PREVENTING A REIGN OF TERROR: CIVIL LIBERTIES IMPLICATIONS OF TERRORISM LEGISLATION

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Abstract: This Article examines a wide spectrum of recent and anticipated federal anti-terrorism proposals. Discussed in particular detail are two bills originally introduced in 1995: President Clinton's proposed legislation and a bill proposed by then Senate Majority Leader Robert Dole. The authors also discuss the mood of the American public on the terrorism issue, proposals for greater involvement of the military in domestic law enforcement, and constitutional concerns raised by the Bill of Rights. The authors make the argument that a more efficient exercise of existing federal powers not the creation of new powers is the proper way to battle terrorism.

> All the horrors of the reign of terror were based only on solicitude for public tranquility. [FN1]
>
> Precisely because the need for action against the . . . scourge is manifest, the need for vigilance against . . . excess is great. History teaches that grave threats to liberty often come in times of urgency, when . . . rights seem too extravagant to endure . . . (*248 W)hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it . . . . (T)he first, and worst, casualty . . . will be the precious liberties of our citizens. [FN2]

The heinous bombing of the Alfred P. Murrah federal building in Oklahoma City has understandably raised public fears of terrorism. As is common after sensational crimes, some persons have revived their call for a bigger federal government and a narrower interpretation of

the Constitution. This Article examines various restrictions on civil liberty that have been proposed in response to the Oklahoma City bombing. This Article also addresses various proposals which surfaced before and after the Oklahoma City bombing.

A few days after the first anniversary of the bombing, President Clinton signed antiterrorism legislation into law. The focus of the Article is not simply to analyze the new law, but instead to look at a wide spectrum of antiterrorism proposals, some of which, while not enacted in 1996, will likely be proposed in future years. Thus, the legislative language that is discussed in most detail comes from two bills originally introduced in the Senate in early 1995: the President's very broad bill (Clinton bill) and majority leader Dole's slightly narrower bill (Dole bill). In May 1995, a deal was arranged by which various provisions from the Clinton bill would be added to the Dole bill, in exchange for White House support for the Dole bill's provisions to sharply curtail habeas corpus. The modified version of the Dole bill (Dole-Clinton bill) was then passed by the Senate on a 91-8 vote. [FN3]

Although the House of Representatives' Judiciary Committee quickly approved Representative Hyde's antiterrorism bill, [FN4] which was similar to the Senate- passed Dole-Clinton bill, the measure ran into strong opposition on the floor of the House. A diverse coalition of Democratic civil libertarians and *249 Republican skeptics of an expanded federal government considered the Hyde bill to be seriously flawed. Toward the end of 1995, various compromise bills were introduced, although none of them came close to satisfying most of the critics. In March 1996, one of the compromise bills came to the floor of the House for a vote. [FN5] The Barr Amendment, sponsored by freshman Bob Barr (R-Ga.), a former United States Attorney, was adopted; this amendment removed most of the provisions which critics had found objectionable, although a different amendment to remove the habeas corpus restrictions failed. The Barr Amendment likely saved the terrorism bill, since, even with the Barr Amendment, 177 legislators still voted against the bill. In April 1996, a House-Senate conference committee, aiming to craft a bill which could pass the House of Representatives and garner the President's signature, put back in some but not all of the provisions which the Barr Amendment had removed. [FN6] We refer to this final legislation as the conference bill.

The battle over the terrorism bills showed the increasing clout of a Bill of Rights alliance which had been coalescing over the past several years, but which worked together as never before on the terrorism bills. The alliance included groups traditionally seen as "left," such as the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the American Friends Service Committee and the Presbyterian Church, and also groups traditionally seen as "right," including the National Rifle Association, the Eagle Forum, [FN7] Americans for Tax Reform, and Gun Owners of America, as well as many others on various sides of the political spectrum. [FN8] In this alliance, *250 two groups were especially important: the American Civil Liberties Union, which took the lead in organizing opposition to the bill, and the National Rifle Association (NRA), which was the single strongest member of the alliance. The NRA was, however, considerably more willing to compromise than most of the rest of the alliance; [FN9] after the Barr Amendment was added, the NRA dropped its opposition to the bill as a whole, a decision which may well have made it possible for a terrorism bill to become law.

At this point, we should disclose our own role in the above alliance. Kopel signed a variety of joint letters to Congress raising objections to the various bills, [FN10] and testified before Congress twice on terrorism issues. Olson is a member of the NRA Board of Directors, but he was not involved in any lobbying on the bills, nor, as will be clear, does he approve of the bill that was finally enacted, even though it is very mild from a gun control viewpoint. Because various potential terrorism laws affect many different parts of the Constitution, this Article proceeds sequentially through the Constitution. Part I offers a short discussion of the American mood on the terrorism issue and of the consequences of repressive terrorism legislation in Great Britain. In Part II, we discuss proposals for greater involvement of the military in domestic law enforcement; this issue relates to Article I principles of avoiding martial law by ensuring civil supremacy over the military. Part III addresses First Amendment concerns of the limits of responsible political dialogue and censorship of the Internet. Part IV, dealing with the Second Amendment, examines militias and various proposals to eliminate them, and also discusses the "assault weapon" issue. In Part V, Fourth Amendment concerns are analyzed, including computer encryption and the privacy of electronic communications, *251 and various proposals for warrantless surveillance of persons not suspected of criminal activity. The Tenth Amendment question (which also has Article I implications) of the proper reach of federal law enforcement in prosecuting local criminal activity is the subject of Part VI. Part VII looks at Fourteenth Amendment equal protection rights, Fourth Amendment restraints on illegal searches, Fifth Amendment due process, and the Sixth Amendment confrontation clause; all are examined in relation to new legislation to allow secret or illegally gathered evidence in certain alien deportation proceedings. Lastly, we offer details of a Constitution-friendly antiterrorism policy in Part VIII.

I. Background

The word "terrorism" originated in the French Revolution, when the government instituted the "Reign of Terror" to execute political opponents, seize their property, and terrorize the rest of the population into submission. [FN11] As President Clinton demanded that Congress pass a terrorism bill, the problem of terrorism was analyzed from two very distinct viewpoints. One view feared a vast militia conspiracy of angry white men with weapons, fueled by paranoia. The other side of the debate also saw a terrorism threat, although this side worried more about terrorism in the original sense of the word: state terror and the risks of unleashing and further militarizing the federal government.

It is sometimes suggested that persons who worry about the second type of terrorism are only a strange fringe of American society. In fact, they are the majority. According to a November 1995, CNN-Time poll, 55 percent of Americans believe "the federal government has become so powerful that it poses a *252 threat to the rights of ordinary citizens." [FN12] Repressive measures, rather than reassuring the American public, may intensify the fears which are already widely shared.

A. Historical Antecedents of the Present Situation

In the United States, there is a long, sad history of interest groups or government officials taking a few isolated incidents and inflating them into some kind of vast threat, requiring an immediate,

repressive response. In 1798, President John Adams and the Federalists who controlled Congress were scandalized by the vicious campaigns against them in the press. These scurrilous charges--such as accusations that President Adams had sent Vice- President Pinckney to England to procure a pair of young mistresses for each of them, or that Adams was plotting to establish an American monarchy--illustrate that today's foolish conspiracy theories are nothing new. [FN13]

At the same time, in the turbulent years following the French Revolution, the French government worked furiously to obtain American support in the French conflict with England. French officials attempted to bribe American newspapers to take the French side in the conflict and to criticize the pro-England policy of President Adams.

President Adams unfortunately reacted in a manner that would set a pattern of federal error. Because a few of his political opponents were motivated by foreign bribes, Adams assumed that his political opponents as a whole were illegitimate. In 1798, Congress enacted and President Adams signed the Alien and Sedition laws. These hated laws allowed the extra-judicial deportation of legal resident aliens whom the administration considered to be a security threat. [FN14] Criticism of the *253 President was termed "sedition" and banned. [FN15] Political opponents of President Adams were persecuted under the laws for supposed disloyalty. [FN16]

Rather than calming the political waters, the Alien and Sedition Acts provoked a furious backlash. The Kentucky and Virginia Resolutions were enacted, in which state legislatures asserted the authority to nullify within their territory laws which violated the Constitution. [FN17] Had President Adams decided to force the issue, civil war might have resulted. Happily, the Alien and Sedition Acts were never uniformly enforced. After Thomas Jefferson was elected in 1800, the Acts were allowed to expire.

Decades later, a violent, deranged abolitionist named John Brown led a raid on the federal armory at Harper's Ferry, hoping to set off a massive slave rebellion. John Brown's delusional scheme was rapidly suppressed, and Brown was tried and executed. But John Brown's isolated act--combined with the extremist rhetoric of some abolitionists--led many Southern state legislatures to conclude that all the critics of slavery were part of some fearsome conspiracy to promote violent revolution and to destroy the South. Brown's crime reinforced the determination of Southern states relentlessly to suppress anti- slavery speech. Abolitionists and slaveowners both saw each other only in distorted stereotypes. The polarization led to the tremendous suffering of the Civil War and in the long run to a solution to slavery which, unfortunately, left many ex-slaves in a condition of virtual slavery.

In the decades following the Civil War, the political leadership again overreacted to organizations which challenged the existing system. During much of the nineteenth century, and a good part of the twentieth century, conspiracy laws were used against unions and union organizers. Many state governments, and often the federal government, engaged in a policy of confrontation and war against organized labor. Labor violence *254 convulsed the nation. Criminal syndicalism laws (an updated version of John Adams' sedition laws) were employed against radical unions such as the "Wobblies" (the International Workers of the World). [FN18] Beginning in 1877, the United States was wracked by labor riots in one major city after another. The old armories that one can find in the downtown of almost every major American city that

was a city during the late nineteenth century were often built for suppressing labor riots. The Haymarket Massacre was one of the bloodiest, but hardly the only, tragedy resulting from a confrontation between militarized law enforcement and groups which the political system deemed unacceptable. [FN19]

Some of the riot leaders were Communists or other advocates of violent overthrow. Others harbored various conspiracy theories, including anti-Semitic ones. But a generally hostile press and political establishment overestimated the pervasiveness of such sentiments. Most workers simply wanted better working conditions, and a better share of the wealth that they helped produce. In the end, it was the protection of the rights of working people, and negotiation over legitimate grievances, which led to an abatement of labor strife. Even in the twentieth century, radical critiques of the government have too often been met with fierce government repression. During World War I, Eugene V. Debs' peaceful criticism of the draft landed him in federal prison. [FN20]

As Communists took over Russia following the end of the war, American fears of violent foreign radicals intensified. In August 1919, Attorney General A. Mitchell Palmer established the predecessor of the FBI, the "General Intelligence Division," of the Department of Justice. The Division was headed by J. Edgar Hoover, and charged with gathering information on radicals. Over the next year, six thousand people were seized in the *255 "Palmer Raids," many of them innocent of any crime, and unconnected to radical politics. [FN21] Many suspects were held in filthy jails and beaten into false confessions. Even people who came to visit these victims in jail were arrested, on the theory of guilt by association. While Attorney General Palmer was well on his way to using the hysteria he helped create into as a stepping-stone to the Democratic presidential nomination, he overplayed his hand. His prediction of a major terrorist attack on May Day 1920 failed to materialize, and the national panic subsided. In September, an anarchist's bomb killed thirty-three people on Wall Street, and the nation correctly recognized the crime as the work of a lone actor, rather than a manifestation of some immense conspiracy. [FN22]

During the Cold War, concerns about Soviet spies and their American accomplices (such as the Rosenbergs and Alger Hiss) led to repressive legislation, blacklists, loyalty oaths, and other infringements on the freedoms which distinguished America from the Soviet Union. Especially in the 1950s, criticism of the free enterprise system or of militarism was falsely equated with disloyalty. Leftist critics of the government policies were smeared with guilt by association as Communist sympathizers.

At about the same time, many Southern state governments, as well as the FBI, were aware that "Communist agitators" were among those leading the civil rights movement, as indeed they had been since at least the 1930s. [FN23] But the presence of a few Communists within the civil rights movement or its leadership (like the earlier presence of Communists within the labor movement), did not mean the civil rights movement was fundamentally Communist, or that it should be suppressed. Nevertheless, that is precisely what many state governments attempted to do for many years.

If it is easy for many Americans to see, in hindsight, the legitimacy of the viewpoint of Jeffersonians, of southern abolitionists, of labor organizers, and of the civil rights movement, it is not so easy for some Americans to respect the current concerns *256 of their fellow citizens. Today, there are many tens of millions of people who are terrified of the government, and many thousands (or perhaps more) who participate in militias. To follow the voices of those who urge us to repeat Attorney General Palmer's policy--to crack down on radicals with unorthodox views--would be the most dangerous course. Respectful dialogue and reform, not stereotyping and repression, are the courses that history will judge wisest.

B. There is No Terrorism Crisis

"By enabling the terrorists to appear much stronger than they really are, the media often find themselves working pour le roi de Prusse," observed one historian. [FN24] According to the State Department, international terrorist attacks are at their lowest level in 23 years. [FN25] In the United States in the last eleven years, according to the FBI, there have been only two international terrorist incidents. One was the World Trade Center bombing; the other was a trespassing incident at the Iranian mission to the United Nations, in which five critics of the Iranian regime took over the mission's offices, and refused to leave. [FN26]

As for incidents of domestic terrorism, there were none in the United States in 1994, nor were there any preventions of terrorist incidents. In 1993, there were eleven incidents classified by the FBI as terrorist. Nine of those eleven incidents took place one night in Chicago when animal rights activists set off small incendiary devices in four department stores that sell fur. [FN27]

Combining domestic and international terrorism, and also accounting for suspected terrorist acts, the total terrorist incident count in the United State is as follows:

*257

Terrorist Incidents in United States

Year	Actual	Prevented	Suspected
1994	0	0	1
1993	12	7	2
1992	4	0	0
1991	5	4	1
1990	7	5	1
1989	4	7	16

Of these incidents, only one (the 1993 World Trade Center bombing) was classified as international in origin. [FN28]

The Oklahoma City bombing was one of the most terrible single crimes in American history, but it was just that--an isolated, single crime. Isolated incidents of mental aberration and evil

such as, the arson mass murder of several dozen people in a New York City nightclub in 1989, the Oklahoma City bombing, or the awful Dunblane murders in Scotland as well as repeated crimes by small groups of criminals such as the financial fraud and other intimidation perpetrated by the misnamed "Freeman" in Montana are just that--crimes--not organized terrorism. [FN29] To the extent that these acts involve more than a pair of perpetrators, prosecution of the handful of criminal individuals involved will suffice to destroy whatever pathetic organization they call themselves. According to the prosecution's theory of the case in the Oklahoma City bombing, the crime was perpetrated by the two defendants and perhaps one helper. Although the trial has not yet taken place, there is not sufficient evidence at this time to base public policy on the theory that there is some vast conspiracy which the federal government has failed to discover, or is conspiratorially covering up.

*258

C. The British Tragedy

More government secrecy, more police powers to detain people at will, less governmental accountability, and less freedom are not novel responses to terrorism. [FN30] They are precisely the approach that has been taken in Great Britain since the early 1970s. The British lesson should be a caution to American politicians who feel confident that the main thing wrong with antiterrorism policy is that the Bill of Rights has been taken too far.

In 1974, Irish Republican Army terrorists bombed pubs in Birmingham, killing nineteen people. [FN31] Home Secretary Roy Jenkins introduced the Prevention of Terrorism (Temporary Provisions) Act. Approved without objection in Parliament, the Act was supposed to expire in one year, but has been renewed every year. [FN32] The Act included a smorgasbord of civil liberties restrictions, some of which have been proposed, with changes in details, in the United States.

Under the Act, the police may stop and search without warrant any person suspected of terrorism. [FN33] They may arrest any person they "reasonably suspect" supports an illegal organization, or any person who has participated in terrorist activity. [FN34] An arrested person may be detained up to forty-eight hours and then for five more days upon the authority of the Secretary of State.

Of the 6,246 people detained between 1974 and 1986 in connection with Northern Ireland, 87 percent were never charged with any offense. [FN35] Many detainees reported that they *259 were intimidated during detention and prevented from contacting their families. [FN36] The Prevention of Terrorism Act also makes it illegal even to organize a private or public meeting addressed by a member of a proscribed organization or to wear clothes indicating support of such an organization. [FN37] The Act allows the Secretary of State to issue an "exclusion order" barring a person from ever entering a particular part of the United Kingdom, such as Wales or Northern Ireland. [FN38] Persons subject to this form of internal exile have no right to know the evidence against them, to cross-examine or confront their accusers, or even to have a formal public hearing. [FN39]

The European Court of Human Rights ruled the Prevention of Terrorism Act to be in violation of Article Five, Section Three of the European Convention on Human Rights, which requires suspects to be "promptly" brought before a judge. [FN40] Nevertheless, the British government refuses to abandon its preventive detention policy and evades the European Court's ruling by invoking Article 15's provision for countries to ignore the Convention on Human Rights "in time of war or other emergency threatening the life of the nation." [FN41]

One of the most important lessons from Britain is that even a huge dose of restrictions on civil liberties, such as the *260 Prevention of Terrorism Bill, does not long remain sufficient in the eyes of the government. At least in regard to civil liberties, the domino theory has proven correct, as one traditional Anglo-American freedom after another has fallen under the government's assertion of the need for still more anti-terrorist powers.

In Northern Ireland, the jury has been suspended for political violence cases; judges in the Diplock courts hear the cases instead. Confessions are admitted without corroboration. Confessions are extracted through "the five techniques": wall-standing, hooding, continuous noise, deprivation of food, and deprivation of sleep. [FN42] In addition, convictions may be based solely on the testimony of "supergrasses" (police informers). [FN43]

In 1988, the Thatcher government enacted additional laws restricting civil liberties. Television stations were forbidden to broadcast in-person statements by supporters of a legal political party, Sinn Fein. [FN44] The ban even applied to rebroadcasts of archive films taped many decades ago, such as footage of Eamon de Valera, the first president of Ireland. A confidential British Broadcasting Corporation memo announced the government's intention to keep journalists from broadcasting any statement by U.S. Senator Edward Kennedy supporting Sinn Fein. [FN45] The *261 BBC also banned Paul McCartney's "Give Ireland Back to the Irish," and a song by another group urging the release from prison of the Guildford Four. [FN46]

A suspect's decision to remain silent under interrogation may now be used against him in court. The abolition of the right of silence at first only applied in Northern Ireland, but has now been extended to Britain. [FN47] Wiretaps do not even need judicial approval. [FN48] No one who has seen Great Britain's slide down the slippery slope can feel confident that repressive measures introduced solely for terrorism will not eventually seep into the ordinary criminal justice system.

The Security Service Act of 1989 provides: "No entry on or interference with property shall be unlawful if it is authorized by a warrant issued by the Secretary of State." [FN49] If committed pursuant to an order from the Secretary of State, acts such as theft, damage to property, arson, procuring information for blackmail, and leaving planted evidence are not crimes. [FN50]

As in America, gun prohibitionists in Great Britain have hitched their wagon to "antiterrorism," with little regard for an actual terrorist nexus. Although British laws regarding possession of actual firearms were already quite severe, the Firearms Act of 1982 introduced restrictive licensing for imitation firearms which could be converted to fire live ammunition. [FN51] The sponsor of the new law against imitation firearms promised that it would help stem "the rising tide of crime and terrorism"--although there had never been a crime or terrorist act committed with a converted imitation weapon. [FN52] *262

The first time the Prevention of Terrorism Act was used was after another pub bombing, in the English town of Guildford. Four people were arrested, held incommunicado in prison for a week, and coerced into false confessions by administration of drugs and by threats against their families. While the Guildford Four were being held, the police used the time to fabricate evidence against them. Although members of the Irish Republican Army already in prison confessed to the Guildford bombings, the Guildford Four were tried, convicted, and sentenced to life in prison. Several leading English statesmen, including Roy Jenkins, felt that the defendants had been framed. A campaign to free them continued for fifteen years, until, upon discovery of police notes of fabrication of evidence, the Guildford Four were released from prison. [FN53]

The Birmingham bombings that led to the Prevention of Terrorism Act resulted in the conviction of a group of defendants called the Birmingham Six. Amnesty International charged that their confessions were extracted under torture. The forensic scientist whose testimony convicted the Birmingham Six later admitted that he lied in court. The Birmingham Six confessed while being held incommunicado by the police; the various confessions were so factually inconsistent that they could not have been true. Civil libertarians fear that the Birmingham case is only one of many instances of police obtaining coerced confessions. [FN54] The Birmingham Six were also eventually freed. Britain, fortunately, has no death penalty. In America, where President Clinton announced, before anyone had even been indicted, that the perpetrators of the Oklahoma City bombing should be executed, the federal death penalty would mean that vindication of persons wrongfully convicted of terrorism might be post-mortem.

To state the obvious, all the legislation has hardly immunized Britain from terrorism. But Britain has, in two decades, *263 eviscerated the magnificent structure of liberty and limited government that took over a millennium to construct. For centuries the rights of Englishmen were proudly held up in contrast to the absolutism of the continent. Far from being an exemplar to the world, the modern "anti-terrorist" United Kingdom has been found culpable of human rights violations under the European Convention on Human Rights more often than any other member of the Council of European States. [FN55] To a student of Britain's magnificent history in the story of freedom, it is a pitiful sight to see modern Britons forced to turn to Brussels and the European Court of Human Rights as the last protector of what were formerly the unquestioned rights of Englishmen.

Britain was once the freest nation in the world; today, it is one of the unfreest in Western Europe. As Britain illustrates, no matter how great a country's tradition of freedom, freedom can be lost in less than a generation if public officials and the public allow terrorism to destroy their traditional way of life.

II. Article One: Limits on Use of the Military Against Citizens

A. Historical and Legal Background

The Posse Comitatus Act forbids the military to participate in domestic law enforcement. [FN56] The Act is based on the traditional American abhorrence of rule by the military and on the

recognition that military personnel (who are trained to destroy rapidly) cannot be realistically expected to behave with the restraint and constitutional sensitivity of civilian police (who are trained in force minimization, careful evidence gathering, and constitutional law). [FN57] *264

The increasing militarization of domestic law enforcement in the United States is an ominous trend. If we examine the law enforcement policies of virtually every unfree nation in the world, we find two common traits: first, law enforcement is heavily centralized, under national, rather than local control; and second, law enforcement is heavily militarized. The line of separation between the police and the army has been blurred or erased.

Although centralized, militarized law enforcement may seem to protect public safety, the American people have historically recognized that law enforcement which is not under the direct control of the local populace and law enforcement along military lines, creates grave threats to the safety and liberty of the American people. Such deadly consequences of the use of the military in domestic law enforcement are not speculative. In 1913, in Ludlow, Colorado, the National Guard machine-gunned and burned to the ground a camp of striking coal miners and their families, in the "Ludlow Massacre." [FN58] Decades later, National Guard units shot and killed protesting students at Kent State and Jackson State Colleges. The National Guard killings at Kent State and Jackson State led to massive national protests. [FN59] The healthy distrust of militarized law enforcement is the basis of the Posse Comitatus Act, by which Congress outlawed the use of military personnel in domestic law enforcement.

The Posse Comitatus Act of 1878, as amended, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act or Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both. [FN60] *265

While the concept of outlawing use of the military in law enforcement is easy to understand, the phrase posse comitatus in the statute is unfamiliar to most late twentieth century readers. Since the earliest days of the common law, citizens have had the duty to help the sheriff pursue fleeing felons. As the Supreme Court put it, "For these purposes (the sheriff) may command the posse comitatus or power of the county; and this summons, every one over the age of fifteen years is bound to obey." [FN61] In a late nineteenth century case, the Court wrote, "It is the right, as well as the duty of every citizen, when called upon by the proper officer, to act as part of the posse comitatus in upholding the laws of his country." [FN62] At the request of President Jefferson, James Madison, the "father of the Constitution," wrote a routine order to a federal marshal which stated: "Should any aid be necessary you will call for the assistance of the good citizens of the district, as the posse comitatus or civil power of the territory." [FN63] In American parlance, posse comitatus was often shortened to "posse," as in "the sheriff called out the posse." Thus, the Posse Comitatus Act forbids use of the military in law enforcement by forbidding it to perform the function of a posse comitatus [FN64]--that function properly belongs to the responsible citizens of a given county, not to the standing army.

While Article I of the Constitution does aim to ensure civilian control over the military, [FN65] there is no explicit prohibition on use of the military in domestic law enforcement. Such a restraint, however, has been seen as implicit in the American *266 structure of government. Thus, in Luther v. Borden, an 1849 case arising out of the Dorr Rebellion against the undemocratic state government of Rhode Island, the Court emphasized the need to suppress domestic violence, including actual rebellion, by use of the militia and the posse comitatus, and not by use of martial law. [FN66] The Court was following the structural scheme explicated by James Madison in The Federalist: the military was for "security against foreign danger," [FN67] whereas for domestic strife, Article I allowed Congress "to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions. . . . " [FN68] Only in specific, narrow situations is domestic use of the military allowed: when necessary to protect the states "against invasion" or--when the state so requests--"against domestic violence." [FN69] Thus, it should not be surprising that when the Congress passed the Posse Comitatus Act, "several senators expressed the opinion that the Act was no more than an expression of constitutional limitations on the use of the military to enforce civil laws." [FN70]

The historic democratic purpose of relying on the people is clear: to promote popular participation in law enforcement and to prevent authoritarian rule by use of the military to enforce the law. As one modern court stated, the Posse Comitatus Act,

> is not an anachronistic relic of an historical period the experience of which is irrelevant to the present. It is not improper to regard it, as it is said to have been regarded in 1878 by the Democrats who sponsored it, as expressing "the inherited antipathy of the American to the use of troops for civil purposes." [FN71] *267

In litigation growing out of the Wounded Knee uprising, the Eighth Circuit explained:

> Civilian rule is basic to our system of government. The use of military forces to seize civilians can expose civilian government to the threat of military rule and the suspension of constitutional liberties. On a lesser scale, military enforcement of the civil law leaves the protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights. It may also chill the exercise of fundamental rights, such as the rights to speak freely and to vote, and create the atmosphere of fear and hostility which exists in territories occupied by enemy forces. [FN72]

B. Proposals to Weaken the Posse Comitatus Act

Two proposals have been offered to increase military participation in law enforcement: a biological and chemical exception and a terrorist exception.

1. Biological and Chemical Exception

Currently, military expertise may be used in cases of nuclear terrorism, since military specialists, appropriately, possess knowledge of nuclear weapons which state and local law enforcement

does not. The Clinton administration has proposed adding "biological" and "chemical" exceptions to match the nuclear exception. [FN73]

The Posse Comitatus Act does not prevent the armed forces from training civilian law enforcement in chemical and biological weapons; only direct military intervention is prohibited. There has been no proof offered that civilian law enforcement officers, trained by the military when necessary, cannot respond adequately to chemical or biological crimes. [FN74] *268

2. Terrorism Exception

Although the Dole bill did not contain the chemical and biological exception to posse comitatus proposed by the White House, both the Clinton bill [FN75] and the Dole bill [FN76] did contain a clause which essentially repealed the Posse Comitatus Act. As detailed infra, [FN77] the bills define almost every violent and property crime, no matter how trivial, as "terrorism." (This expansion of federal jurisdiction was eventually enacted in a significantly narrower form.) [FN78] The bills would then authorize "the Army, Navy, and Air Force" to render assistance against "terrorism" whenever requested by the Attorney General. [FN79] Simply put, this a formula for martial law.

Use of the military for fighting terrorism is sometimes justified on the grounds that not using the military would be a waste of resources. The argument proves too much. Why not avoid wasting resources by allowing army privates driving tanks and wielding flamethrowers and machineguns to fight terrorism too? Why not really use resources efficiently, and allow the military to fight all crimes?

The answer is that military resources serve primarily as a deterrent to foreign aggression, and thus are useful even when not actually in combat. Eroding the distinction between the military and the civilian erodes the very basis of American civil society, a society which has been built up by the sacrifice of many generations of Americans. Conserving the foundation of a civil society--the distinction between civil and martial law--is far more important than is the pennywise, pound foolish use of the military in domestic law enforcement simply to avoid "wasting resources."

Further, few federal government actions (other than gun confiscation) could be better calculated to frighten people and *269 drive more Americans into militias than increasing the presence of the military in domestic law enforcement.

C. Current Militarization of Law Enforcement

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

to exclude trespassers--on "open fields" without probable cause or a search warrant [FN80] many rural areas are subjected to low-level overflights and landings of dark helicopters carrying men in military uniforms with automatic weapons. Who would not be frightened at a sudden invasion of an unmarked helicopter and men with machine guns on private property?

The militarization of federal law enforcement has a trickle-down effect on state and local law enforcement. During the 1970s, the FBI set off a national trend in law enforcement by creating a "S.W.A.T." (Special Weapons and Tactics) team. Abandoning former Director J. Edgar Hoover's principle that FBI agents should be well-trained generalists, the new FBI created S.W.A.T. units which specialized in confrontation, rather than investigation, even though investigation was, after all, the very purpose of the Federal Bureau of Investigation. Whereas Hoover's agents wore suits, and typically had a background in law or accounting, S.W.A.T. teams wore camouflage or black ninja clothing, and came from a military background. They were trained killers, not trained investigators. In the early 1980s, an FBI super-S.W.A.T. team was invented: the Hostage *270 Rescue Team. Like the S.W.A.T. team, it received military training, carried military weapons, and was composed mostly of former military personnel. But instead of becoming known for the rescuing of hostages, the Hostage Rescue Team has become most notorious for two incidents in which it ended up holding people hostage who only wanted to be left alone: Ruby Ridge and Waco. [FN81]

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

In the long term, the militarization of law enforcement will be aggravated by the Department of Justice/Department of Defense "Troops to Cops" conversion program, which provides local police departments a large federal subsidy for employing ex-military personnel. [FN82] Of course, any person who has served honorably in the military should be allowed to apply for any civilian job, including law enforcement. But the federal government should not use subsidies to bias police departments into hiring persons with a military background, as opposed to a background in civil society. The training which makes a good soldier is contradictory to the training necessary to be a "peace officer."

III. First Amendment

A. The Limits of Political Dialogue

Many people, particularly people who abhor "right-wing" political viewpoints, have asserted that talk show hosts, commentators, and others who speak strongly about the need to restrain the federal government are indirectly responsible for the events in Oklahoma City. Such claims are disgraceful.

When President Kennedy was assassinated in Dallas in 1963, some people attempted to link the assassination to the climate of "hate" that characterized the intense Southern opposition *271 to President Kennedy's legislative program, including civil rights. But quite plainly, Southern

segregationists, wrong as they were on policy matters, had nothing to do with the President's murder.

In 1970, anti-war radicals blew up a math building at the University of Wisconsin. [FN83] These radicals lived in an "Amerika" where important intellectual, political, and media voices proclaimed that the Vietnam War was immoral, illegal, and imperialist, and that the American government was guilty of crimes against humanity. The young Bill Clinton enunciated some of these views. Yet it would be improper to blame the opponents of the Vietnam War, including young Mr. Clinton, for the criminal acts of the Wisconsin bombers.

After the Oklahoma City bombing, Danny Welch, an official with the Southern Poverty Law Center (SPLC) blamed people who were working within the system to restrain the federal government for the Oklahoma City bombing: "I think the (extremist groups) are heartened by how much mainstream citizens seem to be voicing the same thing. . . . They feel this is their time." [FN84]

Columnist Suzanne Fields responds:

> In other words, we must keep government as big and oppressive as we can lest the loonies get the wrong idea. This is depressingly similar to the argument of *272 Southern segregationists of a generation ago who argued that since desegregation was espoused by Communists, who stirred up violence, it was an unworthy goal for loyal Americans. [FN85]

The Unabomber has planted sixteen bombs in the last seventeen years. [FN86] The Unabomber characterizes himself as a "radical ecologist" and states that his motive is "to promote social instability in industrial society, propagate anti- industrial ideas and give encouragement to those who hate the industrial system." [FN87] It was generally reported that the bomber attended an Earth First! meeting at which a "hit list" of "enemies" was distributed. [FN88] Two persons on that list were later murdered by the Unabomber. [FN89] Should anti-industrial talk show hosts, academics, and political activists who strongly advocate "deep ecology" and other anti-industrial viewpoints be held responsible for the Unabomber? Should there be a media crusade against the Sierra Club, which has Earth First! founder Dave Forman on its Board of Directors? Of course not.

For people sympathetic to the general thrust of environmentalism, it is easy to see that peaceful advocates of radical environmentalism should not be blamed for criminally murderous acts of radical environmentalism. Even people who peacefully express deep hate of modern industry and everyone who works in it are not responsible for a deranged individual's crime spree. But such assurance of the guiltlessness of the non-criminal radical might not have been so forthcoming if the Unabomber had been against gun control or abortion, rather than being against "the industrial system." [FN90] *273

As always, proponents of censorship misuse Justice Holmes' dictum that the government can make it illegal to shout fire in a crowded theater. To be precise, Justice Holmes wrote that "(t)he most stringent protection of free speech would not protect a man in falsely shouting fire in a

theater and causing a panic." [FN91] The point of Justice Holmes' example is not that any kind of speech that might have harmful long-term consequences can be banned. Rather, the question is whether the speech makes impossible any reflection on the part of the audience, and thus impels instantaneous action. In a theater, when someone yells "fire," people will not have an opportunity to investigate and make their own determination about whether there is a fire; rather, they will head for the exits posthaste, perhaps trampling others in a panic.

As to "hate-speech" or criticism of the government, Holmes wrote, "(W)e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so immediately threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." [FN92] As Justice Brandeis later elaborated:

> But even advocacy of (law) violations however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted upon . . . .(N)o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for full discussion. [FN93] *274

Thus, when a speaker at an anti-Vietnam rally in Washington stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers," the Supreme Court found the man's political hyperbole to be protected under the First Amendment. [FN94] Likewise, in a case growing out of a Ku Klux Klan rally, the Court unanimously formulated the modern version of the Holmes " shouting fire" test. The government may not: "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [FN95]

Justice Brandeis understood that suppression of critical speech, no matter how repugnant, would in the long term breed more violence: "(R)epression breeds hate; . . . hate menaces stable government; . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." [FN96]

While the First Amendment protects a wide spectrum of angry, militant speech, it is perfectly appropriate for public figures to urge that dialogue on contentious issues be conducted in a respectful manner. It is hypocritical, however, for a person to denounce his enemies in hateful terms, while at the same times condemning political opponents for using excessive rhetoric. Yet this is precisely what President Clinton has done, despite his duty as President to set a constructive tone for national debate. According to President Clinton, persons who disagreed with his terrorism bill were terrorist co-conspirators, for they wanted to "turn America into a safe house for terrorists." [FN97] The public campaign waged in newspaper opinion pieces, joint letters to Congress, and lobbying was falsely characterized as "back- alley whispers." [FN98] Earlier, persons who had opposed *275 the 1994 Clinton crime bill's ban on semiautomatic firearms were said by the President to have no basis in conscience for doing so, [FN99] as if a sincere belief in strict Constitutional construction were not only incorrect, but immoral. Two

weeks after the Oklahoma City bombing, President Clinton characterized many millions of Americans as unpatriotic, for "there is nothing patriotic about . . . pretending that you can love your country but despise your government." [FN100]

We hope that President Clinton simply meant the remarks as cheap shots at his political opponents, and never thought them through carefully. For if he really believed what he said, then would he say that a true German patriot in the 1930s could not love Germany and despise the Nazi government? [FN101] Could William Jefferson Clinton believe that namesake Thomas Jefferson could not love America while despising King George's government? For that matter, was it impossible for a young student named Bill Clinton and his fellow anti-Vietnam draft evaders to find themselves, in his words, "still loving their country but loathing the military . . . "? [FN102]

Speaking just a week after the Oklahoma City murders, President Clinton called attention to recent remarks by talk show host G. Gordon Liddy, saying "I cannot defend" such speech. [FN103] Shortly after the Oklahoma City bombing, Liddy urged listeners to cooperate if Bureau of Alcohol, Tobacco, and Firearms (BATF) agents arrived peacefully to execute a search warrant. But, Liddy added,

> (I)f they smash in unannounced, screaming at you and assault you with lethal force, you have two choices. You can die under their bullets, or you can shoot back and *276 try to defend your wife and family. If they're wearing flak jackets, don't shoot them there, shoot them in the head. [FN104]

In every state, it is legal to use deadly force to defend against a lethal attack. If the attacking criminals happen to be government agents, the law is not changed. Thus, Liddy's statement advocated only lawful self-defense, not criminal attack.

Taken as a whole, Liddy's statement suggested absolutely nothing illegal, but taken out of context, the "shoot them in the head" statement was repeatedly misconstrued to suggest that Liddy had told listeners to hunt down BATF agents and assassinate them. President Clinton's speech, of course, relied on the out- of-context construction. We will assume that President Clinton was not deliberately lying about what Liddy had said, but instead was misinformed, although it is hard to see why a man with a large staff of speech writers and speech-writing assistants cannot make sure that people whom he attacks by name have actually said what he is attacking them for.

"Strong rights require strong responsibilities," is the slogan of the Communitarian Network, a Washington political movement of which President Clinton is a strong supporter. [FN105] America's strong freedom of speech requires those who exercise it not just to avoid unlawful speech, but to avoid speech that is hateful, polarizing, and defamatory. Too many leaders of the militia and patriot movements have failed to live up to this responsibility. So, too, has Mr. Clinton. [FN106] *277

B. Censoring the Internet

Some Congresspersons have announced their dismay that explosives recipes and other instructions for making products which are illegal without a special license can be found on the Internet. First of all, it is legal in the United States, and always has been, to publish information about how to make firearms, or explosives, or any other type of weapon. The only attempt to create an exception involved nuclear weapons, an exception based on the unique, gargantuan destructive power of nuclear weapons (which can destroy not just a building, but an entire city), and hence inapplicable to more conventional products. [FN107]

Thus, the sixties' relic *The Anarchist Cookbook* remains lawfully available today and can be bought by mail-order. [FN108] Likewise, it is legal to purchase and read any number of books that detail how to break various laws, steal things, or resist the government, including Abbie Hoffman's *Steal This Book*. [FN109]

The fact that some such books are being distributed electronically--by phone lines, rather than by printing and mail-order--hardly changes their secure status within the protection of the First Amendment, any more than the fact that *The Anarchist Cookbook* was printed with a high-speed modern printing press rather than a Franklin press took the book out of the First Amendment. It is well established that government may punish persons for breaking the law, or for imminent incitement *278 to break the law. [FN110] It may not punish people for possessing knowledge or for reading about breaking the law.

The final terrorism legislation requires the Attorney General to study the availability, in all media, of bomb-making instructional manuals and the constitutionality of restrictions on such manuals.

C. Felonizing Support for Peaceful Activities of Foreign Organizations

Before the terrorism bills were even introduced, federal law appropriately forbade the provision of material support to foreign terrorists. [FN111] This law also forbade investigations of people for violating this law unless there is some reasonable suspicion that they have violated or may violate the law. [FN112]

In the terrorism bill signed by the President, the statutory protection of First Amendment rights was eliminated. Further, the bill expanded the prohibition of support to include a prohibition on support for lawful non-violent activities of any group which the Secretary of State designated a "foreign terrorist" organizations. [FN113] As the bill moved through Congress, the Clinton administration retreated from its insistence that the Executive designation be unreviewable. At the least, the potential for judicial review will reduce the risk of the terrorist designation being used against domestic dissident groups, since they would be able to show in court that they were not foreign. [FN114] But it should be remembered that American courts have historically been extremely deferential to Presidential foreign policy decisions. If there were even a modicum of evidence in favor of the President's designation of a foreign group as "terrorist," then it is very likely that courts would not overturn the designation. In addition to criminal penalties of up to ten years in prison, civil fines of $50,000 per offense may be imposed, and in *279 civil prosecutions, the government may, upon approval of the court, introduce secret, classified evidence that remains hidden from the defendant. [FN115] In case of judicial review of the

"terrorist" designation, the government would be able to use secret evidence, shown ex parte and in camera. [FN116]

Moreover, a provision put into the final bill at the last minute by the Conference Committee requires banks to freeze the domestic assets for any account-holder who claimed to be an agent of a foreign terrorist organization. [FN117] Notably, the legal requirement to freeze assets is not contingent on any designation by the Secretary of State, but instead is an independent legal duty of the bank. [FN118] The bill does not offer any provision for an individual or organization to appeal the freezing of their assets. [FN119]

The reader might consider imagining this legislation in the hands of her worst political nightmare. An organization which provides support to the government of Israel or to the Israeli Defense Forces (both of which are considered "terrorist" in some political circles) could be outlawed, as could (by a different President) a group which provides support to Palestinian refugees.

One important distinction between the Clinton and Dole bills was that the Dole bill created an explicit exception to the "material support" statute: "'Material support' . . . does not include humanitarian assistance to persons not directly involved in such violations." [FN120] Thus, under the Dole approach, sending a Christmas food package to an I.R.A. or A.N.C. prisoner would constitute material support, but giving money to a fund that assisted *280 the orphaned children of I.R.A. or A.N.C. members would not. The final legislation did not include the proposed Dole exception.

Thus, under the new terrorism bill, a donor to the I.R.A. orphanage would be a federal felon, subject to ten years in prison, as would be a person who spent five dollars to attend a 1980s speech of a visiting lecturer from the African National Congress. If the "material support" language had been law in the early 1980s, persons who gave money to church relief groups in El Salvador and Nicaragua, which opposed American policy in Central America, could have been labeled "terrorist." [FN121] When pressed about this problem at Congressional hearings, a Clinton administration spokesperson acknowledged that minor support for the A.N.C.'s peaceful activities could have been felonized, but that the American people should simply trust the President not to abuse the immense power which President Clinton was requesting. But as President Lyndon Johnson put it: "You do not examine legislation in light of the benefits it will convey if properly administered but, in light of the wrongs it would do and the harms it would cause if improperly administered." [FN122]

1. Licensed Donations

Both the Clinton and Dole bill included provisions allowing certain humanitarian contributions to blacklisted groups. However, these provisions were not included in the Conference bill. The unenacted licensing procedure was very difficult to comply with. Not only did a recipient group have to open its books to the Treasury Department, so did the donor. In other words, if a person wanted to make a $50 contribution to buy clothes for Palestinian orphans, the person must make his financial records *281 open for inspection, and be able to show "the source of all funds it receives, expenses it incurs, and disbursements it makes." [FN123] There was no limitation that

the complete accounting of receipt, expenses, and disbursements be limited to the charitable donation. Virtually no one in the United States keeps such detailed records. Knowing that a charitable donation to a politically blacklisted group would expose the donor to a nightmare audit, few donors would be courageous or foolish enough to give anyway.

2. The Constitutional View

The Constitution mandates that if a person is to be punished for association with a group which has unlawful objectives, the government must prove that the individual specifically intended to further the unlawful objectives. [FN124] What the Clinton/Dole bills propose is a return to practices which the Supreme Court outlawed over half a century ago.

In 1940, the Immigration and Naturalization Service (INS) attempted to deport labor organizer Harry Bridges because of his affiliation with the Communist party. Bridges had supported only lawful Communist activities--not the party's unlawful ends. The INS (like Clinton and Dole) argued that if an organization had unlawful purposes, the fact that a supporter had supported only lawful purposes was irrelevant. The Supreme Court disagreed and reversed. [FN125]

More recently, the Court declared unconstitutional a law that was "a blanket prohibition of association with a group having both legal and illegal aims." [FN126] Unless there was proof that the defendant specifically intended to support the group's *282 illegal aims, the prohibition was a violation of " the cherished freedom of association protected by the First Amendment." [FN127]

IV. Second Amendment

A. Cracking Down on Militias

Adam Parfrey, who had written an October 1994 story about militias for the *Village Voice*, [FN128] found himself an instant militia "expert" after the April 1995 crime in Oklahoma City. Major news organizations would contact him, asking him to supply a quote which linked the militias to the bombing. When he suggested that there was no link, reporters quickly lost interest. The mainstream media's combination of certitude and ignorance was illustrated by a statement from a *Washington Post* researcher: "The militias--whoever the fuck they are--are a ticking time-bomb composed of paranoid lunatics." [FN129] Many Americans, including, we guess, most readers of this law review as well as many journalists who have written about militias, have never met an actual militia member. Most militia members, we are certain, have never met an actual international banker. In a condition of ignorance, it is possible for militia members to believe dark tales of an international banking conspiracy that would be laughable to a person who knew international bankers by meeting them at Manhattan cocktail parties. Conversely, well-educated Americans who know all about international *283 banking, but nothing about living on a farm in Montana, may fall for stupendous exaggerations about evil militia conspiracies.

Much of what many Americans "know" about militias comes from uncritical media repetition of information from America's anti-militia movement. Exclusive reliance on such sources can be as

misleading as would be reliance on Operation Rescue for most of one's information about abortion clinics. Unfortunately, the anti-militia movement too often acts as a mirror image of the worst side of the militia movement: the ideology is exactly reversed, but the paranoia and misinformation remain the same.

These problems are illustrated in a pair of books published by anti-militia leaders shortly before the first anniversary of the Oklahoma City bombing: *A Force upon the Plain: The American Militia Movement and the Politics of Hate*, by Kenneth Stern of the American Jewish Committee (AJC), [FN130] and *Gathering Storm: America's Militia Threat*, by Morris Dees of the Southern Poverty Law Center (SPLC). [FN131]

Before analyzing the books, we wish to emphasize our respect for the good work that the AJC and the SPLC have done in other fields. One of us, Kopel, was a monthly donor to the SPLC from 1984 through 1995. Both organizations are composed of good Americans who mean well for their country. But the anti-militia groups, like the militias they criticize, have allowed their prejudices and fears to outrun the facts. A sensible policy regarding militias must steer a middle course between the paranoia at both ends of the debate.

"The very future of the United States is at risk, because of treason in our midst." [FN132] This quote summarizes the apocalyptic exaggeration of some militia leaders. It is also the implicit message of the anti-militia movement. Dees' book opens with a quote from the Gettysburg Address, observing that "we are engaged in a great civil war," and wondering "whether (our) nation . . . *284 can long endure." [FN133] "Unless checked," the militia movement "could lead to widespread devastation or ruin," we are warned. [FN134]

The mastermind of the great militia conspiracy, according to Dees, is Ku Klux Klan leader Louis Beam, who appears in the book as a Moriarty, to Dees as a Sherlock Holmes. (Dees and his organization, the nation's wealthiest civil rights charity, [FN135] must fight almost alone against the vast militia conspiracy, as ignorant state attorneys general refuse to heed Dees' call for a crack-down on militias.) The American militia movement was originated primarily from the brilliant tactical decision of Beam and a few other racists to use the Randy Weaver incident to go mainstream. They built organizations composed of people concerned about the loss of their rights, rather than racists who wanted to take away the rights of other people. [FN136] Although, as even Dees' statistics show, most militias are not run by racists, non-racist militia members are essentially dupes of Beam, et al., and the non-racist militias are allegedly vulnerable to takeover by the Beam conspiracy. "Conspiracy reeks throughout this bloody murder" announced racist preacher Pete Peters after the deaths of Sammy and Vicki Weaver at Ruby Ridge, Idaho. [FN137] Dees and Stern believe the same about Oklahoma City.

At an Estes Park, Colorado meeting following the Weaver incident, according to Dees, "Plans were laid for a citizens' militia movement like none this country has known. It's a movement that has already led to the most destructive act of terrorism in our nation's history." [FN138] "Patriot Underground Strikes in *285 '95" is the headline for a special year-end report of the Southern Poverty Law Center; immediately below the headline are pictures of the Arizona train derailment and of the Alfred P. Murrah Building in Oklahoma City. [FN139] There is, of course, no suspect in the Arizona train derailment, let alone a "Patriot" movement suspect. Nor has anyone in the

Patriot movement been implicated in the Oklahoma City bombing. Nor is there any sinister Patriot "underground." The Patriot movement has public meetings, advertises in newspapers, and communicates through newspapers and talk radio--not exactly the tools of an underground.

Yet Dees and Stern build their books around the claim that the militia/patriot [FN140] movements are unindicted coconspirators in the Oklahoma City murders. McVeigh's entire connection to the militia movement has two pieces. First, Terry Nichols and he attended two meetings of the Militia of Michigan. It is uncontroverted that the pair were told to leave because they were talking about violence. [FN141] Second, Mark Koernke, a short-wave radio personality who runs a mail-order business selling militia *286 gear, was seen with someone who looks a great deal like McVeigh. That's all the evidence showing any contact at all between McVeigh and the militias, and obviously does not come remotely close to even suggesting that anyone in a militia encouraged McVeigh to do anything illegal, let alone perpetrate one of the most vicious mass murders in history.

Added to the above collection of nothing, there is certain circumstantial evidence. McVeigh photocopied material at a copy center in Arizona. "He would not have needed extra copies unless, maybe, he was supplying them to his confederates," suggests Dees. [FN142] Or unless he was selling or giving away the material from his booth at gun shows, where he was known to sell literature; this rather obvious alternative explanation is not even suggested to the reader.

One key piece of evidence, emphasized by Dees and Stern is that after being arrested, McVeigh only supplied his name, and no other information. This conduct, the authors note, is consistent with instructions which members of the Militia of Michigan have been given if they are captured. [FN143] True enough, but the authors overlook the obvious fact that instructions to supply only name, rank, and serial number are also given to members of the United States armed forces in which McVeigh served.

So hard are the authors searching for tiny specks of evidence of militia conspiracy in Oklahoma City that they neglect much more obvious facts; we know who taught McVeigh how to manufacture and employ explosives, as well as who put him through a specific course of psychological conditioning--designed by behavioral experts--with the intention of destroying the normal human reluctance to kill another human being. [FN144] It was the United States Army. *287

Most soldiers understand the difference between killing enemy soldiers and killing one's own civilian countrymen, just as most militia members understand the difference between training for self-defense and blowing up innocent people. Yet Stern and Dees, convinced that McVeigh's horrible crime was driven by militia ideology, do not even pause to consider whether United States government ideology and training may have played a role.

The authors ominously note that McVeigh read gun magazines, especially *Soldier of Fortune*, [FN145] but fail to note that *Soldier of Fortune*, while sharply critical of government conduct at Ruby Ridge and Waco, has published articles debunking some militia leaders' claims about foreign troops in the United States and other false facts which would tend to create an atmosphere of crisis. [FN146] Besides, using reading material as the foundation of guilt by

association is tenuous at best. When arrested, McVeigh had in his car a handwritten passage from John Locke's *Two Treatises of Government* about the right to resist tyranny by force. [FN147] Shall we condemn Locke and Lockeans for creating the climate of hate against government employees that may have pushed McVeigh into violence? The date of the *288 Oklahoma City bombing, besides being the second anniversary of the FBI tank and chemical warfare assault on the Branch Davidians, was also the 220th anniversary of the battles of Lexington and Concord. When arrested, McVeigh was also carrying material about those battles. [FN148] Should every history teacher who has glorified America's noble resistance to King George be condemned as contributing to the " climate of hate" and a crime perpetrated by a man who could not make the moral distinction between shooting at an advancing hostile army, and blowing up innocent government employees?

Borrowing an idea from Ken Toole, [FN149] Stern examines societal extremes in the context of a funnel: at the widest point, are people concerned with tax and environmental issues; deeper, in the narrower part of the funnel, are the conspiracy theorists; at the far end, out pops Timothy McVeigh. The metaphor is powerful, but it is nothing more than guilt by association. It is no more valid than a funnel with clean water advocates at the wide end, radical environmentalists in the middle, and the Unabomber popping out the narrow end.

Moreover, the great ideological inspiration for McVeigh was neither a gun magazine, John Locke, or any other form of militia literature. McVeigh fell in love with *The Turner Diaries*, a fictional, white-racist, anti-Semitic account of a race war in which the FBI building is destroyed with a fertilizer bomb. [FN150] Well before the militia movement even existed, McVeigh was captivated with the book, urging his friends to read it, and selling it at a discount.

Unlike the Southern Poverty Law Center, we do not have "dossiers" on thousands of suspected militia members and militia sympathizers. Nor do we have a staff of ten people devoted entirely to collecting information on militias. Nor do we have infiltrators placed in the militia movement. Thus, there is a great deal of material in Dees' book, and Sterns' as well, which we cannot authoritatively claim is false. There is no way of telling. Neither book has footnotes, which makes verification of the various claims all the more difficult. [FN151] But as for the facts *289 in the books for which we have independent knowledge, there are a good number of incorrect statements, or facts presented out of context.

Stern's book prominently features the following quote from Samuel Sherwood of the U.S. Militia Association: "Go up and look legislators in the face, because someday you may be forced to blow it off." [FN152] The quote is ubiquitous among anti-militia activists, [FN153] and their supporters in the media. [FN154] The one problem with the quote is that it is a falsehood.

In a July 1995 article, *Reason* magazine exposed the alleged Sherwood quote as a fabrication of a local journalist that was repeated by the *Wall Street Journal's* intensely anti-gun Al Hunt. [FN155] It then became a certified part of official Washington's false consciousness.

Here's what the Reason article reports:

> In the closing minutes of the meeting, Sherwood made an impassioned plea for using political action rather than violence in correcting the wrongs that the members of the United States Militia Association see in government. He suggested that if his listeners wanted to grab a gun to shoot their legislators, they should first go look them in the face and recognize that legislators are also American citizens who are fathers, mothers, husbands, and wives. The audience not only understood *290 that he was arguing against violence, they applauded his remarks. Unlike *Journal* columnist Hunt, I was actually at the meeting. [FN156]

Stern also throws in the G. Gordon Liddy quote about shooting BATF agents, omitting Liddy's words about doing so only in case of a murderous invasion of one's home. [FN157]

Dees and Stern both devote a good deal of ink to promoting gun control, particularly the notion that the Second Amendment does not guarantee an individual right to arms. [FN158] Dees and Stern assure us that "most scholars" agree. [FN159] While the Second Amendment is subject to legitimate debate, the position that most scholars have taken (regardless of whether that position *291 is correct), is not debatable. The overwhelming body of scholarship on the Second Amendment concludes that the Second Amendment was intended to guarantee an individual right; no-one who is familiar with scholarly debate on the Second Amendment in the last decade could possibly assert that most scholars reject the individual rights view. [FN160] Scholars who do *292 argue against the individual rights view acknowledge that they are arguing against a large mass of published scholarship. [FN161]

Dees tells the reader that George Washington "denounced the actions of privately armed groups with a political agenda as a threat to democratic society. He then went out and crushed *293 the Whiskey Rebellion." [FN162] Washington's exact words are not specified, and we would suggest that Washington was not quite as hostile to militias as Dees claims. He did crush a privately armed group--when they started a violent rebellion against the laws of the United States. But to crush the Whiskey Rebellion, George Washington exercised his legal authority to "call forth the militia" of Pennsylvania. [FN163] Before the American Revolution, George Washington, along with George Mason, founded a non-governmental militia outside the (British-appointed) Governor's chain of command. The Fairfax County Militia Association, with as strong a political agenda as any group could have, declared: "Threat'ned with the Destruction of our Civil-rights, & Liberty," (we will) "each of us, constantly keep by us" arms and ammunition. [FN164]

Stern also offers some dubious history:

> (A militia book) claimed that "American patriots took up arms against the British and began the revolution only when--and precisely because--the British attempted to disarm them." Wrong, says historian Rosemary Zagarri. "The British fought the Americans," she says. "They didn't try to disarm them." [FN165]

The list of sources for the chapter does not include any work by Rosemary Zagarri (who apparently is quoted in some other source of Stern's), but the issue, in any case, hardly requires a professional historian. The commonly-accepted opening of the American Revolution is the

battles of Lexington and Concord in which American militiamen "fired the shot heard round the world." The British had marched on Lexington and Concord to seize weapons and gunpowder in the militia armories of the two towns. The first fighting in Virginia occurred when the *294 Redcoats attempted to seize gunpowder. [FN166] When the British marched toward Lexington and Concord, they marched out of the occupied city of Boston, whose people the British government had assiduously attempted to disarm. [FN167] When British victory appeared in sight in 1777, Colonial Undersecretary William Knox authored a plan: "What is Fit to Be Done in America?" Knox suggested establishment of a state church, unlimited tax power, a governing aristocracy, a standing army, repeal of the militia laws, a ban on arms manufacture, a ban on arms imports without a license, and "the arms of all the People should be taken away." [FN168]

While Dees and Stern may not know the detailed history of the American Revolution and Early Republic (which should make them cautious in making broad pronouncements about them), it is fair to expect the head of an organization to describe correctly his own organization's legislative agenda. Protesting a concern for civil liberties, Dees announces his affection for the right to assembly, adding only the reasonable-sounded qualification that "the government can insist that those who assemble do so without automatic weapons in order to protect against a potential deadly breach of the peace." [FN169] This is doubly misleading. First, the statement about automatic weapons adds to the public confusion about the distinction between automatic weapons (machine guns) and semi-automatic weapons (which fire only one shot per trigger pull, but which sometimes look like automatic weapons) that has been fomented by the anti-gun lobbies. Nor is the Southern Poverty Law Center's proposed ban on assembly with firearms limited to automatics, or even semi-automatics. The SPLC proposal applies to any gun, all the way down to a single-shot .22 rifle, and could turn a hunting-lodge political discussion into a federal felony.

As the books build to their climax, they warn that more militia violence is coming. Of course the evidence that there *295 has already been a wave of militia violence is tenuous. The centerpiece of the theory of militia violence is the unsupported link between militias and the Oklahoma City bombing. Several other crimes by militia members are detailed, supplemented by the elastic category of crimes by "militia sympathizers," an open-ended grouping as subject to abuse as the John Birch Society's listing of "Communist sympathizers." [FN170]

Even if we count all alleged "militia sympathizers" as actual militia members, the SPLC Report shows that militia members perpetrate violent crimes at a per capita rate far below the American population as a whole. Certainly there are criminals who belong to militias, as there are criminals who belong to police departments, or to Congress. (Indeed, rogue police officers have committed far more than thirty-six violent crimes in the period covered by the Southern Poverty Law Center report.)

The presence of a few criminals among a vastly larger class of law-abiding citizens is no reason to "crack down" on non-criminal militia members--or to crack down on non-criminal police officers. The prediction of the coming wave of militia terrorism is actually nothing more than Dees' psychological analysis of how he thinks militia members are likely to behave: "After a while, angry loners are likely to grow bored roaming around the woods and shooting at paper targets." [FN171] In other words, if people train with guns, they will eventually start killing with

guns. The speculation parallels the theory of unilateral disarmament advocates that nuclear weapons, if possessed, will eventually be used. Dees and his coauthor have a gift for powerful language, which sometimes can make the reader forget the absence of facts to support it: "Predicting when and where militia terrorists will strike next is no easier than guessing when and where the next whirlwind of dust will form. Unfortunately, all that seems certain is that the devils will strike again." [FN172] *296

It is not unusual for direct-mail organizations to grossly exaggerate alleged threats. Several former Southern Poverty Law Center staff attorneys have accused the group of overstating the Ku Klux Klan threat in the 1980s, fooling credulous donors about the pervasiveness of Klan activity in the modern South. [FN173]

Stern, also a powerful writer, warns, "Whenever an ideology justifies baby- killing--even at the fringes of the fringes--that is an especially strong danger signal." [FN174] True enough, but Stern never identifies any militia ideologue-- even on the fringes of the fringes--who justifies baby killing.

Dees is much more careful than Stern to emphasize that most militia members are not racists. [FN175] Yet broad smears still appear in the book. The first page of the photo spread at the center of the book is titled "Martyrs of the Modern Militia Movement," and features a picture of the founder of a neo-Nazi group (the Order) and homicidal leader of the racist Christian Identity religion. [FN176] Dees does, however, opine that Americans were fully within their rights to change the party in control of Congress in the 1994 elections, and he makes a point of expressing his own frustrations with the federal government, as when federal regulators forced his father to plow under two acres of cotton during the Depression, because Dees' father had exceeded his acreage allotment. [FN177]

Stern, in contrast, occasionally acknowledges that not all militia members are racists, but his stock phrases, such as "the *297 hate of militias," leave an opposite impression. [FN178] He finds that in the 1994 elections, "the vitriolic antifederal sentiments of some of these newly elected officials" differed "in detail but not in flavor" from the ideas of racist gangs in the 1980s and today's militias. [FN179]

Stern is much more explicit in doing what has been implicit in much of the anti-militia movement: using charges of anti-Semitism and racism to delegitimize political stands he does not like, and to vilify political opponents, just as charges of being a "Communist sympathizer" were used in earlier generations to attack non-Communist advocates of civil rights or other progressive legislation.

Thus, "whenever Americans have talked of 'states rights' or 'county supremacy,' that is a cover for bigotry." [FN180] It is true that states' rights have sometimes been used as a cover for bigotry--such as when the argument was used to defend white supremacist policies in Southern states in the 1950s. But to argue that "whenever" states' rights are discussed, the proponent is always promoting racism is absurd. The Tenth Amendment--ratified by both houses of Congress and by three-quarters of American state legislatures--guarantees states' rights. Were all of its supporters motivated by bigotry? Were all the United States Supreme Court Justices who

vindicated the Tenth Amendment in *New York* v. *United States*, [FN181] N*ational League of Cities* v. *Usery*, [FN182] and *United States* v. *Butler* [FN183] likewise bigots? Is Dennis Henigan--the Handgun Control, Inc. attorney who argues that the Second Amendment guarantees a state's right to have a militia [FN184]--likewise a bigot? *298

Moreover, legislators can never do anything which militias might agree with, for such action would only legitimize them. Thus, the majorities of both houses of the Montana legislature are guilty of legitimizing militias because they passed legislation that required federal agents to receive permission from local sheriffs before conducting arrests. [FN185] Likewise, "if there are 'retreats' on environmental protection and gun control," militias may be strengthened. [FN186]

Stern quotes an Ohio militia member who suggests that the current United States government perpetrates many of the same abuses identified in the Declaration of Independence. The militia movement is then chastised for "(t)he use of patriotic images to malign American government." [FN187] Actually, comparing one's political opponent to King George III is one of the oldest non- partisan rhetorical devices in American politics. Pat Schroeder, who loves her country and its government, delivered a stirring speech to the 1974 Colorado Democratic Convention comparing then-President Richard Nixon to King George, by reading through the litany of grievances in the Declaration of Independence. [FN188]

After acknowledging that most people do not join militias for racist or anti-Semitic purposes, Stern insists that "racism, especially anti-Semitism, was essential to the movement . . ." [FN189] For example, militias believe in "states rights" and "county rights" which are "covers for bigotry." [FN190] After all, "(y)ou don't want to make the county sheriff the highest legitimate government official if you are concerned about building an egalitarian society." [FN191] If the only way in which "an egalitarian society" can be built is through the federal government imposing racial quotas and other laws on private citizens, *299 Stern's assumption may be true. But it is certainly possible for a person to believe in good faith that we will get a more egalitarian society when we do not have a federal or a state government capable of imposing racial or religious discrimination, all people are equal before the law regardless of race or religion, and no form of private bigotry can find a government to support it. There is certainly room for people to disagree about whether federal power or greater personal liberty are better approaches to an egalitarian society, and the purpose of this Article is not to argue for one approach or the other. We do argue that it is inappropriate for Stern to insist that people who favor the less-government path to egalitarianism are, by definition, racists or anti-Semites. [FN192]

According to Stern, people who believe in big-government conspiracy theories, just like the small-government proponents are necessarily anti-Semitic. "(T)he conspiracy theories that underlie the movement are rooted in the *Protocols of the Elders of Zion*." [FN193] Talk about "international bankers," the "Federal Reserve," the "Trilateral Commission," or "eastern elites" are all "code phrases" that imply anti-Semitism. [FN194] The anti-Semitic *Protocols of the Elders of Zion* is not, however, the foundation for conspiracy theories about international bankers and the like. [FN195] As Stern reports, the John Birch *300 Society (in some respects an intellectual ancestor of today's conspiracies theorists), traced the then- current "Communist conspiracy" (alleged to include President Eisenhower), back to the Bavarian Illuminati of 1776. [FN196] The great founding document of this conspiracy theory, *Proofs of a Conspiracy*, was

written in 1798, by Edinburgh University professor John Robison; the book has been reprinted by Western Islands Press, the publisher of John Birch Society books. [FN197] Some strands of *301 conspiracy thinking extended back to Sparta. On the way to the present, numerous other groups are implicated in conspiracy theories, including the Knights Templar, the Masons, the Gnostics, the Manicheans, and various other folks. What these groups all have in common (besides supposedly being involved in the great conspiracy), is that none of them are Jewish. The Knights Templar were the international bankers of the middle ages, brought down when a free-lance paid informant accused them of heresy, homosexuality, and other practices, and, when tortured, many members of the order confessed. [FN198] As the great historian Richard Hofstadter explained in *The Paranoid Style in American Politics*, contemporary American conspiracy thinking starts with the use of Robison's book in campaigns against the Jeffersonians, and was flourishing long before the 1903 publication of *The Protocols*. While not all American anti-conspiracy movements have been religiously prejudiced, Catholicism, not Judaism, has been the obsessive concern of anti-conspiratorialists who are also bigots. [FN199]

As in too much of the militia movements, in the anti-militia movement "rhetoric is routinely used to demonize an opponent, legitimize insensitive stereotypes, and promote prejudice." [FN200] The militia and anti-militia movements too often offer, "a model of conspiratorial 'logic' designed to grab audiences who, if they accepted the premises and did not question the sleight-of-hand, *302 easily could have been convinced." [FN201] The wild claims based on weak evidence [FN202] serve to polarize rather than advance political dialogue and national unity. Contrary to the prescriptions of the anti-militia movement, the best path for dealing with issues raised by the militias is for all sides to have less hate, less paranoia, and less stereotyping.

In an odd sense, the militia and anti-militia movements benefit from mutual antagonism. The claims from militia and anti-militia paranoia-mongers may not convince the majority of the American public, or a majority of Congress of anything. But far-out stories energize already credulous supporters, and bring in new support from persons who are ill-informed about the supposed enemy "menace." [FN203] "Mark from Michigan" has done a thriving business in selling mail-order survival equipment, and the Southern Poverty Law Center, with reserves of fifty-two million dollars, is one of the wealthiest non-profit groups in the United States. [FN204] *303

The outer fringes of the militia and patriot movements, with their nativist fears of a vast international conspiracy involving the United Nations and highly-placed American traitors, reflects some of the political orientation of the John Birch Society. Ironically, the SPLC, the ACJ, and other anti-militia groups increasingly resemble a John Birch Society of the Left. Barbara Dority (president of Humanists of Washington, executive director of the Washington Coalition Against Censorship, and co-chair of the Northwest Feminist Anti-censorship Taskforce), writes:

> Much of the readily available "information" about militias and the patriot movement is being disseminated by "anti-hate" organizations with their own agendas. One such group is the Southern Poverty Law Center, whose recent direct-mail materials indicate a surprising attitude. Rightly acclaimed for its effective lawsuits against racist groups that commit acts of violence, the SPLC

> says it has recently established a massive computer database of "hate groups," including reports on 14,000 individuals who have "committed hate acts" or who are "affiliated with hate groups," as well as "extensive intelligence" on more than 3,200 "hate and militia organizations."
>
> From a civil-liberties standpoint, these tactics are a little too reminiscent of organizations like the John Birch Society, which kept extensive records on "communists and communist sympathizers." Moreover, the SPLC campaigns for laws that will effectively deny free speech and freedom of association to certain groups of Americans on the basis of their beliefs. Six times a year, the SPLC's letter boasts, the center reports its findings to over 6,000 law-enforcement agencies; then, with no discernible irony, it goes on to justify its Big Brother methods in the name of "tolerance," arguing that "paranoid militant groups" are seeking protection from "imagined threats" to their freedoms. [FN205] *304

The paranoid tracts of the anti-militia movement, like Mark Koernke's ridiculous short-wave fearmongering, should not be dismissed as unimportant, for like Mark Koernke, the anti-militia movement has a large following. In the foreword to *A Force upon the Plain*, Stern explains that the book was written to provide the public relations foundation for legislation being pushed by Representative Charles Schumer (a leader of the Congressional anti-militia movement). [FN206] "(V)aluable Americans, valuable books," writes *New York Times* columnist Abe Rosenthal of the Stern and Dees books. [FN207] *Newsday* called Stern's book "prodigiously researched and compellingly written." [FN208] The *New York Times* liked the book so much that it gave the book *two* glowing reviews. [FN209] Senator Daniel Patrick Moynihan also lavished praise. [FN210] The Dees book jacket features quotes from opinion leaders such as Jimmy Carter and Arthur M. Schlesinger, Jr. [FN211] Stern and Dees are almost as guilty as Mark Koernke of poisoning the American political dialogue, and the audience which falls for the anti-militia conspiracy theory is much more politically powerful than is the smaller group that falls for Koernke's fictions.

To respond intelligently to the militia and patriot movements, we must acknowledge that, although the movements are permeated with implausible conspiracy theories, the movements are a reaction to increasing militarization, lawlessness, and violence of federal law enforcement. Such genuine problems should concern all Americans. Simply asserting that all these people are conscious or unconscious anti-Semites, dupes of some vast Ku Klux Klan conspiracy, is not an adequate response. Public policy makers should give serious consideration to Professor Glenn Harlan Reynolds' insight: *305

> When large numbers of citizens begin arming against their own government and are ready to believe even the silliest rumors about that government's willingness to evade the Constitution, there is a problem that goes beyond gullibility. This country's political establishment should think about what it has done to inspire such distrust--and what it can do to regain the trust and loyalty of many Americans who no longer grant it either. [FN212]

If Americans want to shrink the militia movement, the surest way is to reduce criminal and abusive behavior by the federal government. Conversely, the persons responsible for the deaths of innocent Americans should not be promoted to even- higher positions in the FBI or federal law enforcement. If the Clinton administration were trying to fan the flames of paranoia, it could hardly have done better than to have appointed Larry Potts second-in-command at the FBI.

We must also remember that it is lawful in the United States to exercise freedom of speech and the right to bear arms. Spending one's weekends in the woods practicing with firearms and listening to right-wing political speeches is not our idea of a good time, but there is not, and should not be, anything illegal about it.

Cracking down on militias will lead to disaster. Nearly twenty years ago, an article in the *Public Interest* explained the American gun control conflict:

> (U)nderlying the gun control struggle is a fundamental division in our nation. The intensity of passion on this issue suggests to me that we are experiencing a sort of low-grade war going on between two alternative views of what America is and ought to be. On the one side are those who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made *306 rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.
>
> On the other side is a group of people who do not tend to be especially articulate or literate, and whose world view is rarely expressed in print. Their model is that of the independent frontiersman who takes care of himself and his family with no interference from the state. They are "conservative" in the sense that they cling to America's unique pre-modern tradition--a non- feudal society with a sort of medieval liberty (at) large for everyman. To these people, "sociological" is an epithet. Life is tough and competitive. Manhood means responsibility and caring for your own. [FN213]

The author explained the catastrophe that America will create for itself if fearful people in government attempt to "crack down" on fearful gun-owners, thereby fulfilling the worst fears that each group has of the other:

> As they (the gun-owners) say, to a man, "I'll bury my guns in the wall first." They ask, because they do not understand the other side, "Why do these people want to disarm us?" They consider themselves no threat to anyone; they are not criminals, not revolutionaries. But slowly, as they become politicized, they find an analysis that fits the phenomenon they experience: Someone fears their having guns, someone is afraid of their defending their families, property, and liberty. Nasty things may happen if these people begin to feel that they are cornered.

> It would be useful, therefore, if some of the mindless passion, on both sides, could be drained out of the gun-control issue. Gun control is no solution to the crime problem, to the assassination problem, to the terrorist problem . . . . (S)o long as the issue is kept at *307 a white heat, with everyone having some ground to suspect everyone else's ultimate intentions, the rule of reasonableness has little chance to assert itself. [FN214]

Kenneth Stern correctly chastises elements in the militia movement which see the end of the Cold War as simply the beginning of a new war with a domestic enemy. [FN215] His insight applies equally to all sides of the political debate. Kenneth Stern, the Militia of Michigan, and President Clinton all have something in common: they are all Americans, and they deserve to be treated, in cases of political disagreement, as political opponents, rather than as traitors or devils. Both sides of the militia debate have much room for improvement in this regard.

B. "Assault Weapons"

Among the more cynical efforts to exploit the Oklahoma City tragedy is the effort of gun prohibition advocates to use the murders as a pretext for preserving the federal ban on so-called assault weapons. To state the obvious, the Oklahoma City bombing was perpetrated with a bomb, not a gun. The bombers may have attended meetings of groups that support the right to keep and bear arms, but that does not prove that gun rights groups were co-conspirators, despite the vicious insinuations of some gun prohibition advocates. *308

The reasons for repealing the gun ban remain as strong as ever. First, Congress has no Constitutional power, under the Constitution's text and original intent, to use the interstate commerce power to ban the simple possession (as opposed to sale in interstate commerce) of anything. [FN216] Second, if one looks at actual police data (rather than unsupported claims from anti-gun police administrators), "assault weapons" constitute only about one percent of crime guns. [FN217] Third, despite the menacing looks of so-called "assault weapons," they are not more powerful or more deadly than firearms with a more conventional appearance. Instead, the "assault weapon" ban is based on cosmetics, such as whether a gun has a bayonet lug--as if criminals were perpetrating drive-by bayonetings. [FN218] Finally, the ban has already been nullified for all practical purposes. Since the law defines an "assault weapon" based on trivial characteristics like bayonet lugs, gun manufacturers have already released new versions of the banned guns, minus the cosmetically offensive bayonet lugs and similar components.

Repeal of the "assault weapon" ban makes sense as a move towards a more rational federal criminal justice policy. It makes even more sense when its social impact is considered. Many gun control advocates acknowledged that "assault weapons" were a tiny component of the gun crime problem, but they still liked the ban because of its symbolic value. [FN219] However, many other people were very upset by the symbolic message of the gun ban. Some of them have joined militias, patriot groups, or similar organizations. Indeed, it would be no exaggeration to say that President Clinton, Representative Schumer, and Senator Feinstein have, through pushing the gun ban through Congress, done more to promote the surge in militia membership than anyone else in the nation. *309

If we want to reduce the number of people who are frightened by the federal government, the federal government should stop frightening so many people. Given the irrelevance of the "assault weapon" ban to actual crime control, repeal of the ban would be an important step that the federal government could take to convincing millions of Americans that it is not a menace to their liberty. Conversely, retention of a ban on cosmetically- incorrect firearms by law-abiding citizens would be a strong statement to the American people that their federal government does not trust them; and if so, why should the American people trust their own government?

C. Ban on Training

The Southern Poverty Law Center and other anti-militia groups have begun promoting a federal ban on group firearms training which is not authorized by state law. First of all, state governments are perfectly capable of banning or authorizing whatever they want. [FN220] The proposal for a federal ban amounts to asking Washington for legislation similar to that which various allies of Mr. Dees promoted at the state level in the 1980s, with little success. Most states have rejected a broad training ban, and the federal government should not impose the will of the some states on all the rest.

A former direct-mail fundraiser for the anti-gun lobby, Mr. Dees may be forgiven for a low level of concern for the exercise of the right to keep and bear arms. But the right to keep and bear arms necessarily includes the right to practice with them, just as the Constitutional right to read a newspaper editorial about political events necessarily includes the right to learn how to read. Just as the government may not forbid people from learning how to read in groups, it may not forbid people *310 from learning how to use firearms in groups. Further, the right may not be denied because it is exercised simultaneously with First Amendment rights.

"Organizing, arming, and training in conjunction with a political agenda would be seen as dangerous in any other society but our own," a private security consultant told Congress, demanding that "these groups be flatly dealt with as 'enemies of our society.'" [FN221]

Of course the United States was founded by "religious nuts with guns," and achieved independence as a result of a war instigated by people who organized, armed, and trained with a political agenda. The sparks of the Revolutionary War, the battles of Lexington and Concord, was prompted by the ruling government's attempts to confiscate the "assault weapons" of the day held by local militias. [FN222] It was at the Concord Bridge where militiamen were ordered to "wait until you see the whites of their eyes" and then shot government employees who were coming to take away their "assault weapons" (firearms and a cannon). [FN223] Likewise, the Texan revolution against Mexico began over civilian possession of "military" arms. When the Mexican government demanded that settlers hand over a cannon, the Texans replied, "Come and take it!" [FN224]

The militiamen of Concord Bridge and Texas may have broken the law, but they were great men, worthy of admiration by every schoolchild, and every other American. "You need only reflect that one of the best ways to get yourself a reputation as a dangerous citizen these days is to go around repeating the very phrases which our founding fathers used in their struggle for independence," observed American historian Charles A. Beard. [FN225] *311

V. Fourth Amendment: Wiretapping and Other Expanded Surveillance

A. Wiretapping

Various proposals have been offered to expand dramatically the scope of wiretapping. For example, the Clinton and Dole bills defined almost all violent and property crime (down to petty offenses below misdemeanors) as "terrorism" and then allowed wiretaps for "terrorism" investigations. [FN226]

Other proposals would allow wiretaps for all federal felonies, rather than for the special subset of felonies for which wiretaps have been determined to be especially necessary. Notably, wiretaps are already available for the fundamental terrorist offenses: arson and homicide. Authorizing wiretaps for evasion of federal vitamin regulations, gun registration requirements, or wetlands regulations is hardly a serious contribution to antiterrorism, but amounts to a bait-and-switch on the American people.

Currently, FBI "national security" wiretapping, bugging, and secret break-ins of the property of Americans are allowed after approval from a judge on a seven-member federal court that meets in secret. [FN227] Applications for national security surveillance orders are made in secret before specially-selected judges of the Foreign Intelligence Surveillance Court. Of the 7,539 applications, only one has been rejected. [FN228] The standard for a FISA search order is lower than that for a normal Fourth Amendment search warrant. The potential for abuse is substantial, since all applications remain sealed and unavailable to the public, and since targets are never notified that they have been under surveillance. Proposals for a special attorney to point out defects in order applications for cases involving American targets have not been implemented. [FN229] *312

Past use of wiretap powers does not lay a strong factual foundation for a vast expansion of wiretapping based on anti-terrorist needs. Terrorists are, of course, already subject to being wiretapped. Yet as federal wiretaps set new record highs every year, wiretaps are used almost exclusively for gambling, racketeering, and drugs. The last known wiretap for a bombing investigation was in 1988. Of the 976 federal electronic eavesdropping applications in 1993 and the 1,154 applications in 1994, not a single one was for arson, explosives, or firearms, let alone terrorism. [FN230] From 1983 to 1993, of the 8,800 applications for eavesdropping, only 16 were for arson, explosives, or firearms. [FN231]

Even more disturbing than proposals to expand the jurisdictional base for wiretaps are efforts to remove legal controls on wiretaps. For example, wiretaps are authorized for the interception of particular speakers on particular phone lines. If the interception target keeps switching telephones (as by using a variety of pay phones), the government may ask the court for a "roving wiretap," authorizing interception of any phone line the target is using. Yet while roving wiretaps are currently available when the government shows the court a need, the Clinton and Dole bills allow roving wiretaps for "terrorism" without court order. [FN232] Again, remember that both bills define "terrorism" as almost all violent or property crime.

The final terrorism bill, while deleting provisions for warrantless roving wiretaps, significantly expanded wire-tapping authority. The Electronic Communications Privacy Act makes wiretapping by the government or by private parties illegal, with certain exceptions, such as when a warrant is obtained. The terrorism bill narrowed the type of communication interceptions that are considered to be wiretapping, and thereby greatly expanded the scope of communications which can legally *313 be intercepted by private actors, as well as by government officials who lack both probable cause and a search warrant. Wireless transmission of computer data is now subject to at-will searches. [FN233]

B. Warrantless Data Gathering

Proposals have also been offered to require credit card companies, financial reporting services, hotels, airlines, and bus companies to turn over customer information whenever demanded by the federal government. [FN234] Document subpoenas are currently available whenever the government wishes to coerce a company into disclosing private customer information. Thus, the proposals do not increase the type of private information that the government can obtain; the proposals simply allow the government to obtain the information even when the government cannot show a court that there is probable cause to believe that the documents contain evidence of illegal activity.

Similar analysis may be applied to proposals to increase the use of pen registers, which record phone numbers called, but do not record conversations, and thus do not require a warrant. If a phone company has a high enough regard for its customers' privacy so as to not allow pen registers to be used without any controls, the government may obtain a court order to place a pen register. Business respect for customer privacy ought to be encouraged, not outlawed. *314

Expanding the warrantless gathering of consumer data proved to be too controversial to include in the final terrorism bill. A partial expansion was, however, inserted in a State Department funding bill, which was enacted at about the same time. [FN235]

C. Encryption

For some government agencies, the Oklahoma City tragedy has become a vehicle for the enactment of "wish list" legislation that has nothing to do with Oklahoma City. It is apparently hoped the "do something" imperative will not examine the legislation carefully.

One prominent example is language in the final terrorism bill to drastically curtail the right of habeas corpus--the first statutory constriction of habeas corpus since the creation of Great Writ many hundreds of years ago in England. [FN236] Although Supreme Court decisions in recent years have already significantly limited habeas corpus, [FN237] prosecutors' lobbies have pushed much further. Two obvious points should be made. First, habeas corpus has nothing to do with apprehending criminals; by definition, anyone who files a habeas corpus petition is already in prison. Second, habeas corpus has nothing to do with Oklahoma City in particular, or terrorism in general. [FN238]

A second example of piggybacking irrelevant legislation designed to reduce civil liberties are FBI efforts to outlaw computer privacy. If a person writes a letter to another person, he *315 can write the letter in a secret code. If the government intercepts the letter, and cannot figure out the secret code, the government is out of luck. This basic First Amendment principle has never been questioned.

But, if instead of writing the letter with pen and paper, the letter is written electronically, and mailed over a computer network rather than postal mail, do privacy interests suddenly vanish? According to FBI Director Louis Freeh, the answer is apparently "yes."

Testifying before the Senate Judiciary Committee about the Oklahoma City Bombing, Director Freeh complained that people can communicate over the Internet "in encrypted conversations for which we have no available means to read and understand unless that encryption problem is dealt with immediately." [FN239] That "encryption problem" (i.e., people being able to communicate privately) could only be solved by outlawing high quality encryption software such as Pretty Good Privacy.

First of all, shareware versions of Pretty Good Privacy are ubiquitous throughout American computer networks. The cat cannot be put back in the bag. More fundamentally, the potential that a criminal, including a terrorist, might misuse private communications is no reason to abolish private communications per se. After all, people whose homes are lawfully bugged can communicate privately by writing with an Etch-a-Sketch. [FN240] That is no reason to outlaw Etch-a- Sketch, or its substitutes, such as chalkboards or old-fashioned slates.

Although Director Freeh apparently wants to outlaw encryption entirely, the Clinton administration has been proposing the Clipper Chip. The federal government requires all vendors supplying phones to the federal government to include the Clipper chip. Using the federal government's enormous purchasing clout, the Clinton administration is attempting to make the Clipper Chip into a de facto national standard. [FN241] *316

The Clipper Chip provides a low level of privacy protection against casual snoopers. But some computer scientists have already announced that the chip can be defeated. Moreover, the "key"--which allows the private phone conversation, computer file, or electronic mail to be opened up by unauthorized third parties--will be held by the federal government.

The federal government promises that it will keep the key carefully guarded, and will only use the key to snoop when absolutely necessary. This is the same federal government that promised that the Internal Revenue Service would never be used for political purposes.

Proposals for the federal government's acquisition of a key to everyone's electronic data, which the government promises never to misuse, might be compared to the federal government's proposing to acquire a key to everyone's home. Currently, people can buy door locks and other security devices that are of such high quality that covert entry by the government is impossible. The government might be able to break the door down, but the government would not be able to enter discretely, place an electronic surveillance device, and then leave. Thus, high-quality locks

can defeat a lawful government attempt to bug someone's home, just as high-quality encryption can defeat a lawful government attempt to read a person's electronic correspondence or data.

Similarly, it is legal for the government to search through somebody's garbage without a warrant, but there is nothing wrong with privacy-conscious people and businesses using paper shredders to defeat any potential garbage snooping. Even if high-quality shredders make it impossible for documents to be pieced back together, such shredders should not be illegal. Likewise, while wiretaps or government surveillance of computer communications may be legal, there should be no obligation of individuals or businesses to make wiretapping easy.

Simply put, Americans should not be required to live their lives in a manner so that the government can spy on them when necessary. *317

Thus, although proposals to outlaw or emasculate computer privacy are sometimes defended as maintaining the status quo (easy government wiretaps), the true status quo in America is that manufacturers have never been required to make products which are custom-designed to facilitate government snooping. The point is no less valid for electronic keys than it is for front-door keys.

The only reason that electronic privacy invasions are even discussed (whereas their counterparts for "old-fashioned" privacy invasions are too absurd to even be contemplated), is the tendency of new technologies to be more highly restricted than old technologies. For example, the Supreme Court in the 1920s began allowing searches of drivers and automobiles that would never have been allowed for persons riding horses. [FN242]

But the better Supreme Court decisions recognize that the Constitution defines a relationship between individuals and the government that is applied to every new technology. For example, in *Katz* v. *United States*, the Court applied the privacy principle underlying the Fourth Amendment to prohibit warrantless eavesdropping on telephone calls made from a public phone booth-- even though telephones had not been invented at the time of the Fourth Amendment. [FN243] Likewise, the principle underlying freedom of the press-- that an unfettered press is an important check on secretive and abusive governments--remains the same whether a publisher uses a Franklin press to produce one hundred copies of a pamphlet, or high speed printers to produce one hundred thousand. Privacy rights for mail remain the same whether the letter is written with a quill pen and a paper encryption "wheel," or with a computer and Pretty Good Privacy.

Efforts to limit electronic privacy will harm not just the First Amendment, but also American commerce. Genuinely secure public-key encryption (such as Pretty Good Privacy) gives users the safety and convenience of electronic files plus the security features of paper envelopes and signatures. A good encryption program can authenticate the creator of a particular *318 electronic document--just as a written signature authenticates (more or less) the creator of a particular paper document.

Public-key encryption can greatly reduce the need for paper. With secure public-key encryption, businesses could distribute catalogs, take orders, pay with digital cash, and enforce contracts with verifiable signatures--all without paper.

Conversely, the Clinton administration's weak privacy protection (which gives the federal government the ability to spy everywhere), means that confidential business secrets will be easily stolen by business competitors who can bribe local or federal law enforcement officials to divulge the "secret" codes for breaking into private conversations and files, or who can hack the Clipper Chip.

D. Weakening Restraints on FBI Political Surveillance

Within days after the Oklahoma City bombing, conservative talk show host Rush Limbaugh began casting blame on civil libertarians who promoted strict guidelines on FBI surveillance of dissident groups in the United States. [FN244] Other persons have also called for abolition of the remaining limitations on FBI investigations.

First of all, there is at present no evidence that the FBI wanted to spy on anyone suspected in the Oklahoma City bombing, but was prevented from doing so by the current guidelines. Thus, persons demanding the abolition of FBI guidelines are demanding a "solution" for which there is no demonstrated problem.

Second, the FBI guidelines exist for a very good reason. Before the guidelines were implemented, the FBI spied on literally hundreds of thousands of Americans who were doing nothing more than exercising their Constitutional right to question government policies. Victims of these abuses included Dr. Martin Luther King, Jr., the Ku Klux Klan, the Congress on Racial Equality, Barry Goldwater, [FN245] Cesar Chavez, [FN246] and the civil *319 rights movement. The Counter- intelligence Programs (COINTELPRO) invaded the Constitutional rights of American people who simply were expressing in public what Secretary of Defense Robert McNamara had concluded in private. Far from being confined to a single type of dissident, or to a few years of excess, FBI abuses dated back to the 1940s and were pervasive until brought to light by fifteen months of hearings before Senator Frank Church's special committee in 1975-76. Altogether, there were 675 FBI operations against civil rights, white supremacist, or anti-war groups, which led to only four convictions. [FN247] Even after all the public hearings, and the implementation of guidelines, the FBI continued to abuse the rights of dissident Americans, through a massive surveillance of people in CISPES (Committee in Solidarity with the People of El Salvador) who were opposed to President Reagan's policy in El Salvador in the mid-1980s. The CISPES investigation, justifiably regarded today as shameful, would have been lawful if the Dole or Clinton terrorism bills had been law.

Right up to the present, FBI infiltrators have frequently served as agent provocateurs, inciting and directing murders and other violent crimes. [FN248] In one of the most notorious recent cases, an FBI informant solicited the murder of Louis Farrakhan by a dissident family of Black Muslims; the case was one of classic entrapment involving an FBI informant with a pending felony charge, plainly motivated by money. [FN249]

The first set of FBI guidelines were implemented by President Ford's Attorney General Edward Levi in 1976. In 1983, the "Levi guidelines" were replaced by President Reagan's Attorney *320 General William French Smith. The "Smith guidelines" were far less restrictive. Attorney General Smith stated that the guidelines allowed investigation "when persons advocate crime,

particularly violent crime--such as blowing up a building or killing a public official. . . ." [FN250] Thus, the highly-publicized claim of a former FBI official that "you have to wait until you have blood on the street before the bureau can act" is patent nonsense. [FN251]

In fact, the Smith guidelines, which were revised in 1989 and are still in force, nowhere require the completion of a violent crime. Rather they state that a:

> domestic security/terrorism investigation may be initiated when the facts for circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States. [FN252]

Specifically, the guidelines already allow investigations based upon mere words:

> When, however, statements advocate criminal activity or indicate an apparent intent to engage in crime, particularly crimes of violence, an investigation under these Guidelines may be warranted unless it is apparent, from the circumstances or the context in which the statements are made, that there is no prospect of harm. [FN253]

While the Smith guidelines would prevent infiltration of militia groups simply because they are sharply critical of government policy, the guidelines do not prevent infiltration of groups that actually threaten violence. For example, in Virginia, *321 a group of fifteen men who allegedly wanted to resist the federal government managed only three meetings before being arrested for weapons violations as a result of a government infiltrator's secret tape recordings, although it turned out that the only person advocating violence had been the government informant, and no one had listened to him. [FN254] Moreover, militia and patriot groups generally hold public meetings, sometimes advertising in local newspapers. There is hardly a need for greater "surveillance" of such public political discussions.

Rather than being obliterated, guidelines on FBI domestic surveillance should be brought up to full strength. A statutory version of a combination of Levi and Smith guidelines should be enacted.

Persons who are eager to "unleash" the FBI against dissident groups who are not threatening illegal activity might first want to go through the mental exercise of imagining their worst nightmare as President. Liberals might imagine Patrick Buchanan or Pat Robertson. Conservatives could imagine Dianne Feinstein or Jesse Jackson. In such a scenario, would we want the FBI free to spy on whomever the President does not like? Under Presidents Nixon, Johnson, and Kennedy (who were all moderates within their own party), the FBI did so with baleful results. An official at the Treasury Department, who works closely with the BATF, warned that there is "a tremendous potential for abuse" in administration proposals to loosen controls on the FBI. [FN255]

It must be remembered that many of America's greatest organizations were, in their day, radical extremists. The abolitionists were extremists, as were the suffragettes, the civil rights movements, and many of the opponents of the Vietnam War. If these groups seem vindicated by history, they were bitterly attacked in their day as radical anti-Americans, who should be investigated and suppressed by the government. *322

VI. Tenth Amendment and Article One: Limits on Enumerated Congressional Powers

One of the reasons that so many people have become fearful of the federal government, and some have become angry, is the virtually uninterrupted expansion of federal laws at the expense of civil liberty. The cycle of misleading media sensationalism, a couple of Congressional hearings, and then another broad and intrusive federal remedy has become all too familiar. It is possible to assemble before any given Congressional panel a half-dozen very sincere witnesses who will claim that any given topic is: 1. An immense problem; 2. Rapidly spiraling out of control all over the nation; and 3. Desperately in need of an immediate, sweeping federal remedy. Sometimes these witnesses are correct, but other times they are not.

We know in retrospect that the Marihuana Tax Act of the 1930s was the result of a racist campaign of disinformation about the use of marijuana by Hispanic criminals. [FN256] We know that the Food Stamp Act in the early 1970s was passed, in part, as a result of tremendous misinformation about the extent of malnutrition in rural America. [FN257] We know that, despite the wild claims of various law enforcement administrators, "assault weapons" constitute only about one percent of crime guns seized by police, even in major cities. A climate of panic and misinformation about the Love Canal incident in New York led Congress to enact the Superfund law--a draconian law which imposes huge retroactive liability on companies and individuals for unlawful environmental practices, and which eliminates most ordinary due process protections for individuals targeted by the government. [FN258] *323

A. Federalizing Violent Crime by Defining it as "Terrorism"

Previous federal laws already provided a comprehensive, realistic definition of "terrorist activity." Federal statutes already made it a federal felony to make a real terrorist threat, such as threatening to set off a bomb or to assassinate the President. [FN259] The new terrorism bill, though, defines most violent crime as "terrorism," whether or not related to actual terrorism. [FN260] "Terrorist" offenses now include almost all violent crime except for sex offenses: any assault with a dangerous weapon, assault causing serious bodily injury, or any killing, kidnapping, or maiming, or creating a risk of serious bodily injury through destruction of property. [FN261] This provision is actually narrower than the original Dole and Clinton bills, which also labeled any property damage, no matter how trivial, as "terrorism," even if there was no risk to any individual's life or limb. [FN262]

In order for the offense to be considered "terrorism," it is necessary to meet one of six jurisdictional predicates. [FN263] Two predicates cover crimes against federal employees or federal property; and two others cover crimes on the territorial sea or within the special maritime

jurisdiction of the United States. [FN264] Federal criminal jurisdiction over such crimes is certainly proper--and already exists. [FN265] The only effect of these four criminal predicates is to upgrade the severity of various offenses; mugging a Department of Agriculture employee or breaking someone's arm while in a private boat that is in American territorial waters is now "terrorism." *324

The other two jurisdictional predicates are much broader. One predicate is that any offender "uses the mail or any facility of interstate or foreign commerce in furtherance of the offense." [FN266] The second predicate is that "the offense obstructs, delays, or affects interstate or foreign commerce," or would have done so, had the offense been consummated. [FN267] It is just about impossible to perpetrate anything without talking on the phone, driving a car on a public road, using electricity, or affecting someone else's use of the phone, automobile, or electricity. [FN268]

To limit the federalization of virtually violent crime, there is a requirement that the offense involve "conduct transcending national boundaries," [FN269] which is defined as "conduct occurring outside the United States in addition to conduct occurring inside the United States." [FN270] This last provision is considerably narrower than earlier proposals. [FN271] If courts enforce this language seriously, then the terrorism bill will not turn into a de facto federalization of all violent crimes other than sexual assaults. *325 On the other hand, given the great lengths to which interstate commerce has been stretched, it is entirely possible that the requirement for "conduct occurring outside the United States" could be met simply through the use of a weapon manufactured outside the United States, or the perpetration of the crime by a visiting tourist.

Once the government alleges that any of the above ordinary violent crimes, with some conduct occurring outside the United States, has taken place (or been attempted, threatened, or conspired towards), a heavy set of hammers begins to fall on the accused. Although the law allows state law definitions of a crime to be used to create federal jurisdiction, the law forbids defendants from invoking state constitutional law protections of the state where the alleged offense took place. [FN272] Sentences for "terrorism" are severe, and must run consecutively to any other sentence imposed. [FN273] Presumptive detention (denial of bail) is applied to anyone accused of "terrorism," [FN274] and "terrorism" *326 is now a predicate offense for the federal money laundering statute. [FN275]

Not adopted were Clinton and Dole proposals to make the already overbroad federal RICO, [FN276] and wiretapping laws [FN277] applicable to "terrorist" offenses and to authorize use of the military in domestic law enforcement for "terrorist" crimes. [FN278] Since the original Dole and Clinton bills defined property crimes, all the way down to petty vandalism, as "terrorism," and since the bills made only a feeble effort to require that the crime be genuinely international, the final bill's new "terrorism" crime section is significantly narrower in scope and civil liberties danger than the original proposals.

The proponents of these bills may expect that the essentially limitless discretion granted to the federal government will not be abused. But a fundamental principle of American law has always been that the law should control the government; citizens should not be at the mercy of the good judgment of government officials. As the Supreme Court put it, "It would certainly be dangerous

if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." [FN279] Putting aside questions of constitutionality, it is inappropriate that the draconian federalization of state crimes be pushed through Congress under the mask of antiterrorism. Prudence suggests that federal law enforcement intervene only when state law enforcement is inadequate. Yet advocates of greater federalization have offered have *327 no evidence that existing state and federal laws are inadequate to punish the small number of criminals involved in actual terrorist crimes.

B. Federal Response to Threats Against Government Employees

It is clear that a small number of persons have engaged in criminal harassment or even violence against state and local government officials. Representative Charles Schumer, lead sponsor of the original Clinton Antiterrorism bill, later introduced the "Republican Form of Government Guarantee Act," which he unsuccessfully attempted to tack on to the antiterrorism bill which passed the House of Representatives. [FN280] The bill would be based on the federal government's Article IV power to guarantee to every state a republican form of government. Such legislation does not, of course, per se exceed the scope of the enumerated powers granted to the federal government. Nevertheless, at least the spirit of the Tenth Amendment should cause us to ask if a federal solution is appropriate.

One of the most common forms of harassment (perpetrated by the criminal Freemen of Montana, among others)--has been the filing of purported liens or other alleged "common law" instruments in some state courts. Surely the remedy for abuse of state court procedures is through enforcement of existing procedural rules that punish frivolous or false legal filings, or through reforms of state court systems to provide whatever additional remedies may be needed. State courts are the business of the states, not of Congress.

Before Congress acts, it should consider what the state legislatures, and the people of the state decide to do. For example, in 1996 the people of Montana approved a ballot initiative to strengthen states laws against threatening government officials. It ought to be the people of Montana, not 535 people in the District of Columbia--of whom only three are from Montana--who decide what to do. *328

When the federal racketeering statute (RICO) was enacted in the 1970s, proponents promised that it would provide an important new weapon to target organized crime organizations, as opposed to prosecuting only individual criminals. But the RICO statute has also been used in ways which its sponsors never foresaw.

For example, in the 1980s, an ambitious United States Attorney in New York City used RICO's preemptive strike provisions to destroy the securities firm of Princeton/Newport, which was, years later, found to be not guilty of wrongdoing. [FN281] But in the meantime, the company had been ruined, the employees had lost their jobs, and the owners had lost their business and the assets that they had built over the years through honest hard work. [FN282]

In other cases, RICO laws have been used against abortion clinic protesters. [FN283] Instead of using Mafia laws against church groups, it would be better to fashion--as many legislatures have--more specific statutes which deal with the particular problem of access to abortion clinics.

In regards to anti-government violence, proposals for broad new conspiracy statutes, or for broad new judicial authority to destroy or disband organizations have not been shown to be necessary--particularly at a federal level. We know from history that injunction and conspiracy laws have often been used unfairly against political dissidents, such as labor organizers. [FN284] Moreover, criminally violent anti-government organizations are tiny. Prosecution of the handful of criminal individuals involved will suffice to destroy the pathetic "organization" itself.

Schumer's bill included several new mandatory minimums aimed at violent anti-government extremists, but written to apply to far more. For example, the bill would impose a two-year mandatory minimum on someone who shoved a policeman during an argument over a traffic ticket, a two-year mandatory *329 minimum on a jilted teenage girl who sent her rival an anonymous letter "I'm going to tear your eyes out," and an eight-year mandatory minimum on a homeowner who waved a baseball bat at a zoning inspector. [FN285] None of these activities are justified, of course, and none of them are the intended target of the proposed mandatory minimums. But mandatory minimums are perversely designed to apply remedies which seem appropriate in the abstract to situations where they may be wildly inappropriate.

One particularly inappropriate provision of the Republican Form of Government Guarantee Act actually subverts local government. When county governments enforce state and local laws against what they believe to be illegal conduct by federal employees, the federal government would become the judge of its own case. Rather than having the dispute settled by a neutral arbiter, such as the courts, the dispute will be investigated by the federal employees' own chief lawyer (the Attorney General), who would then unilaterally withhold Payments in Lieu of Taxes from the county. [FN286]

It is an elementary principle of justice that no person, nor the person's attorney, can be the judge of his own case. It is a misuse of language to claim that the federal executive's judging of its own case in disputes with counties will somehow further the federal government's obligation to guarantee to each state a republican form of government. County commissioners are, after all, democratically elected. They--not the federal executive branch--are part of a state's republican form of government. The final terrorism bill simply ordered the Attorney General to compile statistical information about crimes and threats against federal, state, and local law enforcement employees. [FN287]

C. Removing Other Jurisdictional Limits on Law Enforcement

Various terrorism proposals have included other provisions to remove jurisdictional limits on law enforcement. For example, *330 it has been proposed that the FBI's foreign jurisdiction be expanded. First, the expansion is unnecessary, since the CIA can operate overseas against terrorists. Second, allowing domestic American law enforcement agents to operate on foreign soil against foreign citizens creates a dangerous precedent, and will inevitably lead to demands for reciprocity. Do we really want the Russian secret police, or even the Mexican federales,

operating on American soil? The same Article I concerns about a use of the American military in law enforcement [FN288] militate all the more strongly against allowing foreign officers, with no background at all with respect to American constitutional norms, to operate in the United States. [FN289] Internationalizing criminal law is even more dangerous to civil liberty than is federalizing it.

The original Dole and Clinton bills would have abolished all jurisdictional restraints on federal law enforcement agencies regarding any "terrorist" offense (i.e., all property and violent crime, as those bills defined "terrorist"). [FN290] In other words, the *331 Bureau of Alcohol, Tobacco and Firearms would not be limited to cases involving alcohol, tobacco, or firearms; the IRS would not be limited to tax cases; and the Drug Enforcement Agency would not be limited to drug cases. Removing the jurisdictional limitations may tend to disconnect these law enforcement agencies from the constitutional authority by which they were created (such as the tax power for the Internal Revenue Service), and thus let the agencies drift beyond the proper Article I limits of their authority.

Another unadopted provision of the Dole and Clinton bills would allow state and local law enforcement officers, under the direction of the attorney general, to operate anywhere in the United States, rather than in their state or local jurisdiction. The provision would interfere with the Tenth Amendment prerogative of states and localities to enforce territorial limits on the operations of state and local police, as well as state and local authority to determine who is authorized to act as a peace officer within the state or locality.

VII. Fourth, Fifth, Fourteenth Amendments: Aliens and the New Star Chamber

Although the United States has suffered exactly one alien terrorist attack in the last eleven years, special harsh rules for aliens were at the top of the "antiterrorism" agenda. The new Antiterrorism Act allows secret evidence for deportation cases in which the government asserts that secrecy is necessary to the national security. [FN291] Georgetown University Law Professor David Cole calls the secret court the new "Star Chamber," since its powers resemble those of the inquisitorial court that the British monarchy, in violation of the common law, used to terrorize dissident subjects. [FN292] Star Chamber was one of the most *332 hated features of the British government in the years leading up to the English Civil War, and was abolished by the revolutionary Long Parliament in 1641. [FN293]

Modern Star Chamber proceedings are to be before a special court (one of five select federal district judges), [FN294] after an ex parte, in camera showing that normal procedures would "pose a risk to the national security of the United States." [FN295] Based upon further ex parte, in camera motions, evidence which the government does not wish to disclose may be withheld from the defendant, who will instead be provided a general summary of what the evidence purports to prove. In other words, secret evidence may be used. [FN296] Of course any of the "showings" that the government makes in camera and ex parte may be based on allegations regarding the unreviewable claims of a secret informant. No evidence may be excluded because it was illegally obtained, no matter how flagrantly the law was broken. [FN297]

Legal aliens do not, of course, have the full scope of Constitutional rights guaranteed to American citizens; for example, they cannot exercise rights associated with citizenship, such as voting, or serving on a jury. But significantly, a recent Ninth Circuit case affirmed that First Amendment rights of association are fully applicable in alien deportation cases. [FN298] Likewise, legal aliens have always been accorded the same due process protections in criminal cases. The Ninth Circuit explained, "aliens who reside in this country are entitled to full due process protections." [FN299] After all, the Fifth Amendment's guarantee of Due Process protects "all persons," not just "all citizens." [FN300] *333

Procedures like those adopted in the new terrorism bill have already been found unconstitutional. As the District of Columbia Court of Appeals stated:

> Rafeedie--like Joseph K. in *The Trial*--can prevail before the (INS) Regional Commissioner only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden. [FN301]

The argument for allowing secret evidence in deportation proceedings is that otherwise the identity or operational mode of a confidential informant might be jeopardized. First of all, the very purpose of the Sixth Amendment's Confrontation Clause is to prevent people's lives from being destroyed by the type of secret accusations which had characterized the European (in)justice systems. [FN302] *334

Moreover, the argument against endangering the secrecy of confidential accusers in deportation cases proves too much. The very same argument applies in every other case, including cases of tax evasion, drug sales or possession, or gun laws. Obeying the Confrontation Clause in those cases may likewise impede the short-term interests of law enforcement. The Constitution has conclusively determined that a criminal justice system without a right of confrontation poses a far greater long-term risk to public safety than does requiring the government to disclose the reason why it wants to imprison, execute, or deport someone.

Simply put, confidential informants often lie. Informants are rarely good citizens who come forward to help prevent a crime. Rather, informants are criminals who have been caught and have turned informant in order to protect themselves from prosecution; informants have every reason to lie and falsely accuse people. [FN303]

Confidential informants who are not professional criminals may have other reasons for lying. The type of miscarriage of justice that can occur based on confidential informants was illustrated in a 1950 case, in which the Supreme Court held that secret evidence could be used to prevent an alien, married to an American, from entering the United States. [FN304] Because the case generated so much publicity, the alien was granted a hearing anyway, and it was discovered that the confidential informant was her husband's angry ex- girlfriend. [FN305]

Individuals who would oppose Star Chamber proceedings for criminal trials might approve of such procedures in deportation hearings since deportation is, under most circumstances, a less

severe sanction than prison. The prisoner will not even be *335 allowed to ask for a writ of habeas corpus based on governmental violation of statutes. [FN306]

Finally, some persons may accept Star Chamber proceedings for legal resident aliens under the presumption that such procedures would never be used against American citizens. Yet if there is anything the experience of Great Britain proves, it is that special emergency measures implemented in a limited jurisdiction (such as Northern Ireland) soon spread throughout the nation. Cancers always start small. If one international terrorist incident in eleven years is a sufficient interest to justify a Star Chamber for certain terrorism suspects, then it is hard to resist the logic that crimes that actually are widespread (such as homicide, rape, or drug trafficking) should be entitled to their own Star Chamber.

Although not enacted in the final legislation, the original Clinton and Dole bills would have granted similar authority to use secret evidence in proceedings under the International Emergency Economic Powers Act. The Act gives the President unilateral authority to regulate or prohibit all foreign exchange transactions, all imports and exports of securities and currency and foreign currency transactions, and all banking transactions involving foreigners. [FN307]

In the early 1980s, legislation was proposed which would have required judicial authorization for the use of undercover informants, just as judicial authorization is required for a wiretap. [FN308] The "bad old days" of federal informants creating violent crime did not end in the 1960s; the problem continues today. It is long since past time for federal informants to be brought under the rule of law and for undercover operations to be subject to judicial oversight. *336

VIII. Antiterrorism Agenda: De-Ninjafying Federal Law Enforcement

There is no evidence that any of the repressive proposals discussed above would have prevented the Oklahoma City bombing. To use the bombing as a pretext for new laws which endanger traditional American freedoms is highly inappropriate.

A. Fighting Foreign Terrorism

Rather than infringing on Constitutional rights, there are several simple steps which could help fight terrorism. First, the President should announce that whenever it is determined that a foreign government has perpetrated a terrorist attack against Americans, either in America or abroad, the United States will retaliate personally against the head of the foreign government. After the Reagan administration attempted to kill Libya's Mohammer Khaddafi with a bombing raid, Libyan terrorism is said to have diminished. The state sponsors of terrorism, including Syria and Iran, are well-known. They should no more enjoy immunity for their murderous conspiracies than any other murderer should. Such a policy would be much more effective than the new terrorism bill's provision to allow American victims of terrorism to sue foreign governments that support terrorism. [FN309]

Most civil libertarians, concerned about the constitutional issues discussed supra, raised little objection to the terrorism bills' proposed increases in federal spending. Not surprisingly, the final bill became a Christmas tree of new federal money, with the FBI taking an additional 468 million dollars, the Drug Enforcement Agency (which has no anti-terrorist responsibilities) getting 172 million extra, and various other federal and state agencies receiving many millions more. [FN310] But instead of adding still more federal debt, Congress could have found whatever additional antiterrorism resources are needed by reassigning FBI (and other federal) agents who are currently assigned *337 to matters that have no real connection to legitimate federal concerns, such as child support enforcement, obscenity cases, and non-interstate drug cases.

As we consider antiterrorism policy, we should remember not only the Constitution, but also the Declaration of Independence. Solicitude for foreign governments should not blind us to the fact that most governments in the world are dictatorships, and many of them promote state terrorism. Under the principles on which America is based, governments without the consent of the governed have no legitimacy, and it is the right of the people of that nation to overthrow the dictatorship. [FN311]

Yet the new terrorism law applies prison terms of up to twenty-five years to any person who plans the destruction of government property in a foreign nation with which the United States is "at peace." [FN312] Thus, if Chinese refugees living in the United States planned a jailbreak to liberate political prisoners in China, they would be guilty of "terrorism." If Americans in 1940 had plotted the destruction of railways leading to Nazi concentration camps, they too would have been guilty of "terrorism." Similarly, countless American Jews who smuggled firearms to the Jewish resistance movement in Palestine in the 1940s, making possible the eventual establishment of the state of Israel would have been guilty of terrorism. [FN313] Had such a "terrorism" law been universal in 1776, the Dutch, French, and other private citizens who provided material assistance to the American Revolution (while their governments were at peace with the British Empire) would have been "terrorists." It ill becomes a nation that was born in violent revolution with foreign assistance to felonize the very types of charity that allowed our own nation to become free. Resistance to dictatorships and empires is not terrorism. *338

B. Reducing Domestic Violence and Lawlessness

Contrary to the assertions of some in the militia and patriot movement, the United States government is not a terrorist conspiracy. But the federal government too often behaves in a terrifying manner, one which has led a majority of the American people to fear their own government.

Following a hearing on the Ruby Ridge killings, the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Government aptly stated: "The events . . . have helped to weaken the bond of trust that must exist between ordinary Americans and our law enforcement agencies. Those bonds must be reestablished. . . . " [FN314] The law enforcement excesses documented in recent years by Congressional committees and even by popular television programs, [FN315] demonstrate a culture of lawlessness, militarization, and violence that has permeated far too much of American law enforcement. [FN316]

The civil liberties coalition, which fought against the terrorism bills, first came together in early 1994, to send a joint letter to Attorney General Reno calling for federal law enforcement reforms. These reform proposals were refined in a joint letter sent to Congressional leadership in late 1995. [FN317] These reform proposals offer their own anti-terrorist agenda, for they recognize that many tens of millions of people are understandably terrified by the lawless, violent behavior of too much of the federal government. If these corrective measures are adopted, a *339 big step toward the recovery of public confidence and the reduction of public fear of government will have occurred. The remainder of Part VIII incorporates the coalition letter, and then concludes with some additional reforms that were too controversial for some members of the coalition. [FN318]

> (1) The Attorney General, pursuant to her authority under Executive Order 11396, February 7, 1968, should establish clear and uniform guidelines for all federal law enforcement functions, regardless of department, in the execution of search warrants and the use of "dynamic entry," restricting the use of such entry to only the most exigent of circumstances.
>
> (2) Proposals for use of "dynamic entry" should be subject to high-level review and approval on a case-by-case basis to assure that the "dynamic entry," whether or not pursuant to a warrant is necessary and lawful and that the risk of loss of life is minimized.
>
> (3) U.S. Attorneys should be required to review and approve applications for warrants.
>
> (4) There should be appropriate penalties for federal law enforcement agents who file untruthful, misleading, or unlawful applications for warrants.
>
> (5) The use of hearsay in an affidavit seeking a warrant should be permitted only if the actual witnesses are unavailable because of death or incapacity.
>
> (6) Warrant affiants should be required to note exculpatory evidence in their warrant applications.
>
> (7) There should be a limit on the period of time for which warrants, affidavits, and related items can be sealed prior to and after service, with limited periodic review if extensions are shown necessary.
>
> (8) Congress should establish standards for a very high degree of supervision of "informant" activity and guidelines for verifying informant claims when agents rely upon such claims for the issuance of warrants or as the basis for other enforcement operations. *340
>
> (9) The inherently corrosive government practice of paying informants on a "contingency" basis, with payments for their "information" contingent upon arrest or conviction, should be ended.

(10) Congress should take no action to codify or expand the "good faith" exception to the exclusionary rule, and H.R. 666 should be rejected by the Senate.

(11) Pending "counter-terrorism" bills, expanding the government's ability to electronically surveil individuals and groups and use evidence obtained through illegal wiretaps, must be rejected by Congress.

(12) Section 507 of S. 3, seeking to do away with the exclusionary rule altogether, must be rejected.

(13) The Supreme Court's 1984 Leon decision should be legislatively overturned by a Congress now sensitized to the potential for police abuse.

(14) Congress should establish an open discovery process for federal criminal litigation unless a neutral and detached judicial officer finds that a compelling reason has been established that such government disclosure to the defendant is impossible or too dangerous in a particular case. (This disclosure obligation on the government should not be imposed on the defense, as the two sides are not similarly situated in a criminal case; such would subvert the presumption of innocence and Fifth Amendment protections of the citizen accused; and it is the government that has the overwhelming and frequently the sole investigatory resources in a criminal proceeding.)

(15) The Department of Justice must ensure that federal prosecutors adhere to constitutional and ethical obligations. The Department must also strengthen its disciplinary programs to punish prosecutors who conceal any relevant evidence (including any evidence or perjury) in violation of the law, court orders, and the rules of professional responsibility. [FN319]

(16) Pending S. 3, Section 502, seeks to amend the United *341 States Code by expanding the already unfair, probably unconstitutional DOJ " regulation" . . . by empowering the Attorney General to "opt out" her lawyers from all rules of legal ethics at her sole, unreviewable discretion. Congress should reject S. 3, Section 502, and overrule the Justice Department Regulation.

(17) When confronted with crisis situations involving groups with religious or ideological convictions, the Attorney General should be certain that law enforcement has sought the expertise of a cross-section of qualified scholars. In cases dealing with religious groups, such as at Waco, law enforcement should seek the expertise of qualified scholars on religion. [FN320]

(18) Guidelines should be promulgated to eliminate religious or other viewpoint bias in federal law enforcement investigations and practices, including public affairs announcements and other comments before and during trial.

> (19) The federal deadly force policy should clearly state (a) that a threat of physical harm must be immediate in order to justify the use of deadly force; and (b) that when the immediacy of the threat passes, the justification ceases. [FN321]
>
> (20) Federal law enforcement agents should be carefully trained in the law on the use of deadly force. Emphasis should be placed on learning to distinguish between appropriate and excessive applications of force.
>
> (21) Congress should establish a uniform means of permanent, independent oversight of federal law enforcement policies and practices with full redress for allegations of abuse.
>
> (22) Congress should ensure that there are adequate penalties for those federal law enforcement agents who *342 engage in misconduct and should conduct oversight to ensure that they are properly enforced.
>
> (23) Congress should establish a requirement that any federal law enforcement official who seeks to invoke the drug or any other legislative nexus exception to the Posse Comitatus Act should give an oath or affirmation to a neutral and detached judicial officer as to the facts which he is asserting. [FN322] In short, the same rules as are proposed for search warrants and for penalties for false or misleading information should apply here. In addition, Congress should reexamine whether the existing exceptions to the *Posse Comitatus* Act should be retained.

In addition to the above coalition reform related to the *Posse Comitatus* Act, we would go further. Additional reforms should include:

* Repeal the drug exceptions to the *Posse Comitatus* Act;

* Make knowing violation of *Posse Comitatus* Act a predicate felony for felony murder;

* Create a civil cause of action for persons injured by *Posse Comitatus* Act violations;

* Abolish most federal-state multi-agency law enforcement task forces, particularly those involving the National Guard;

* Eliminate the loophole in the *Posse Comitatus* Act that allows military equipment to be used against civilians in the United States as long as military personnel are not involved.

The Bill of Rights coalition concluded with a final suggestion:

> The serious questions raised by congressional hearings and news reports concerning the coordination, oversight, and accountability of so many different federal law enforcement agencies are complex and need the comprehensive, in depth, long-term consideration that only a commission can provide. The

> commission should include a diverse group of local, state, and federal law enforcement officers, prosecutors, defense counsel, bar *343 association representatives, and sufficient representative of civil liberties and civil rights organizations to insure an independent process. The coalition recommends:
>
> (24) The creation of a national commission make specific statutory and regulatory recommendations to the public, the Congress, and to the President regarding needed changes in federal law enforcement policies and practices.

Although not participants in the Bill of Rights coalition, former Attorneys General Richard Thornburgh and Griffin Bell are the among the law enforcement experts who have called for such a commission. [FN323] By taking steps to reduce violent crimes and other abuses perpetrated by federal law enforcement, a commission would reduce state terrorism. By increasing long-term public confidence in the lawfulness of the federal government, the commission would also reduce fear of government and thereby help cool the political climate. Such a commission was included in the final Antiterrorism bill, as the result of an amendment by Rep. Roscoe Bartlett (R-Md.), although subpoena power was stripped out by the conference committee and the commission was never funded. [FN324]

C. The Most Important Solution: Enforcing Article I

Ultimately, the most important antidote for almost every civil liberties problem discussed *infra*, is the same. The federal government should get out of criminal issues that it has no authority over in the first place. The Constitution specifically authorizes federal enforcement of only two types of laws, both of which involve uniquely federal concerns. The first authorized federal enforcement of criminal law is based on the Congressional power "To provide for the punishment of counterfeiting the securities and current coin of the United States." [FN325] The counterfeiting *344 enforcement power immediately follows the delegation of Congressional power "To coin money, regulate the value thereof, and of foreign coin . . . ." [FN326]

The second Congressional criminal power involves the power "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." [FN327] Although currency and the high seas clearly involve areas of federal, and not state concern, it is notable that the authors of the Constitution felt a need specifically to authorize Congressional law enforcement regarding these matters. In addition, the "necessary and proper" clause authorizes punishment of certain offenses. For example, since Congress is given authority over patents and bankruptcy, Congress may enact criminal laws regarding patent or bankruptcy fraud. [FN328] It is questionable whether Congress should arrogate to itself vast criminal powers supposedly deriving from the interstate commerce power, or the taxing power. Much of the expansion of federal criminal power has taken place as a result of an excessive judicial deference to Congress' proclivity for reading the interstate commerce power as a general grant of legislative authority on any subject. [FN329]

Most of the federal government's criminal law jurisdiction is built on an intellectual foundation of sand which will, perhaps, one day be swept away by jurists committed to the text of the Constitution rather than to the political trends of the day. [FN330] *345

Conclusion

After testifying at a Congressional hearing, one of us listened to a leader of the anti-militia movement tell Representative Bill McCollum that repressive measures were necessary because the authors of our Constitution had never faced a threat like John Trochmann (the leader of the Militia of Montana). Nobody familiar with American history could say such a thing. Rebellion was no abstraction to the authors of the United States Constitution and Bill of Rights; they had fought their own revolution a few years before. The Constitutional Convention took place only a few months after the suppression of an armed revolution led by Daniel Shays, in Western Massachusetts. [FN331] The first four Presidencies each faced a violent rebellion or a conspiracy to destroy the United States. President Washington witnessed the Whiskey Rebellion in western Pennsylvania and Virginia; President Adams faced the anti-tax Fries' Rebellion in northern and southeastern Pennsylvania, [FN332] and President Jefferson's term saw former Vice-President Aaron Burr lead a treasonous conspiracy to sever the western United States from the rest of the nation. During the Madison administration, while American armies were fighting the War of 1812 against Great Britain, New England secessionists met at the Hartford Convention to draw up plans for withdrawing New England from the Union. [FN333] The conflict, however, was avoided by conclusion of a peace treaty with the British. Any *346 one of the three serious armed revolts, as well as Burr's immense conspiracy and the Hartford plan of secession, was a vastly greater threat to national stability than the current threat allegedly posed by the Militia of Montana, or all the militias of the United States put together.

The people of the early American republic understood that the surest guaranty of a stable society was not repression from a central government, but the full protection of all civil liberties, and the careful control of centralized power. [FN334] When the government did overreact--as in the case of the Alien & Sedition laws--the people resisted.

In this Article, we have discussed a plethora of measures that would chop away at the Constitution; for not one of those measures have its proponents offered evidence that it would have prevented the terrible crime in Oklahoma City. Everything that terrorists do is already illegal. Current laws already provide ample authority for investigations of potential terrorists, including persons who have done nothing more than talk big. Various proposals that are offered as supposed solutions to terrorism--including more spying on peaceful dissidents, more electronic surveillance, trials with secret evidence, felonizing charitable donations to foreign humanitarian causes, and federalizing and militarizing criminal law--will make America more dangerous, not safer. Releasing the federal government from the strict Constitutional rule of law would, in the long run, facilitate state terrorism.

"Government is the potent, the omnipresent teacher," Justice Brandeis told us. [FN335] The most important thing that the federal *347 government can do to prevent terrorism is to not practice it. Without the unjustifiable, illegal, militaristic, deadly federal violence at Rudy Ridge and at Waco, there would be no militia movement. The federal government should set a better example. [FN336] If Rudy Ridge had led to a real investigation and genuine corrective measures-- instead of years of coverup by both the Bush and Clinton administrations, followed by grudging, ersatz reforms--America would be both safer and freer.

Ruby Ridge and the Waco tragedies were not the fault of a few bad officials, but the inevitable result of a culture of lawlessness, militarization, and violence that has permeated far too much of the federal law enforcement establishment. When the federal government--especially the executive branch-- stops demanding new powers, and starts exercising its existing powers in a responsible and lawful manner, then we will see a massive reduction in the tension between the majority of the American people and the government that should be their trusted servant, and not a terrifying master.

Footnotes

FNa. Associate Policy Analyst, Cato Institute, Washington, D.C.; Research Director, Independence Institute, Golden, CO; B.A. 1982, Brown Univ.; J.D. 1985, Univ. of Michigan.
FNaa. Professor of Law, Hamline Univ.; B.A. 1967, Univ. of Notre Dame; J.D., 1970, Duke Univ.; LL.M., 1981, Univ. of Florida. Research assistance for this article was provided by Chris Little and Scott Hattrup.
FN1. Leo Tolstoy, War and Peace, 857 (Louise & Aylmer Maude trans., Inner Sanctum ed. 1942) (1869).
FN2. Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 635-36 (1989) (Marshall, J., dissenting).
FN3. 141 Cong. Rec. S7880 (daily ed. June 7, 1995) (vote no. 242).
FN4. H.R. 1710, 104th Cong., 1st Sess. (1995).
FN5. H.R. 2703, 104th Cong., 1st Sess., 142 Cong. Rec. H2304 (1996) (enacted).
FN6. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104- 132, 1996 U.S.C.C.A.N. (110 Stat.) 1248.
FN7. Run by Phyllis Schaffley, one of the founders of the modern social conservative movement. FN8. E.g., Americans for Tax Reform, American Friends Service Committee, American Immigration Lawyers Association, Center for Democracy and Technology, Citizens Committee for the Right to Keep and Bear Arms, Gun Owners of America, Law Enforcement Alliance of America, Presbyterian Church (SA) Washington Office, Second Amendment Foundation. Letter from American Civil Liberties Union, et. al. to President Clinton and Congressional Leadership (Apr. 26, 1995) (on file with author).
FN9. For example, at a December 1995 press conference opposing a new version of Rep. Henry Hyde's terrorism bill, NRA-ILA Executive Director Tanya K. Metaska stated that the NRA was only putting up a "yellow light" on the terrorism bill-- asking for substantial improvements, rather than wanting to stop the bill entirely.
FN10. The signatures were on his own behalf, and not on behalf of any organization with which he is affiliated. Kopel is also a non-policy-making member of several organizations in the alliance, including ACLU, NACDL, NRA, and GOA.
FN11. Terrorist was first defined as: "In the French Revolution, an adherent or supporter of the Jacobins, who advocated and practised methods of partisan repression and bloodshed in the propagation of the principles of democracy and equality." The New Shorter Oxford English Dictionary 3258 (1993). In modern times, a great deal of terrorism is sponsored by government. See Ray S. Cline & Yonah Alexander, Terrorism as State-Sponsored Covert Warfare (1986).
FN12. Angie Cannon, *Focus on Politics*, Orange Cty. Reg., Feb. 6, 1996 at A14.

FN13. Regarding the alleged mistresses, Adams remarked, "'I do declare upon my honor, if this be true General Pinckney has kept them all for himself and cheated me out of my two.'" Paul F. Boller, Jr., Presidential Campaigns 12-13 (1985) citing 2 Page Smith, John Adams 1034 (1962). Jeffersonians also claimed that President Adams had planned to marry one of his sons to the daughter of England's King George III and start an American monarchy; Adams had supposedly abandoned the plan only after George Washington threatened to run him through with a sword. Id. at 12-13.
FN14. 1 Stat. 570, 577 (1798).
FN15. 1 Stat. 596 (1798).
FN16. E.g., Lyon's Case, 15 F. Cas 1183 (C.C.D. Vt. 1798) (No. 8646).
FN17. James Madison & Thomas Jefferson, Resolution of the Kentucky Legislature, in The Tree of Liberty 89-90 (Nicholas D. Kittrie & Eldon D. Wedlock, Jr., eds., 1986).
FN18. Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in Violence in America: Historical and Comparative Perspectives 281 (Hugh Davis Graham & Ted Robert Gurr, eds., 1969); Michael Wallace, *The Uses of Violence in American History*, in Riot, Rout, and Tumult: Readings in American Social and Political Violence (Roger Lane & John J. Turner, Jr., eds., 1978).
FN19. Jeremy Brecher, Strike! 47-50 (1972).
FN20. Debs v. United States, 249 U.S. 211 (1919).
FN21. Paul Aurich, Anarchist Voices 318 (1995).
FN22. John A. Garraty, The American Nation, 285-86 (1966).
FN23. Ralph J. Bunch, The Political Status of the Negro in the Age of FDR 86 (Dewey W. Granthan ed., 1973).
FN24. Martin Van Creveld, Technology and War: From 2000 BC to the Present 306-07 (1989).
FN25. George Gedda, *International Terrorism Down*, Associated Press, Apr. 28, 1995 available in 1995 WL 4385779.
FN26. Center for National Security Studies, Recent Trends in Domestic and International Terrorism 1 (May 1, 1995).
FN27. *Id*. at 1-2.
FN28. *Id*.
FN29. See infra note 43.
FN30. In fact, the repressive, counterproductive actions of the British Crown that set off the Revolutionary War in the American Colonies in 1775 are not entirely dissimilar to the British government's policy over the last two centuries regarding Ireland. It was, of course, just this type of oppressive governmental action in the suppression of dissent that the successful American revolutionaries sought to prevent, after they had won their liberty, by adoption of the Constitution's Bill of Rights.
FN31. Thomas Butson & Bryant Rollins, *The I.R.A. is Outlawed in Britain*, N.Y. Times, Dec. 1, 1974, at 2.
FN32. Prevention of Terrorism (Temporary Provisions) Act 1974 (Eng.).
FN33. *Id*.
FN34. Prevention of Terrorism (Temporary Provisions) Act 1989, Sec. 2 (Eng.).
FN35. Paddy Hillyard & Janie Percy-Smith, The Coercive State: The Decline of Democracy in Britain 272 (1988).
FN36. *Id*.
FN37. Prevention of Terrorism (Temporary Provisions) Act 1989, Sec. 3(I) (Eng.). See also K.D.

Ewing & G.A. Gearty, Freedom Under Thatcher: Civil Liberties in Modern Britain 216 (Oxford: Clarendon Pr., 1990). The Irish Bishops' Commission for Prisoners distributes a leaflet to Irish emigrants to Britain, warning young people that if arrested, they should expect "rough, accusational anti-Irish treatment" and should be prepared for "disorientation resulting from solitary confinement . . . and lack of contact with anyone except the police." The leaflet advises Irish to "sign nothing" without first consulting a lawyer. Mary Holland, *Ireland Laments Her Innocents Imprisoned Abroad*, Observer, Oct. 22, 1989, at 2.

FN38. Prevention of Terrorism (Temporary Provisions) Act 1989, Pt. II, SS 4-8 (Eng.).

FN39. Hillyard & Percy-Smith, supra note 35, at 273; Regina v. Secretary of States for the Home Department, ex parte Stitt, reported in The Times (London), Feb. 3, 1987 (Divisional Court ruling that requiring reasons for exclusion "would be fraught with difficulty and danger"), quoted in Ewing & Gearty, supra note 37, at 217.

FN40. Brogan v. United Kingdom, 11 Euro. Hum. Rts. Rep. 117 (1989) (12-7 vote).

FN41. John Carvel, *PM Clings to Detention Powers*, The Guardian (London), Oct. 21, 1989, at 1. Kevin Dawson, *Pressure Mounts to Reopen Birmingham Case*, The Sunday Trib., Oct. 22, 1989, at A15.

FN42. These interrogation techniques will cause the suspect to "admit" almost anything the interrogator suggests in an effort to relieve the strain. No such coerced confession can be trusted and, in the United States today, such confessions are still inadmissible because of the Fifth and Fourteenth Amendments. *E.g.*, Payne v. Arkansas, 356 U.S. 560, 569 (1958).

FN43. Barry James, Justice in England Undergoes Stress, L.A. Times, Apr. 7, 1985, at 2. The "five techniques" were condemned by the European Court of Human Rights as inhuman and degrading. Ireland v. United Kingdom, 2 Euro. Hum. Rts. Rep. 25 (1978).

FN44. Duncan Campbell, *The Thatcher Government vs. the British Press*, Col. Jnl. Rev., May/June 1989, at 35. The ban on the use of voices of Irish nationalists was dropped after Prime Minister Thatcher left office. Serge Schemann, *Overseas, Oklahoma City Bombing Is Seen Through Prism of Experience*, N.Y. Times, Apr. 30, 1995, at 28.

FN45. Labour Member of Parliament Ken Livingstone denounced the plan to "prevent access to radio and TV by those who are critical of government policy in Ireland." On the other hand, South African President P.W. Botha applauded the move, and suggested that South Africa emulate the British plan. Campbell, supra note 43, at 35.

FN46. Ewing & Gearty, supra note 37, at 248 (citing Independent, Nov. 11, 1988; Feb. 13, 1989).

FN47. Criminal Evidence (Northern Ireland) Order 1988, S 3 (Eng.), Criminal Justice and Public Order Act 1994, SS 34-35 (Eng.).

FN48. Terence DuQuesne & Edward Goodman, Britain An Unfree Country 26 (1986) (citing Interception of Communications Act, July 25, 1985). American wiretaps authorize only the recording of conversations regarding the subject of the tap. British wiretappers are required to ecord all conversations on the tapped line. Ewing & Gearty, supra note 27, at 70.

FN49. S 3(l); see also Campbell, supra note 44, at 37.

FN50. *Id.*

FN51. Firearms Act 1982 (Eng.); Stephen Gold, *Carry on Squirting*, 133 New L.J. 989 (1983).

FN52. Firearms Act 1982, ch. 31 (Eng.); Michael Yardley & Jan A. Stevenson, Report on the Firearms (Amendment) Bill 65 (2d ed. 1988).

FN53. See generally R.C. Longworth, *Perjury, Abuse of Prisoners Lead to Criticism of British Police*, C.J. Int'l, Sept. 1990, at 19 (reprint from Chicago Tribune).

FN54. Ewing & Gearty, supra note 37, at 18-19. Among the other well-known cases involving Irish defendants allegedly tortured into confession by the police are the Maguire Seven and U.D.R. Four. Craig R. Whitney, *Faith in British Justice System is Shaken By Forced Confessions and False Jailings*, N.Y. Times, June 2, 1991, at 1.
FN55. Hillyard & Percy-Smith, supra note 35, at 274.
FN56. 18 U.S.C. Sec. 1385 (1994).
FN57. As the great historian Edward Gibbon observed, "The temper of soldiers, habituated at once to violence and slavery, renders them very unfit guardians of a legal or even civil constitution." Quoted in Douglas Casey, *The New Praetorians*, Liberty, Mar. 1996, at 50. Like the FBI, the Army infiltrated antiwar groups in the 1970s and kept dossiers on opponents of the war. *Congress Not Ready to Alter Law Banning Police Role for Military*, Crime Control Dig., May 5, 1995, at 3 (quoting Lawrence Korb, a Pentagon personnel chief during the Reagan administration).
FN58. See generally, H.M. Gitelman, Legacy of the Ludlow Massacre (1988).
FN59. For the creation of the modern National Guard, see H. R. Rep. No. 141, 73d Cong., 1st sess., (1933).
FN60. 18 U.S.C. S 1385 (1994). Not all of America's "armed forces" are included. The Act does not apply to the Navy or the Marine Corps, for they were seen as seagoing services not likely to be a domestic threat. The Coast Guard (in time of peace, a part of the Treasury Department but, in time of war, a part of the Navy) is also not included, as it was a tiny service of tax collectors and also not perceived as a domestic threat in the nineteenth century.
FN61. South v. Maryland, 59 U.S. 396, 402 (1855). See also 4 William Blackstone, Commentaries *146 ("And by the statute of 13 Hen. IV. c.7. any two justices, together with the sheriff or under sheriff of the county, may come with the posse comitatus, if need be, and suppress any such riot, assembly, or rout, arrest the rioters. . .).
FN62. In re Quarles, 158 U.S. 532, 535 (1895). The passage was quoted with approval in United States v. New York Tel. Co., 434 U.S. 159, 178 (1977).
FN63. Livingston v. Dorgenois, 11 U.S. 577, 579 (1813).
FN64. See 18 U.S.C. S 1835 (1994).
FN65. U.S. Const., art. I, S 8. The power to declare war and appropriate funds for the military is vested in Congress, the most democratic branch, and army appropriations are limited to a period of two years, so that the army is dependent on a new appropriation after every House election. Id.
FN66. 48 U.S. 1, 76 (1849).
FN67. The Federalist No. 41 (James Madison).
FN68. U.S. Const., art. I, S 8 (emphasis added).
FN69. U.S. Const., art. IV, S 4. To state the obvious, there is no threat of invasion of any state, nor has any state asked the federal government to protect it against domestic violence. Thus, there is no Constitutional foundation for current use of the military in domestic law enforcement. Such actions are ultra vires.
FN70. U.S. v. Walden, 490 F.2d 372, 375 (4th Cir. 1974).
FN71. Wrynn v. United States, 200 F. Supp. 457, 465 (E.D.N.Y. 1961) (holding Air Force participation in execution of law wrongful, but not cause of injury under Federal Tort Claims Act). FN72. Bissonette v. Haig, 776 F.2d 1384, 1387 (8th Cir. 1985) (footnote omitted), *aff'd*, 485 U.S. 264 (1988). *See generally* Stephen P. Halbrook, *Military Enforcement of the Drug Laws*, in Kevin & E. Zeese, Drug Law (1993).
FN73. Mike Spofford, *Feingold Not Sold on New Power for Military*, Capital Times, May 11,

1995, at 1E.
FN74. Even if arguably legitimate, any additional exception to the Posse Comitatus Act should be strictly limited to cases where special expertise is necessary. Spraying someone with mace may be a crime involving chemical attack, but is not one requiring that we call out the army.
FN75. H.R. 896, 104th Cong., 2d Sess. (1996).
FN76. S. 735, 104th Cong., 2d Sess. (1996).
FN77. See infra text accompanying notes 257-91.
FN78. *Id*.
FN79. H.R. 896, S 101(f); S. 735, S 102(f).
FN80. 466 U.S. 170 (1984).
FN81. Mark Levin, *What Became of the FBI?*, Nat'l Rev., Oct. 9, 1995, at 20.
FN82. Justice, *Defense Announce "Troops to Cops" Conversion Program*, Crime Control Dig., May 5, 1995, at 1.
FN83. One of the authors, Olson, wrote the following in a letter concerning the right-wing bashing done after the Oklahoma City bombing:

> It was the capitol city of a midwestern state. A nice town known, perhaps, for yelling, shouting, and political marches but not for violence. It was a government building--home to administrators and staff and, even, to educators. It was a truck loaded with common fertilizer, ammonium nitrate, mixed with common fuel, diesel oil, and set off with hardware store parts. The bomber was a wacko who hated the federal government and especially the agency whose work was done in the building. A wacko who felt shut out of our democracy and who despaired of a political solution to his real and imagined grievances. A wacko who shamed those who also had grievances with the government but who had chosen to use the processes of democracy to seek redress. It was Madison, Wisconsin in 1970. The wacko came from the far-left. Otherwise the analogy to 1995 is near perfect.

Joseph Olson, Letter to the Editor, L.A. Times, Apr. 27, 1995, at 2.
FN84. Suzanne Fields, *Bombing Brings Reckless Charges of Blame*, Gazette- Telegraph (Colorado Springs), Apr. 27, 1995, at B7.
FN85. *Id*.
FN86. As this article is written, a man believed by authorities very probably to be the Unabomber has been arrested and is being held by federal officials. Since the suspect lived in a remote cabin with no utilities, and had apparently not even been an object of suspicion to the FBI before his brother turned him in, it seems unlikely that any of the proposed anti-terrorist legislation discussed in this article would have speeded his apprehension.
FN87. *Text of Letter From "Terrorist Group," Which Says It Committed Bombings*, N.Y. Times, Apr. 26, 1995.
FN88. Cal Thomas, *Unabomber: A Liberal McVeigh*, Cincinnati Enquirer, April 12, 1996, at A14. FN89. Id.
FN90. See generally Linda Chavez, *Media Ignore Unabomber Ecotage Link*, Den. Post, Apr. 11, 1996, at 7B; Thomas, supra note 88. Al Gore's book, *Earth in the Balance*, was found in Theodore Kaczynski's cabin. Kaczinski had apparently underlined many passages and made copious marginal notes. *Inside Politics*, Wash. Times, June 16, 1996, at 16.
FN91. Schenck v. United States, 249 U.S. 47, 52 (1919).

FN92. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
FN93. Whitney v. California, 274 U.S. 357, 376-77 (1927) (Brandeis, J., dissenting).
FN94. Watts v. United States, 394 U.S. 705 (1969) (per curiam).
FN95. Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
FN96. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (Justice Holmes joined in the concurring opinion).
FN97. *Clinton Slams Gun Lobby, House on Terrorism Bill*, Reuters, Mar. 16, 1996, available in LEXIS, Nexis Library, Reuters file.
FN98. *Id.*
FN99. President Clinton, Philadelphia Mayor Edward Rendell, and New York Mayor Rudolph Guliani, Remarks to the 16th Annual Convention of the National Association of Police Organizations (Aug. 12, 1994).
FN100. White House, Office of the Press Secretary, *Remarks by President Clinton at Michigan State University* (May 5, 1995).
FN101. *E.g.*, Peter Hoffman, German Resistance to Hitler (1988).
FN102. *Echoes of Oxford*, Wall St. J., May 9, 1995.
FN103. *Clinton Singles Out Liddy in Rebuking Talk Show Hosts*, Associated Press, May 4, 1995, available in LEXIS, Nexis Library, AP file.
FN104. Roy Bragg, *Conservative Talk-Show Hosts Counterattack*, San Antonio Exp.- News, Apr. 30, 1995.
FN105. Amitai Etzoni, *Just a Social Crowd of Folk*, The Guardian, Feb. 18, 1995, at 29.
FN106. So too, have right-wing voices, such as House Speaker Newt Gingrich. After Susan Smith drowned her two young boys in a car in South Carolina, Gingrich said,

> How a mother can kill her two children, fourteen months and three years, in hopes that her boyfriend would like her, is just a sign of how sick the system is and I think people want to change. The only way you get change is to vote Republican. That's the message for the last three days.

David Pace, *Gingrich Defends Using Boys' Slayings In Campaign*, Orange Cty. Reg., Nov. 8, 1994. If there is a real sign of how sick the system is, it is in the willingness of major political leaders to link their opponents to the murder of children, and the eagerness of many Americans to believe lies about minority groups perpetrating heinous crimes. Smith's claim that a black man had taken her car and children was initially given great credibility by many Americans, if not by the law enforcement officials involved. The same may be said of the assertions that militia members were involved in the Oklahoma City bombing.
FN107. United States v. Progressive, Inc., 467 F. Supp. 990 (D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979). The ruling was based on two facts only applicable to a hydrogen bomb, which are emphatically not applicable to ordinary explosives. First, "(a) mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all." Id. at, 996. Second, "'the design and operational concepts described in the manuscript are not expressed or revealed in the public literature nor do I believe they are known to scientists not associated with the government weapons programs.'" Id. at 993 (quoting Dr. Hans A. Bethe).
FN108. William Powell, The Anarchist Cookbook (1971).
FN109. Abbie Hoffman, Steal This Book (1971).
FN110. Brandenburg v. Ohio, 395 U.S. 444 (1969).

FN111. 18 U.S.C. S 2339A (1994).
FN112. *Id*.
FN113. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, S 302, 1996 U.S.C.C.A.N. (110 Stat.) 1248.
FN114. Only the organization itself can challenge the designation. An individual who is being criminally prosecuted for giving support to the organization may not challenge the designation. Id. FN115. S 303, 1996 U.S.C.C.A.N. (110 Stat.) 1251.
FN116. *Id*. What makes an organization "foreign" is undefined by the legislation. Thus, an American organization with some non-American members could arguably be considered foreign, as could an American organization with substantial overseas activity, such as Oxfam.
FN117. S 303, 1996 U.S.C.C.A.N. (110 Stat.) 1250.
FN118. *Id*.
FN119. S. 735, 104th Cong., 2d Sess., S 402 (1996).
FN120. Anthony Lewis, *How Terrorism Wins*, N.Y. Times, Mar. 11, 1996 at A17. All these examples are contingent upon the organization in question being designated a "foreign terrorist organization" by the Secretary of State.
FN121. The original Clinton bill's overbreadth was even more astonishing. In that bill, the Palestine Liberation Organization was permanently defined as a terrorist organization, no matter what its future conduct. H.R. 896, 104th Cong., 2d Sess. S 202(a) (1996). Thus, if the P.L.O. should live up to the peace treaty that it signed with Israel, President Clinton would be guilty of providing "material support" to a terrorist organization should he invite Yassir Arafat to the White House and give him a free meal and a night's lodging.
FN122. Collections from Kharris (visited December 30, 1996).
FN123. H.R. 896, S 301(a); S. 750, S 401(a).
FN124. Healy v. James, 408 U.S. 169 (1972).

> (G)uilt by association alone, without (proof) that an individual's association poses the threat feared by the Government, is an impermissible basis on which to deny First Amendment rights. The government has a burden of establishing a knowing affiliation with an organization pursuing unlawful aims and goals, and a specific intent to further those illegal aims.

Id. at 186 (citations omitted).
FN125. Bridges v. Wixon, 326 U.S. 135 (1945).
FN126. Elfbrandt v. Russell, 384 U.S. 11, 15 (1966).
FN127. *Id*. See also Noto v. United States, 364 U.S. 290 (1961). "There is danger that one in sympathy with the legitimate aims of . . . an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes he does not necessarily share." Id. at 299-300. Thus, the Supreme Court has declared unconstitutional many laws imposing disabilities on persons solely because of their membership in the Communist Party, a group which has legal and illegal aims, and which has supported and received support from foreign terrorist organizations (such as the K.G.B.). Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 448-49 (1974); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589, 606-07 (1967); Apthekar v. Secretary of State, 378 U.S. 500 (1964); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

FN128. Adam Parfrey & Jim Redden, *Patriot Games*, Village Voice, Oct. 11, 1994, at 26-31.
FN129. Adam Parfrey, *Oklahoma City: Cui Bono?* Prevailing Winds Magazine, no. 2, Alternative Press, at 42, 51 (1996). The same article was also published as *Finding Our Way Out of Oklahoma*, Alternative Press, Winter 1996, at 60.
FN130. Kenneth S. Stern, A Force upon the Plain: The American Militia Movement and the Politics of Hate (1996).
FN131. Morris Dees & James Corcoran, Gathering Storm: America's Militia Threat (1996).
FN132. *Id*.
FN133. *Id*.
FN134. *Id*. at 2. Rep. Charles Schumer agrees; at the opening of House subcommittee hearings on militias, Schumer warned, "America is at greater risk today than ever before...they could destroy America." The Nature and Threat of Violent Anti-Government Groups: Hearing Before the Subcomm. on Crime of the House of Representatives Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (Statement of Rep. Schumer).
FN135. Sandee Richardson, *Law Center Hierarchy Remains All White*, The Montgomery Advertiser, August 25, 1996, at 1A.
FN136. Stern's book does not make Beam and Dees the central characters, but Stern does write that "The most significant precursor of the militias was the Ku Klux Klan." Stern, supra note 130, at 43.
FN137. Dees supra note 131, at 29.
FN138. *Id*. at 66.
FN139. Southern Poverty Law Center, Klanwatch Intelligence Report, Feb. 1996, at 1.
FN140. The "Patriot movement" is the name used by a large group of people, on the political right, who raise mainstream concerns about expanded federal power, but who place those concerns in the context of alleged conspiracies to destroy American freedom and place the American people under the control of a one-world international government. International bankers, the Trilateral Commission, the Council on Foreign Relations, the United Nations, and other elite international organizations are often said to be deeply involved in the conspiracy, as are Presidents Bush and Clinton, and other parts of the United States government, especially the Federal Reserve and the Federal Emergency Management Agency. The militia movement, in contrast, consists of people who form local organizations to train for lawful civil defense--usually, but not always, with firearms training included. Almost all militia members are suspicious of the federal government; many, but not all, militia leaders and members believe in the Patriot ideology. The militia movement is much smaller than the Patriot movement.
FN141. The step-father of Susan Smith (the South Carolina mother convicted of killing her two young sons) sexually molested her one night after he returned from putting up posters for the Pat Robertson presidential campaign. *The Company You Keep*, The New Republic, May 15, 1995, at 11. What if someone suggested that the radical patriarchal theories espoused by Robertson and the Christian Coalition created the atmosphere that led to the incestuous rape, and that therefore all Christian Coalition members were responsible for the crime, and the FBI should crack down on them? The claim would be dismissed in a second; equally outrageous claims about militia members should likewise be dismissed.
FN142. Dees, supra note 131, at 163.
FN143. Dees, supra note 131, at 162; Stern, supra note 130, at 187.
FN144.

> Since the dawn of warfare, military commanders have tried, with little success, to overcome the natural reluctance of humans to kill other humans. Every source of statistical information that we can discern shows huge numbers of soldiers never firing their guns, or, when forced to fire by the presence of officers, elevating firearm slightly so as to fire over the head of the enemy. Not until the Vietnam conflict was there a war in which the majority of American soldiers actually fired their guns; by Vietnam, the military had begun putting recruits through special psychological conditioning designed to overcome the resistance to kill.

Dave Grossman, On Killing: The Psychological Cost of Learning to Kill in War and Society (1995). FN145. Dees, supra note 131, at 152; Stern, supra note 130, at 188.
FN146. E.g., Craig B. Hulet, *Patriots or Paranoids?*, Soldier of Fortune, Aug. 1995, 43.
FN147. Nolan Clay, *McVeigh Carried Political Writings When Arrested*, Daily Oklahoman, Nov. 4, 1995. The passage was:

> I have no reason to suppose that he who would take away my liberty would not when he had me in his power take away everything else. And therefore it is lawful for me to treat him as one who has put himself into a state of war against me and kill him if I can.

Id. McVeigh's handwritten note, while generally accurate, was not entirely precise. The exact quote was:

> . . . I have no reason to suppose, that he, who would *take away my Liberty*, would note when he had me in his Power, take away every thing else. And therefore, it is Lawful for me to treat him, as one who has *put himself into a State of War* with, *i.e.* kill him if I can. . .

John Locke, Two Treatises of Government, 320-21 (Peter Laslett ed., New American library 1965) (1689) (emphasis in original).
FN148. *Id*. at A2.
FN149. A leader of the anti-militia movement in the northwest.
FN150. William Pierce, The Turner Diaries (1988).
FN151. Dees' book has a bibliography; Stern lists sources at the end of every chapter, but does not link particular sources with particular facts.
FN152. Stern, supra note 130, at 170.
FN153. The Nature and Threat of Violent Anti-Government Groups: Hearing Before the Subcomm. on Crime of the House of Representatives Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (testimony of Michael Lieberman, Anti-Defamation League); *Id*. (testimony of Brian Levin, Southern Poverty Law Center).
FN154. Stern, supra note 130, at 165-70. For example, Stern's quote of Sherwood was the lead paragraph in the National Journal's review of Stern's book. Politics, Nat'l J., Mar. 9, 1996, at 561. The Sherwood quote is featured in large type on the inside back cover of a glossy SPLC special report summarizing the Dees book. Southern Poverty Law Center, False Patriots: The Threat of Antigovernment Extremists (1996).
FN155. Mark Tanner, *Extreme Prejudice: How the Media Misrepresent the Militia Movement*,

Reason, July 1995, at 45.
FN156. *Id*.
FN157. Other militia facts circulated by anti-militia fundraisers (but not in the Stern and Dees books) are also taken wildly out of context. For example, a reader may be told that a militia leader called for an armed march on Washington which would order Congress, at gunpoint, to repeal the Brady Act, abolish the Internal Revenue Service, pass various constitutional amendments, as so forth. The reader may be told that the militia leader was Linda Thompson, with the H.M.S. Pinafore-like title "Adjutant General of the Unorganized Militia." What the reader will rarely learn, however, is that Ms. Thompson gave herself that title although she does not command a single militia squad, let alone hundreds of them (as a real general would). Nor did the actual militia movement pay much attention to Ms. Thompson's call for a September 7, 1994 armed march, except to denounce it as outrageous and ridiculous. The reader will certainly not learn that Ms. Thompson's preposterous suggestion was eventually withdrawn, as she claimed that her call for the march had been a hoax. Adam Parfrey, *Oklahoma City: Cui Bono?* Prevailing Winds Magazine (1996), at 42, 45.

Pro-militia radio commentator Bo Gritz (in a quote correctly described by Stern), theorized that the Oklahoma City bombing could not have been perpetrated by a pair of men with a fertilizer bomb, because the destruction of the building was so sophisticated and effective; the bombing was a "Rembrandt-- a masterpiece of science and art put together." Stern, supra note 130, at 204. The Gritz quote is often repeated out of context, as if Gritz were praising the bombing as a positive act. FN158. Stern summarizes a law review article by Handgun Control, Inc. chief counsel Dennis Henigan (identified by Stern only as "attorney Dennis Henigan"), that the Second Amendment cannot possibly guarantee a right to own guns to resist tyranny, because no structure of government can contemplate its own overthrow. Stern, supra note 130, at 110-13. Yet in Stern's 1994 book about his role as an attorney for armed, violent American Indian movement, he wrote that armed, collective self-defense against federal tyranny is "the last, core, rock bottom concept of sovereignty." Kenneth S. Stern, Loud Hawk 322 (1994). But only, apparently, when being exercised from the left rather than the right.
FN159. Dees, supra note 130, at 218; Stern, supra note 131, at 112.
FN160. See, e.g., 4 Encyclopedia of the American Constitution 1639-40 (Karst & Levi eds., 1986); E. Foner and J. Garrity, Reader's Companion to American History 477-78 (1991) (entry on "Guns and Gun Control"); Stephen Halbrook, A Right To Bear Arms: State And Federal Bills Of Rights And Constitutional Guarantees (1989); Leonard Levy, Original Intent and the Framers' Constitution 341 (1988); Joyce L. Malcolm, The Right to Keep and Bear Arms: the Origins of an Anglo-American Right (1994); Oxford Companion to the United States Supreme Court (1992) (entry on the Second Amendment); Akhil Amar, *The Bill of Rights and Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1164 (1991); David Caplan, *The Right of the Individual to Bear Arms*, 1982 Det. Coll. L. Rev. 789 (1982); Robert J. Cottrol & Raymond T. Diamond, P*ublic Safety and the Right to Bear Arms*, in D. Bodenhamer and J. Ely, After 200 Years: the Bill of Rights in Modern America (1993): Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. Balt. L. Rev. 32 (1984); Robert Dowlut, *The Right to Arms*, 36 Okla. L. Rev. 65 (1983); Richard E. Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. Rev. 63 (1982); Stephen P. Halbrook, *The Right of the People*

or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment, 26 Val. U. L. Rev. 131 (1991); Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 Dayton L. Rev. 91 (1989); David Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & Politics 1 (1987); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 Harv. J.L. & Pub. Pol'y 559 (1986); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comm. 87 (1992); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 244- 52 (1983); Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 Ala. L. Rev. 103 (1987); Stephanie A. Levin, *Grass-Roots Voices: Local Action and National Military Policy*, 40 Buff. L. Rev. 321, 346-7 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637 (1989); Joyce Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hastings Const. L.Q. 285 (1983); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective* in Firearms and Violence: Issues of Public Policy 417 (Don Kates, ed., 1984); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 328 (1990); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution*, 61 Tenn. L. Rev. 647 (1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms*, 139 U. Pa. L. Rev. 1257 (1991); Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 Law & Contemp. Probs. 125 (1986); Robert E. Shalhope, *The Ideological Origins of the Second Amendmen*t, 69 J. Am. Hist. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 Duke L.J. 1236 (1994); David Vandercoy, *The History of the Second Amendment*, 28 Val. U. L. Rev. 1007 (1994); Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995 (1995). *Cf.* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 Rutgers L.J. 1 (1992); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 Emory L.J. 967 (1993); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 Yale L.J. 551 (1991) (individual right was intended, but since state governments have neglected their duties to promote responsible gun use through drill in a "well- regulated militia," the right to arms is no longer valid); Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 Hamline L. Rev. 69 (1986) (amendment was intended to guarantee an individual right of personal security, but the right can be protected by confiscating all guns).

But see Lawrence Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. Am. His. 22 (1983); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 Dayton L. Rev. 5 (1989); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. Ky. L. Rev. 141 (1982); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U. L. Rev. 107 (1991); Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 Hamline L. Rev. 383 (1983). FN161. Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and the Dereliction of Dialogic Responsibility*, 75 B.U.L.Rev. 57 (1995) (arguing for individual right, but only to participate in the militia); Garry Wills, *To Keep and Bear Arms*, N.Y. Rev. Books Sept. 21, 1995, at 62 (arguing that the scholarly "standard model" of Second Amendment is

wrong). The Wills article, incidentally, offers a unique interpretation of the Second Amendment: rather than providing an ordinary individual right (standard model) or a narrow individual right to serve in the militia (Herz) or a right of state governments to have a militia (Henigan, and others), the Second Amendment has no legal meaning at all. James Madison cleverly wrote a Constitutional amendment that does absolutely nothing, in order to placate anti-Federalists. This heretofore-undiscovered secret meaning of the Second Amendment--which Madison never revealed to anyone or even noted in a secret diary entry--must prevail over the intentions of the state legislatures that ratified the Second Amendment. These legislatures were duped by Madison into thinking that they were guaranteeing an individual right to arms. Wills. *Id*. It is not necessary to live on a farm in Montana and own a lot of guns in order to construct preposterous theories of history.

FN162. Dees, supra note 129 at 219.

FN163. Proclamations of President George Washington, Aug. 7, 1794; Sept. 25, 1794, reprinted in Tree of Liberty 80-81 (Nicholas N. Kitric & Eldon D. Wedlock, Jr. eds., 1986).

FN164. I George Mason, Papers 210-11 (1970), quoted in Stephen P. Halbrook, That Every Man Be Armed: The Evolution of the Constitutional Right 60 (1984).

FN165. Stern, supra note 128, at 116.

FN166. Thomas Jefferson Writings 1419 (M. Peterson ed. 1984).

FN167. E.g., Stephen P. Halbrook, A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees 1-17 (1989).

FN168. I Sources of American Independence 176 (1978); Halbrook, Dayton L. Rev., supra note 158, at n. 144.

FN169. Dees, supra note 131, at 219.

FN170. The crimes of militia sympathizers and others are also published in a special report which the SPLC released shortly before the first anniversary of Oklahoma City, titled *False Patriots*. The report garnered considerable national publicity with its prediction of a vast militia crime wave which must be crushed at once.

FN171. Dees, supra note 131, at 200.

FN172. *Id*. at 210.

FN173. Dan Morse, *Marketing the Klan*, Montgomery Advert., in Rising Fortunes 11 (1994) (reprint of eight-day newspaper series on the Southern Poverty Law Center).

FN174. Stern, supra note 130, at 249.

FN175. E.g., Dees, supra note 131, at 231-32. In other contexts, Dees is much less temperate. For example, in an April 1996 fundraising letter, he states that the "underground 'Patriot' movement" has "united previously warring factions of America's most rabid extremists." Dees states that "many" Patriot movement members "appear to be 'ordinary' Americans. . . . " But a number come from the ranks for white supremacists, militia fanatics, tax protesters, gun enthusiasts and more." Letter from Morris Dees to David Kopel (Apr. 10, 1996). It says quite a lot about Dees' world-view that being a "gun enthusiast" qualifies a person to be included in the same list of dangerous "fanatics" with white supremacists.

FN176. Dees, supra note 131.

FN177. *Id*. at 121.

FN178. E.g., Stern, supra note 130, at 248.

FN179. *Id*. at 217-18.

FN180. *Id*. at 219.

FN181. 505 U.S. 144 (1992) (holding that states cannot be forced to enter into nuclear waste

storage compacts).
FN182. 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (federal government may not impose wage and hour regulations on state and local government employees).
FN183. 297 U.S. 1 (1935) (holding that under the 10th Amendment, agricultural regulation is reserved to the states).
FN184. Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 Val. U.L. Rev. 107 (1991).
FN185. Stern, supra note 130, at 93. The measure was vetoed by Governor Mark Racicot.
FN186. *Id*. at 249-50.
FN187. *Id*. at 152. The man quoted, the leader of one of the largest militia groups in the United States, is an African-American, although Stern never so informs his readers.
FN188. Patricia Schroeder, Address at the Colorado Democratic Convention (Oct. 4, 1974).
FN189. Stern, supra note 130, at 246.
FN190. *Id*.
FN191. *Id*. at 246-47.
FN192. Dees ends the book by urging political leaders to condemn hate from all sides of the political spectrum. He criticizes leaders who lent respectability to conspiracy theorist/numerologist/hate-monger Louis Farrakhan by appearing at his Million Man March in Washington. Dees, supra note 131, at 232-33. Stern, however, has a harder time seeing enemies on the left. In 1994--only two years before publication of A Force on the Plain--he wrote a book, Loud Hawk: The United States versus the American Indian Movement, celebrating his role as an attorney for the American Indian Movement. Many leaders of AIM were racists; they were caught with "350 pounds of explosives"; they hated the FBI; and they believed in a government conspiracy to destroy them. Loud Hawk, supra note 158.
FN193. Stern, supra note 130, at 45.
FN194. *Id*.
FN195. The standard history of the *Protocols* is Norman Cohn, Warrant for Genocide:

> The Protocols consists of lectures, or notes for lectures, in which a member of the secret Jewish government--the Elders of Zion--expounds a plot to achieve world-domination. In the standard version the 'protocols,' or lectures, or chapters, are twenty-four in number; together they fill a booklet--about a hundred small pages . . . They are not easy to summarize, for the style is turgid and diffuse, the argument tortuous and illogical. With perseverance one can however distinguish three main themes: a critique of liberalism; an analysis of the methods by which world-domination is to be achieved by the Jews; and a description of the world-state which is to be established . . . .
>
> The Elders base their calculations on a particular view of politics. As they see it, political liberty is only an idea--admittedly an idea which has great attraction for the masses, but one which can never be translated into reality. Liberalism, which attempts this impossible task, results merely in chaos; for the people are incapable of governing themselves, they do not know their own mind, they are easily deceived by appearances, they cannot choose rationally between conflicting counsels. When the aristocracy ruled it was right that aristocrats should have

> liberty, for they used it for the general good; it was in their own interest, for instance, to care for the workers from whose labour they lived. But aristocracy is a thing of the past, and the liberal order which has succeeded it cannot last but must inevitably lead to despotism. Only a despot can ensure order in society. Moreover, since there are more evil men than good in the world, force is the only appropriate means of government. Might is right; and in the modern world the basis of might is the possession and control of capital. Today it is gold that rules the world.
>
> Over a period of many centuries a plot has been in operation to place all political power firmly in the hands of those who alone are qualified to use it properly--that is to say, in the hands of the Elders of Zion . . . Before the elders can establish their rule over the whole world the existing Gentile states . . . must be finally abolished . . . .

Norman Cohn, Warrant For Genocide: The Myth of the Jewish World--Conspiracy and the Protocols of the Elder Zion 61-62 (1981). According to the Protocols, the Zionist plot even includes the construction of subways, for "these have been devised for the sole purpose of ensuring that the Elders will be able to meet any serious opposition by blowing whole capital cities sky high." Id. at 63. The Protocols may have been written in the 1890s by the Okhrana, the Czarist secret police. Much of the book is a low-quality plagiarization of Maurice Joly, Dialogues aux Enfers entre Montesquieu et Machiavel (Dialogue in Hell between Montesquieu and Machiavelli) (1864). FN196. Stern, supra note 130, at 140.
FN197. John Robison, Proofs of a Conspiracy (1798). *See also* Robert Anton Wilson, The Illuminati Papers (1980).
FN198. Malcolm Barber, The Trial of the Templars (1978).
FN199. *See generally*, Richard Hofstadter, The Paranoid Style in American Politics and other Essays 3-40 (1966).

Paranoia and conspiracy theories pre-date American independence. The Salem witch craze was one manifestation. Another was the incorrect fear of the 1770s Patriot movement that the British monarchy was not only mistaken in its particular policies, but was acting out "a design to reduce (Americans) under absolute Despotism." The Declaration of Independence, para. 2 (U.S. 1776).
FN200. Dees, supra note 131, at 5. Stern observes that if militias were mainly black, rather than mainly white, a legislative crack-down would already have occurred. Stern, supra note 130, at 211. Actually, the 1960's Black Panthers were heavily armed, and much more explicitly pro-violence than today's militias. Not until 1968--by which point race riots had occurred in nearly every major American city--did Congress enact major criminal laws aimed at civil unrest. In any case, the reflexive bigotry which white America has too often felt against black America is hardly a respectable model for social policy, and it is astonishing to see the American Jewish Committee promoting it as a model.
FN201. Stern, supra note 130, at 62. Stern's description of Linda Thompson's misleading but widely circulated videotape "documentaries" about Waco. *Id*. 61- 62.
FN202. The other side of the paranoia business tells whoppers too. For example, militia mail-order entrepreneur, "Mark from Michigan" (Mark Koernke), told his shortwave listeners that the main federal gun law, the Gun Control Act of 1968, was copied word-for- word from Nazi

Germany's gun laws. This is plainly false. Koernke was apparently repeating--in a very derivative and mistaken form--the thesis of the book *Gun Control: Gateway to Tyranny, published by Jews for the Preservation of Firearms Ownership*. Although the book notes parallels between German gun laws and the 1968 American law, the book never asserts that the latter is a word- for-word copy of the former; indeed, the book reprints the German and American statutes in full, making it very clear that the statutes are different. The book does find many similar concepts, such extra regulation for guns which were not "sporting" arms, and offers evidence that Senator Thomas Dodd, the main sponsor of the 1968 Act, knew about the German gun laws, and requested a copy of them from the Library of Congress. Before becoming Senator from Connecticut, Dodd had once served as a member of the U.S. prosecuting team at the Nuremburg trials. See generally, Jay Simkin & Aaron Zelman, Gun Control: Gateway to Tyranny (1992).
FN203. As a Southern Poverty Law Center newsletter explains to potential donors: "The melding of militias and radical racists has made the job of law enforcement and monitoring organizations (i.e. the SPLC) both more difficult and more essential." Joe Roy, *Tracking the Terror*, Klanwatch Intelligence Report, Feb. 1996, at 3.
FN204. Greg Jaffe and Dan Morse, *Poverty Law Center Anything but Poor*, Montgom. Advert., in Rising Fortunes, supra note 171, at 19.
FN205. Barbara Dority, *Is the Extremist Right Entirely Wrong?* The Humanist, Nov.-Dec. 1995, at 12-13.
FN206. Stern, supra note 130, at 486.
FN207. A.M. Rosenthal, *The Montana Mistake*, N.Y. Times, Apr. 9, 1996, at 21.
FN208. Stephanie Saul, *An Explosion of Hate*, Newsday, March 3, 1996, at 33 (book review).
FN209. Christopher Lehman-Haupt, *The Seeds of Hate Some Americans are Sowing*, N.Y. Times, Feb. 12, 1996, at 1C (book review); Patsy Sims, *Armed and Dangerous*, N.Y. Times, Jan. 28, 1996, at 1 (book review).
FN210. John McCaslin, *Inside the Beltway*, Washington Times, Jan. 16, 1996, at A6.
FN211. Dees, supra note 131, at jacket.
FN212. Glenn Harlan Reynolds, *Up in Arms About a Revolting Movement*, Chi. Trib., Jan. 30, 1995, S 1, at 11.
FN213. B. Bruce-Briggs, *The Great American Gun War*, The Public Interest 45 (Fall 1976), at 61.
FN214. *Id*. at 62.
FN215. Stern, supra note 130, at 486.

Unfortunately, the tendency to see the end of the Cold War as the beginning of a domestic war is hardly confined to fringe elements in the militia or anti-militia movements. For example, Irving Kristol, a very mainstream conservative thinker, writes:

> So far from having ended, my cold war has increased in intensity, as sector after sector of American life has been ruthlessly corrupted by the liberal ethos. It is an ethos that aims simultaneously at political and social collectivism on the one hand, and moral anarchy on the other. It cannot win, but it can make us all losers. We have, I do believe, reached a critical turning point in the history of American democracy. Now that the other "Cold War" is over, the real cold war has begun.

Irving Kristol, Neoconservatism: The Autobiography of an Idea 486 (1995). To create some kind of moral equivalence between Bill Clinton and Josef Stalin is outrageous, no less outrageous than the assertions by President Clinton and Rep. Schumer that opponents of their terrorism bill were themselves active supporters of Hamas and other terrorist organization.
FN216. For an overview of the interstate commerce clause issue, see Glenn H. Reynolds, Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government? Cato Institute Policy Analysis no. 216 (Wash. 1994).
FN217. For a comprehensive listing of police seizure data, see David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381 (1994).
FN218. 18 U.S.C. S 921(a)(30) (1994).
FN219. E.g., Charles Krauthammer, *Disarm the Citizenry, But Not Yet*, Wash. Post, Apr. 5, 1996. (stating that the only value of the ban is in desensitizing the American population for eventual gun prohibition).
FN220. In the hysteria following the Oklahoma City bombing, an old anti-training proposal (rejected when heads were clearer) was resurrected and adopted by the Minnesota legislature after members were threatened that a negative vote was a declaration of anti-Semitism. The local chapter of the ACLU was not able to stop its passage because there were no hearings on the restriction. See, Minn. Stat., S 609.669 (1995).
FN221. Francis X. Clines, *FBI Chief Seeks Orders for Inquiries*, N.Y. Times, Apr. 28, 1995, at A25.
FN222. Essex Gaz., Apr. 25, 1775, at 3, col. 3.
FN223. Robert A. Gross, The Minutemen and Their World 60, 117-29 (1976); Robert W. Coakley and Stetson Conn, The War of the American Revolution 25-26 (1975).
FN224. *See generally* Walter Lord, A Time to Stand (1961).
FN225. *See* Collections supra note 122. For example, what would be thought of a person who repeated John Adams' observation, "Fear is the foundation of most governments?" John Adams, Thoughts on Government (1776) in Joseph R. Conlin, The Morrow Book of Quotations in American History 21 (1984).
FN226. *See* infra notes 218-22 and accompanying text. The Attorney General's certification that the crime has an international element is required for a prosecution, but not for an investigation, including a wiretap. H.R. 896, 104th Cong., 2d Sess. S 101(a)(1966).
FN227. Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. S 1801 (1994).
FN228. Philip Colangelo, *The Secret FISA Court: Rubber Stamping of Rights*, Covert Action Quarterly, Sum. 1995 at 43.
FN229. 50 U.S.C. S 1801; Benjamin Wittes, *Inside America's Most Secretive Cour*t, Legal Times, Feb. 19, 1996; Colangelo, supra note 228.
FN230. Administrative Office of the United States Courts, Wiretap Report: For the Period January 1, 1994 to December 31, 1994, at 12 (indicating that in 1994, 876 of 1,154 taps were for controlled substances).
FN231. Stephen Labaton, *Data Show Federal Agents Seldom Employ Surveillance Authority Against Terrorists*, N.Y. Times, May 1, 1995, at A10; James Bovard, *The New J. Edgar Hoover*, Am. Spectator, Aug. 1995, at 34.
FN232. H.R. 896, 104th Cong., 2d Sess. S 101(e)(1996).
FN233. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, S 731, 1996 U.S.C.C.A.N. (110 Stat.) 1303 (to be codified at 18 U.S.C. S 2510(16)). (Such transmissions would include the transmission of data from a portable computer over cellular

phone lines, and transmission over a Local Area Network that communicates by radio rather than by wire.) One can make a reasonable argument that no form of radio communication should be protected by anti-wiretapping laws, since radio communication, by definition, does not involve wire communication. But the point of anti-wiretapping laws such as the Electronic Communications Privacy Act is not, after all, the sanctity of the wire, but the sanctity of privacy.
FN234. E.g., S. 735, 104th Cong., 2d Sess. S 502 (1996) (authorizing FBI to obtain unilaterally certain information, and authorizing court orders for the FBI to obtain a full credit report), S 503 (giving FBI unilateral authority to issue administrative summons to "a common carrier or innkeeper"). FN235. The bill allows the FBI to obtain name, address, and employment information from credit reporting bureaus, simply by asserting that the consumer has been "in contact" with a foreign government. "In contact" can include almost anything, such as requesting a visa, or writing a letter of protest to the government's embassy, complaining about human rights violations. S. 922, 104th Cong., 1st Sess. S 601 (1996).
FN236. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, SS 101-108, 1996 U.S.C.C.A.N. (110 Stat.) 1217-26.
FN237. E.g., Coleman v. Thompson, 501 U.S. 722 (1991).
FN238. Although this article does not discuss the habeas issue in detail, it is difficult to see how legislators who insist that they support "law and order" can also support the habeas legislation approved by Congress; this legislation forbids federal courts to issue a habeas writ in many cases where a prisoner is being illegally held in state prison in violation of the federal Constitution.
FN239. Threat of Terrorism: Hearings Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. (1996) (statement of Louis J. Freeh, Director, FBI).
FN240. The United States Embassy in Moscow used Etch-a-Sketches after discovering that the building was permeated with bugs. Stephen Engelberg, *Whither Moscow Embassy Scandal?*, N.Y. Times, December 9, 1987, at B6.
FN241. Similarly, in 1992, the federal government convinced AT&T to downgrade the privacy protection in a new portable telephone encrypter. In return, the government gave AT&T a large order for the device. Steven Levy, *Battle of the Clipper Chip*, N.Y. Times June 12, 1994, at 46.
FN242. Carroll v. United States, 267 U.S. 132 (1925).
FN243. 389 U.S. 347 (1967).
FN244. Howard Kurtz & Dan Balz, *Clinton Assails Spread of Hate Through Media*, Wash. Post, Apr. 25, 1995, at A1.
FN245. Lee Edwards, Goldwater: The Man who Made a Revolution (1995) (bugging of Goldwater campaign during 1964 Presidential election).
FN246. *FBI Discloses It Monitored Cesar Chavez*, N.Y. Times, May 31, 1995, at A19 (Associated Press report of story originally published in Los Angeles Times). The FBI spied on farmworker organizer Chavez for seven years, compiling a 1,434 page dossier, none of which supported the FBI's hypothesis that Chavez was a Communist or a subversive. *Id*.
FN247. Michael Shanahan & Miles Benson, *Civil Liberties Threatened by Bombing*, Rocky Mtn. News, Apr. 28, 1995, at 48A.
FN248. E.g., Selwyn Raab, *7 Suspects Say FBI Agent Helped Incite Mob Murders*, N.Y. Times, May 10, 1995, at B2 (organized crime investigation in early 1990s).
FN249. Monroe Freedman, *Keystone Kops in Jackboots*, Legal Times, June 12, 1995, at 27. The current director of the FBI, Louis Freeh, is said to have approved of the knowing use of perjured testimony in the Wedtech prosecution, when he was serving as United States Attorney. Bovard, supra note 232.

FN250. *Much Debated: The Domestic Intelligence Guidelines*, Nat'l L.J., May 8, 1995, at A28.
FN251. Robert Pear, Terror in Oklahoma: Law Enforcement Agencies Differ on Need for More Power to Spy on Terror Suspects, N.Y. Times, Apr. 26, 1995, at A23.
FN252. Office of the Attorney General, The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigation, 13 (1989).
FN253. *Id*. at 3.
FN254. Peter Baker, Virginia Hunt Club Was Aiming to Battle Government, U.S. Says, Wash. Post, Apr. 27, 1995, at C1, Peter Carlson, A Call to Arms, Wash. Post, Oct. 13, 1996, (magazine) at 10.
FN255. Pear, supra note 251, at 23.
FN256. *E.g.*, Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 Hamline J. Pub. L. & Pol'y 117, 119 (1992).
FN257. James Bovard, *Feeding Everybody: How Food Programs Grew and Grew*, 26 Pol'y Rev. 29 at 42-51 (1983).
FN258. 42 U.S.C. SS 9601-75 (1994).
FN259. *E.g.*, 18 U.S.C. S 115 (1994) (threats to families of United States officials).
FN260. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, S 702, 1996 U.S.C.C.A.N. (110 Stat.) 1291.
FN261. *Id*. (to be codified at 18 U.S.C. S 2332b).
FN262. Snapping someone's pencil, breaking someone's arm in a bar fight, threatening someone with a knife, or burning down an outhouse would have been considered "terrorist" offenses.
FN263. S 702, 1996 U.S.C.C.A.N. (110 Stat.) 1291 (to be codified at 18 U.S.C. S 2332b(b)(1)). If the jurisdictional predicate exists for any offender, then jurisdiction extends to all principals, conspirators, or accessories after the fact. *Id*. (to be codified at 18 U.S.C. S 2332b(b)(2)).
FN264. *Id*. (to be codified at 18 U.S.C. S 2332b(b)(1)(C)-(F)).
FN265. *E.g.*, 18 U.S.C. S 1114 (1994).
FN266. S 702, 1996 U.S.C.C.A.N. (110 Stat.) 1291 (18 U.S.C. S 2332b(b)(1)(A)). The statute cross-references a different statute, which states: "'facility of interstate commerce' includes means of transportation and communication." *Id*. (referring to 18 U.S.C. S 1958(b)(2)).
FN267. *Id*. (to be codified at 18 U.S.C. S 2332b(b)(2)). This is slightly narrower than the original Clinton proposal, which covered any offense that "affects commerce in any way" (not necessarily interstate commerce), or if the criminal used "any facility used in any manner in commerce," or if the victim was "traveling in commerce" (again, not necessarily interstate). H.R. 896, 104th Cong., 1st Sess., S 101(c) (1995).
FN268. Under current interpretations of "commerce" and "interstate commerce," very few crimes would not be federal. A current federal arson statute makes it a crime to burn "any building used in an activity that affects interstate or foreign commerce." 18 U.S.C. S 844(i) (1994). The statute has been successfully applied to the burning of a trailer that had been attached to an electrical hookup that drew power from an interstate power grid, and to the burning of a building that was connected to interstate gas and telephone lines. United States v. Ramey, 24 F.3d 602 (4th Cir. 1994).
FN269. S 702, 1996 U.S.C.C.A.N. (110 Stat.) 1291.
FN270. *Id*. (to be codified at 18 U.S.C. S 2332b(a)(1) & (g)(1)).
FN271. The Clinton and Dole bills merely required the Attorney General to certify in writing that the offense "transcended national boundaries" and was intended to intimidate a foreign government or "a civilian population, including any segment thereof." H.R. 896, 104th Cong.,

1st Sess. S 101(e) (1995); S. 735 104th Cong., 1st Sess. S 102(e) (1995). There was no provision for review of whether the Attorney General's certification was even remotely accurate. *Id*. The Attorney General certification was only required for prosecution, not investigation, use of the military to "investigate." *Id*.
FN272. S 702, 1996 U.S.C.C.A.N. (110 Stat.) 1291 (to be codified at 18 U.S.C. S 2332b(d)(2)).
FN273. *Id*. (to be codified at 18 U.S.C. S 2332b(c)). For good measure, the bill forbids the judge from sentencing a defendant to probation, even though probation was abolished for all federal offenses in 1984. *Id*.

The sentencing provision is less drastic than the original proposals, which imposed severe statutory mandatory minimum sentences, no matter what the circumstances of the offense. As enacted, the law states maximum penalties, but leaves the actual sentence imposed up to the normal procedures for sentencing, as detailed in the United States Sentencing Commission guidelines.

The new law imposes a mandatory five year prison sentence for any person who transfers "explosive materials," if the transferor knows or has "reasonable cause to believe that the materials will be used in a violent or drug trafficking crime." S 706, 1996 U.S.C.C.A.N. (110 Stat.) 1295 (to be codified at 18 U.S.C. S 844(o)). As with all mandatory minimums, there is no consideration of any of the particular facts of a given case. The Supreme Court has already held that "use" in a drug trafficking offense can include trading a firearm for drugs. Smith v. United States, 508 U.S. 223 (1993). Thus, a person who traded a five-dollar canister of blackpowder for use in an old- fashioned muzzleloader, to his cousin for a five dollar bag of marijuana, would be sentenced to five years in federal prison.

The original Dole proposal was for a ten year mandatory minimum. The Dole bill would also have punished "conspiracies" the same as actually committing the crime, so the most trivial facilitation of the crime would also qualify for the mandatory minimum, as in the case of a teenage girl who lied to her parents about what her friends were talking about, thereby "conspiring" to facilitate the offense. FN274. S 702, 1996 U.S.C.C.A.N. (110 Stat.) 1291 (to be codified at 18 U.S.C. S 2332b(d)). The proposal is a vivid illustration of the "slippery slope." The right to bail was first undermined by Congress in a 1984 law which required the defendant in certain drug cases to prove that he was eligible for bail. *Id*. (to be codified at 18 U.S.C. S 3142(e)). Having enacted legislation on the basis that bail is a statutory gift of Congress rather than an unalterable Constitutional right, Congress faces ever-greater temptations to destroy the right entirely.
FN275. S 726, 1996 U.S.C.C.A.N. (110 Stat.) 1301 (amending 18 U.S.C. S 1956(c)(7) (1994)).
FN276. H.R. 896, 104th Cong., 1st Sess., S 603 (1995); S. 735, 104th Cong., 1st Sess., S 726 (1995).
FN277. H.R. 896, 104th Cong., 1st Sess., SS 101(e), 605 (1995); S. 735, 104th Cong., 1st Sess., SS 102(f), 512 (1995). The Dole bill also authorizes wiretapping for felony offenses involving false identification documents, passport and visa offenses, and alien smuggling. S. 735, S 512.
FN278. H.R. 896, 104th Cong., 1st Sess., S 101(f) (1995); S. 735, 104th Cong., 1st Sess., S 102(f) (1995).
FN279. United States v. Reese, 92 U.S. 214, 221 (1875).
FN280. H.R. 2580, 104th Cong., 2d Sess. (1996).

FN281. United States v. Regan, 937 F.2d 823 (2d Cir. 1991).
FN282. L. Gordon Crovitz, *Rule of the RICO Monster Turns Against Its Master*, Wall. St. J., Jan. 15, 1992, at A13.
FN283. National Org. for Women v. Scheidler, 510 U.S. 249 (1994); Angela Marie Hubbell, *'FACE'ing the First Amendment: Application of RICO and the Clinic Entrances to Abortion Protestors*, 21 Ohio N.U. L. Rev. 1061 (1995).
FN284. William O. Douglas, An Almanac of Liberty 10, 113, 276 (1954).
FN285. H.R. 2580, 104th Cong., 2d Sess., S 4 (1996).
FN286. *Id*. S 7.
FN287. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104- 132, S 808, 1996 U.S.C.C.A.N. (110 Stat.) 1310.
FN288. See infra notes 321-24 and accompanying text.
FN289. The Clinton bill proposed removing most of the limitations regarding use (including overseas) of American trainers for foreign law enforcement, and removing the restriction against American tax dollars being used to pay the salaries of foreign police. H.R. 896, 104th Cong., 1st Sess. S 702 (1995). Currently, federal employees are allowed to provide antiterrorism training to foreign governments, but such training must relate to: "(i) aviation security; (ii) crisis management; (iii) document screening techniques; (iv) facility security; (v) maritime security; (vi) VIP protection; or (vii) the handling of detector dogs, except that only short term refresher training may be provided under this clause." 22 U.S.C. S 2349aa (1994). The Clinton bill attempted to eliminate all these restrictions, thereby allowing training for anything to do with "terrorism." H.R. 896, 107th Cong., 2d Sess. S 702 (1995). As noted previously, the bill defines almost all property and violent crime as "terrorism."

Under former law, American training of foreign police must take place "to the maximum extent possible, within the United States." 22 U.S.C. S 2349aa-2(d)(2)(1994). This restriction too would have been removed, and overseas training allowed for up to 180 days (up from the current limit of 30, a limit which was added in 1990, the law beforehand having totally barred overseas training). As enacted, the Antiterrorism Act removed many of the Foreign Assistance Act's restrictions on training outside of the United States and restated the doctrine that the Attorney General and the Secretary of State are authorized to support law enforcement training in foreign countries. S 328, 1996 U.S.C.C.A.N. (110 Stat.) 1257 (amending 22 U.S.C. 2349aa- 2(d)(1994)).
FN290. "Violations of this section shall be investigated by the Attorney General. Assistance may be requested from any Federal, State or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding." S. 735, 104th Cong., 1st Sess., S 102 (1996); H.R. 896, 104th Cong., 1st Sess., S 101 (1996).
FN291. S 401, 1996 U.S.C.C.A.N. (110 Stat.) 1257. "National security" as statutorily defined does not mean what most people would consider to be genuine national security, such as protecting the lives of undercover CIA agents, or preventing an attack on American military facilities. Rather, "National security . . . means the national defense and foreign relations of the United States." 18 U.S.C. S 1(b) (1994). This expansive definition is explicitly invoked in the Dole bill. S. 735, 104th Cong., 2d Sess., S 301(a)(3) (1996).
FN292. David Cole, *The Omnibus Counter-Civil Liberties Act*, Legal Times, March 13, 1995, at 31.
FN293. *Id*.
FN294. H.R. 896, 104th Cong., 2d Sess., S 503(a) (1996); S. 735, 104th Cong., 2d Sess., S

301(b) (1996).
FN295. H.R. 896, 104th Cong., 2d Sess., S 201, 502(c) (1996); S. 735, 104th Cong., 2d Sess., S 301(e) (1996). The Dole bill contained the additional requirement that the national security danger must arise out of the prospect that normal hearings "would disclose classified information." *Id*. FN296. H.R. 896, 104th Cong., 2d. Sess., S 201, 502(e), (j) (1996); S. 735, 104th Cong., 2d Sess., S 301(f) (1996).
FN297. S 401, 1996 U.S.C.C.A.N. (110 Stat.) 1258.
FN298. American Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1066-70 (9th Cir. 1995).
FN299. *Id*. at 1067.
FN300. Matthews v. Diaz, 426 U.S. 67 (1976). There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of liberty without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. *Id*. at 77. Significantly, the Supreme Court has explained that "the people" (used in the First Amendment right of assembly, the Second Amendment right to arms, the Fourth Amendment right to freedom from unreasonable search and seizure, and the Ninth Amendment reservation of rights) is "a term of art" which refers to members of the American community (and thus, not to foreign citizens living in their foreign homeland). United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). The obvious implication of Verdugo is that if "the people" is a term of art referring to a limited class of people, then the Constitution's use of broader language--such as "person" in the Fifth Amendment--applies to a broader class of people. Under Verdugo, it is difficult to argue that most Constitutional protections which refer to "persons" do not, at the very least, apply to legal resident aliens.
FN301. Rafeedie v. INS, 880 F.2d 506, 516 (D.C. Cir. 1989). *See also* Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (holding INS may not rely on "secret evidence" in summary exclusion procedure against returning permanent resident alien).
FN302. *See, e.g.*, Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 387 n.18 (1979); In re Oliver, 333 U.S. 257, 271 n.22 (1948); Douglas, supra note 284, at 144 (describing the 1603 execution of Sir Walter Raleigh for treason, based on accusation of a witness who was never called to testify). FN303. Stephen Trott, U.S. Dept. of Justice, Prosecution of Public Corruption Cases (Feb. 1988), at 117-18 (criminals are "likely to say and do almost anything to get . . . out of trouble. . . ." Informants are not averse to "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies . . . many are outright conscienceless sociopaths to whom 'truth' is a wholly meaningless concept.") See also United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993) (using informants is a "dirty business").
FN304. United States ex. rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).
FN305. *See generally* Ellen Knauff, The Ellen Knauff Story (1952).
FN306. The Attorney General in consultation with the Secretary of State would simply need to convince potential deportation destinations to state that they do not wish to receive the alien. S 401, 1996 U.S.C.C.A.N. (110 Stat.) 1258.
FN307. H.R. 896, 104th Cong., 2d Sess. S 301(a) (1996); S. 735, 104th Cong., 2d Sess., S 401(c) (1996).
FN308. Monroe Freedman, *The FBI Goes Undercover*, Legal Times, June 12, 1995, at 41.
FN309. S 221, 1996 U.S.C.C.A. (110 Stat.) 1241.
FN310. *Id*. SS 811-819.

FN311. The Declaration of Independence, para. 1 (U.S. 1776).
FN312. S 704, 1996 U.S.C.C.A. (110 Stat.) 1294.
FN313. Yitzhak Rabin, Menachem Begin, and Chaim Herzog were among the revolutionaries who fought in the violent guerrilla war which eventually forced the British to withdraw from Palestine, thereby allowing the creation of the state of Israel. Mr. Begin belonged to the Irgun, a group which bombed the King David Hotel, killing scores of British diplomats and soldiers. *See generally* J. Bell, Terror Out of Zion: The Irgun, Lehi, Stern, and the Palestine Underground, 1929-1949 (1976).
FN314. Ruby Ridge Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Judiciary Committee, at 5 (1995).
FN315. The police actions shown on Fox Network's show COPS is widely used by law school instructors as an exemplar of what the Bill of Rights prohibits. Yet, what is shown is tame compared to what is left out. It amazes the authors that the police officers shown appear to have no idea that their conduct is illegal.
FN316. This is, of course, not to say that all or even a majority of individual police officers are acting improperly, but it is clear that some, perhaps, many are and that many agencies by not firmly disciplining those who cross the line are deliberately creating an atmosphere that fosters such conduct. The Senate Committee severely castigated the FBI, America's premier law enforcement agency, as well as the Bureau of Alcohol, Tobacco and Firearms and the United States Marshals Service in this regard. See Hearings supra note 216.
FN317. Reforms at the federal level, of course, should parallel similar reforms at the state and local levels, where most police activity takes place.
FN318. Kopel participated in the drafting of the letter, which includes a variety of proposals he had offered in other writings.
FN319. Such punishment would not be applicable to prosecutors who bring a test case, seeking to overturn existing doctrine.
FN320. Although the joint letter does not precisely state, law enforcement should then use the expert in deciding how to act.
FN321. If Tennessee v. Garner, 471 U.S.1 (1985) (barring use of deadly force for fleeing suspects of non-violent crime) were over-ruled, the policy would have to be re-examined.
FN322. *Cf*. Franks v. Delaware, 438 U.S. 154 (1978).
FN323. Hearing on the Nature, Extent, and Proliferation of Federal Law Enforcement Before the U.S. House Subcomm. on Crime, Nov. 15, 1995 (statement of Dick Thornburgh); *id*. (statement of Griffin Bell).
FN324. S 806, 1996 U.S.C.C.A.N. (110 Stat.) 1305.
FN325. U.S. Const. art. 1, S 8 cl. 6.
FN326. *Id*. cl. 5.
FN327. *Id*. cl. 10.
FN328. *Id*. at art. I. S 8, cl. 18.
FN329. Barrett v. United States, 423 U.S. 212 (1976); Perez v. United States, 402 U.S. 146 (1971).
FN330. Contrast, for example, the Court's 1915 opinion upholding the Harrison Narcotics Act (controlling opiates), in which the court, expressing "grave doubt as to its constitutionality," construed the Act "as a revenue measure" in order to uphold it, with the Court's opinion six years later in a drug prohibition case, in which the court asserted without support that congressional power to prohibit dangerous drugs "is too firmly established to be called into question." United

States v. Moy, 241 U.S. 394, 394 (1915); Whipple v. Martinson, 256 U.S. 41, 45 (1921). Most of the court's criminal jurisprudence since 1921 has, unfortunately, followed Whipple's vacuous approaching of implicitly assuming a general congressional power to create criminal law, as some sort of penumbra from other congressional powers. The effect, of course, is to undermine the Constitutional system of granting congress only limited, enumerated powers, rather than authority to legislate at large.

FN331. Shays' list of grievances for which the people, "now at arms," demanded reforms dealt mostly with taxes and other financial issues. There were also complaints about the suspension of habeas corpus and the "unlimited power" granted to law enforcement officers by a Riot Act. The last of eight reforms the Shaysites demanded was "Deputy sheriffs be totally set aside as a useless set of officers in the community . . ." Letter from Thomas Grover to the Hampshire Herald (Dec. 7, 1786), in Tree of Liberty, at 71-72 (1986). Styling themselves as "regulators," the Shaysites were insisting that law enforcement be returned to local, community control. Alden T. Vaughan, *The "Horrid and Unnatural" Rebellion of Daniel Shays*, American Heritage, June 1966: 50-53, 77-81.

FN332. Case of Fries, 9 F. Cas. 924 (C.C.D. Pa. 1800) (No. 5, 127). Fries was eventually pardoned. Tree of Liberty, supra note 325, at 95.

FN333. Among the concerns of the Hartford Convention was the President's determination to subject New England militias to federal control.

FN334. Wrote one author:

> (W)hen they'd gathered to frame the Constitution, they did so in a country full of Tory infidels, just after a revolution, on a continent where several powers vied for rich territory, in a word full of terrorists and saboteurs, in a nation very, very wobbly on its legs. Yet they counted the security of this infant nation less important than the freedom of its citizens--and so they honored the rights of those citizens to speak and think and worship and freely trade, and the right to keep weapons as sophisticated as anything the military could acquire for itself, even to the point of buying a cannon and positioning it on one's front lawn.

Denis Johnson, *The Militia in Me*, Esquire, July 1995, at 44.

FN335.

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. 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 the criminal law the end justifies the means . . . would bring terrible retribution.

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

FN336. Writes Joseph McNamara, a research fellow at the Hoover Institute, and retired chief of police of San Jose:

> It would be wise to temper our revulsion at the killers responsible for the Oklahoma City murders and our sorrow for the victims with the realization that during this century the greatest terrorists have been governments like Nazi Germany, Stalin's Soviet Union, Mao's China, and Pol Pot's Cambodia. They murdered millions and millions of their citizens in the name of providing security. . . .
>
> (T)he most reliable way to prevent terrorism is by conducting government in a manner that wins the public's trust and destroys the appeal of the lunatic fringe. It would be ironic if anti-terrorist legislation helped destroy the protections of our Constitution and turned the delusions of paranoids into reality.

Joseph D. McNamara, *Bombs and the Bill of Rights*, Wall St. J., May 5, 1995, at A12.
