981 auto-sear. Trial Transcript, *supra* note 34, at 4296-4302, 4766-4821, 4920-4925 (Testimony of Cynthia Eileen Aleo (Nesard Gun Parts), Peter Waltzman (Sarco, Inc.), Tammy Smith (Shooter Equipment Co.), and Ron Jones (Global Sales)).

The federal government's treating automatic sears the same as machine guns (for which that auto sear is the essential component) dates to 1981. Automatic sears manufactured before 1981 are "grandfathered," and are not subject to the same restrictions as machine guns; the policy was not to suddenly turn the owners of old auto sears into felons. Koresh's possession of the single grandfathered auto sear--while legal--demonstrates his capability of converting one semi-automatic rifle to full automatic. Because the BATF had decided not to ask Koresh's firearms parts suppliers exactly what firearms parts Koresh had bought, the evidence about the grandfathered auto sear was not presented to the magistrate in the warrant application. This evidence would have been the strongest evidence in the application.

158. Actually, G.O.A. stands for Gun Owners of America, and was a group of which Koresh was much fonder than the NRA. According to testimony of BATF undercover agent Rodriguez: "He [Koresh] denounced the Government many times, denounced the NRA, called it as corrupt as our Government." Joint Hearings, *supra* note 15, at 802.

159. Aguilera, *supra* note 12, at 1010.

160. *Id.* at 1010. He meant "destructive devices."

161. Criminal Complaint, United States v. Vernon Wayne Howell (W.D. Tex., Feb. 25, 1993) (W93-17M).

162. See Edward S.G. Dennis, Jr., Evaluation of the Handling of the Branch Davidian Stand-Off in Waco, Texas, February 28 to April 19, 1993 (Oct. 8, 1993).

163. In re Search Warrant for Secretarial Area Outside the Office of Gunn, 855 F.2d 569, 574 (8th Cir. 1988), cert. denied, 488 U.S. 1009 (1989).

164. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 65-66 (4th Cir. 1989). For a good overview, see James E. Phillips, et al., *Litigating Sealed Search Warrants*, The Champion, Mar. 1996, at 7-11.

165. Dunagan, *supra* note 85, at 4.

The second search warrant also authorized search for photographs, because, the BATF agent explained, "I know that often times persons who violate firearms laws take or cause to be taken photographs of themselves displaying their weapons ..." *Id.*

What the BATF agent who procured the second warrant neglected to note to Magistrate Green was that photographs of inert grenade hulls look identical to those of live grenades, and the photographs of semi-automatic firearms generally look identical to photographs of semi-automatic firearms unlawfully converted to full-auto. And, while persons who violate gun laws often have photographs taken of themselves with their firearms--certainly true of criminals such as "Billy the Kid" and Lee Harvey Oswald--the statement is also true of children posing with their cap guns in hand or holster, successful hunters and target shooters, and politicians seeking gun owner votes.

166. E.g., Connally v. Georgia, 429 U.S. 245 (1977);Coolidge v. New Hampshire, 403 U.S. 443 (1971); Johnson v. United States, 333 U.S. 10 (1948).

167. Aguilar v. Texas, 378 U.S. 108, 111 (1964);United States v. Leon, 468 U.S. 897, 914 (1984).

168. Joint Hearings, *supra* note 15 at 128 (testimony of Gerald Goldstein). Goldstein was concerned that the situation was likely to get worse as a result of anti-exclusionary rule legislation being considered by Congress. Some Democratic Representatives noted the irony of Republicans attacking the affidavit and warrant used against David Koresh and Mount Carmel Center while those same Republicans were generally opposed to the exclusionary rule, and had actively worked for H.R. 666 to weaken it still further. As Rep. John Conyers put it:

[J]ust recently in the GOP Contract with America, and specifically H.R. 666, we voted out a bill with nearly unanimous Republican support .... We [Democrats] pointed out that this was eroding the whole Constitution. And now I am So pleased to find that the same people that voted to further erode the exclusionary rule, of which Mr. Goldstein has very adequately complained, are now very worried that there aren't teeth in it. ...

Joint Hearings, *supra* note 15, at 197.

Inconsistencies were not a problem for the groups which most seriously questioned the Waco search warrant. The American Civil Liberties Union (ACLU) unsuccessfully lobbied against H.R. 666. The NRA remained neutral at the time since its Board of Directors had not specifically created a policy on such Fourth Amendment issues. Since then, a policy has been articulated which would require the NRA to lobby against such legislation.

169. *Id.* at 128.

170. *Id.*

171. Weeks v. United States, 232 U.S. 383, 393 (1914).

172. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

173. Elkins v. United States, 364 U.S. 206, 223 (1960).

174. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

175. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

176. United States v. Leon, 468 U.S. 897, 918-22 (1984). See also Illinois v. Krull, 480 U.S. 340, 349-50 (1987); Arizona v. Evans, 514 U.S. 1, 115 S.Ct. 1185, 1193-94 (1995) (reliance on defective computer records).

177. Leon, 468 U.S. at 918-22.

178. *Id.*

179. *Id.*

180. See *infra*, note 181 and accompanying text.

181. Activities of Federal Law Enforcement Agencies Toward the Branch Davidians: Joint Hearings Before the Subcomm. on Crime and National Security, International Affairs, and Criminal Justice, 104th Cong., 1st sess. 40 (1995) (part II) [hereinafter Joint Hearings II].

182. See Kopel & Blackman, *supra* note 133.

183. Brandon M. Stickney, All-American Monster (1996).

184. Joint Hearings II, *supra* note 181, at 40.

185. S.3, 104th Cong., S 75 (1995).

186. *Id.*

187. The Exclusionary Reforming Act of 1995, H.R. 666, 104th Cong. (1995).

188. *Id.*

189. Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Apr. 19, 1979).

190. The statute setting up the remedy might be drafted as follows:
Chapter 171 of title 28, United States Code, is amended by adding the following new section:
S 2675A. Administrative remedy.
(a) Any person who is unlawfully injured as a result of a search and seizure or arrest by the United States may file a claim for damages with the Attorney General.
(b) Within 60 days of receiving a claim filed pursuant to subsection (a), the Attorney General shall either approve the claim and so notify the claimant in writing or deny the claim in whole or in part and notify the claimant in writing, stating the specific grounds for such denial.
(c) If the Attorney General denies a claim in whole or in part, he shall, upon written request of the claimant sent by certified mail within 30 days of receiving notice from the Attorney General, promptly hold a hearing to review his denial. The hearing shall be held at a location convenient to the claimant.

191. Aguilar v. Texas, 378 U.S. 108, 114-15 (1963).

192. Illinois v. Gates, 462 U.S. 213, 216-17 (1983).

193. *Id.* at 225.

194. *Id.* at 246 (referring to basis of knowledge).

195. *Id.* at 225.

196. *Id.* at 226.

197. *Id.* at 114-15.

198. *Id.* at 230-31.

199. *Id.* at 233.

200. Kopel & Blackman, *supra* note 133, at 31.

201. *Id.* at 30.

202. *Minister Who Sought Peace Dies in a Botched Drug Raid*, N.Y. Times, Mar. 28, 1994, at A1. An earlier investigation into the same police unit that raided the minister's apartment revealed that officers routinely fabricated informers to obtain search warrants. *Id.*

203. *Id.*