

CONTINUATION OF THE WACO INVESTIGATION

HEARING
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED SIXTH CONGRESS
SECOND SESSION

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CONTINUATION OF THE WACO INVESTIGATION

WEDNESDAY, JULY 26, 2000

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:04 p.m., in room SD-106, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senators Grassley, Torricelli, and Schumer.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good afternoon, ladies and gentlemen. The Judiciary subcommittee on Department of Justice oversight will now proceed. We have with us today Senator John Danforth, who has just completed 95 percent of the investigation on the incident involving Waco, accompanied by James Martin, the Director of Investigative Operations.

Senator Danforth has carried forward the investigation as Special Counsel under appointment by the Department of Justice, and he brings to this job and to this hearing room a very distinguished resume. We know him very well. I have known him well personally for serving in the Senate with him for 14 of his 18 years in this body.

Before that, he was Attorney General of Missouri, and before that he was a Yale Law School graduate. And before, during and since, he has many accomplishments on his record. I compliment Attorney General Reno for appointing someone of Senator Danforth stature to undertake a matter of this importance with this sensitivity.

The subcommittee is going to be inquiring into quite a number of issues. One of the items which has been highlighted in Senator Danforth's preliminary report was the failure of the Federal Government to disclose the firing of pyrotechnics into the Davidian compound in Waco.

Senator Danforth has come to the conclusion that those pyrotechnics did not start the fire or contribute to the fire, but he has raised some very critical issues as to why the Federal Government failed to disclose that for such a long period of time, with the FBI making an immediate denial that pyrotechnics had been fired right after the incident on April 19, 1993. Then a report from Robert

Scruggs, Esquire, commissioned by the Department of Justice to investigate the incident, reported that there had been no pyrotechnics fired, no incendiaries fired.

The prosecutor for the Department of Justice, Ray Jahn, told Congress the same thing, no pyrotechnics. The FBI Headquarters memorandum denied the use of pyrotechnics, and that found its way into the Attorney General's briefing book. And Attorney General Reno and then FBI Director Sessions testified that there were no incendiaries.

One of the issues which we will be asking Senator Danforth to comment on—he already has it in his report—is the presence of Richard Rodgers, the head of the Hostage Rescue Team, sitting behind the Attorney General and the FBI Director and not correcting their testimony when they said no pyrotechnics had been fired; a January 1996 filing in the civil case where the Government was accused of firing pyrotechnics, and again there was a denial.

Senator Danforth has also documented a litany of situations where the Department of Justice had denied him and his office certain documents, which is reminiscent of what has happened to this subcommittee. And we will be going over that list, where the Department of Justice resisted the production of notes and records of its attorneys that post-dated the appointment of Senator Danforth; that he and his office had numerous disagreements with the Department of Justice over the production of computer files, hard drives, and e-mail; that he had repeatedly received assurances from the Department that they had produced all hard-copy documents, but witnesses told his office that certain categories of documents had not been turned over. And individual witnesses arrived at interviews with notes, videos, and diaries that the Department of Justice had never asked them to provide.

The cooperation of the Department is a very important item in the consideration of our oversight here today. Of special interest to this subcommittee was the effort by the Department, as Senator Danforth has particularized it in his report, to limit his powers, where the Department claimed control over the power to waive attorney-client privilege, where the Department demanded that the Department of Justice be consulted before the Special Counsel took any actions, such as proposing the flare forward-looking infrared test and other matters.

One of the areas of our inquiry will be whether a special counsel is adequate. If you have a man of Senator Danforth's stature and persistence, a special counsel may be fine. But is the Attorney General's own regulation sufficient to guarantee independence if you run out of the short list of people like Senator Danforth? Senator Danforth appears on quite a few short lists, and as long as someone like Senator Danforth is in charge, there is a lot of confidence in what goes on. But I don't know that the generalized special counsel would be adequate to take on this kind of a tough assignment. We will also be inquiring into the withholding of the tapes, into the role of the Special Forces, and into the activities of the Federal Government on the day in question.

I thought it useful to spell out in some generalized opening statement the parameters and the areas of the subcommittee's interest.

I yield now to my distinguished colleague, Senator Schumer.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman, and thank you for holding this hearing.

Senator Danforth, I want to thank you and Mr. Martin and the rest of your staff for diligent and comprehensive efforts in examining a subject that has long troubled the American people, and for your willingness to step forth and put your considerable reputation on the line to try and make some light of all the heat that has accompanied the debate after the terrible incident in Waco.

Mr. Chairman, my theme today is simple on the issue of Waco, and that is enough is enough. It is my hope that your report will put to rest any remaining uncertainties that have surrounded the Waco siege, and I hope when the final report is presented to the American people and the Congress, we can put this subject to bed once and for all. Enough is enough.

Attorney General Reno made a wise decision to select Senator Danforth to conduct an impartial inquiry into these matters. My concern back in September, when new allegations concerning the siege surfaced, was that Members of Congress, and even the American public, would jump to the wrong conclusions based on troubling but incomplete information.

And as Senator Danforth outlines in his preface, the Government's failure to bring complete candor and openness to what was essentially an action that they were being blamed for in far greater proportion by many than they deserved contributed to that blame. We seemed back in September on the brink of starting down the road of multiple, roving, wide-ranging, taxpayer-financed congressional investigations.

I served as the ranking Member on the first Waco hearing, and the issues there seemed to me to be resolved quite clearly. Even those who originally felt that the Government was to blame had to admit by the end of that first hearing that Mr. Koresh set the fire, and all of the discussions since haven't disproved that one iota. All sorts of conspiracy theories abound, and the blame that the Government faces in this is not what they did there, although mistakes were made. In retrospect, it could have been handled differently, but the mistakes were not made in the way the conspiracists view it.

But perhaps the greatest mistake was not being open and candid. Well, this report puts it all out in the open, and I think it should do two things. One, it should be a warning to the Justice Department and all Government agencies in the future, come clean. The best you can do is reveal all the facts right up front, because it will only get worse than the facts are if you don't.

But, second, and to me, at least, Mr. Chairman, more importantly, it should finally put to rest the idea that there was a Government conspiracy to go after David Koresh. There is still a risk even now as Senator Danforth completes his work that we will start again and go through a whole new investigation of these allegations. I would urge my colleagues to resist that temptation. Enough is enough.

The American people want Congress focused on issues like Social Security and Medicare, and education, and fighting crime, not im-

mersed in partisan, contentious hearings over an event that occurred years ago and which has now been extensively examined by congressional committees and an impartial Special Counsel whose credibility is above question.

There are, as I mentioned, a lot of conspiracy theories out there on Waco that I hope this report debunks. I also hope that we will never lose sight of the fact that the man who was principally and ultimately responsible for what happened that day was David Koresh.

I would like to quote myself. Back in 1995, at the beginning of the Waco hearings, I said the following. I said, "It's unfair to twist the facts, making law enforcement the villain and David Koresh, the lawbreaker, the victim. That is like saying right is wrong and night is day. Let us be very clear. David Koresh was a dangerous, sick man who molested children, preached violence, and led his followers into a horrible suicide. David Koresh was not a peaceful cleric in an ivy-covered chapel, or even an eccentric with strange religious views. David Koresh was an armed fanatic who was excoriated in his hometown newspaper in a series entitled 'The Sinful Messiah'. David Koresh sexually abused children and called it holy. David Koresh was obsessed with guns because he claimed it was commanded by scripture. He hoarded a military arsenal that included at least 48 illegal machine guns and scores of illegal hand grenades. Remember, ladies and gentlemen, David Koresh and his followers did not greet Federal law enforcement with a psalm or scripture. They greeted them with more fire power than even the ATF agents themselves had. Nothing excuses that ambush. Nothing in American law excuses it, nothing in the Bible excuses it."

I made that statement on July 19, 1995, at the start of 8 days of congressional hearings. Today, 5 years later, I stand by that statement. There has been a lot of investigating, a lot of allegations, a lot of speculating, and a ton of money and resources expended. But I don't think that the ultimate conclusions of what happened at Waco have changed much, and Senator Danforth's report backs that up.

We have been picking the Waco siege apart for years now. Senator Danforth's meticulous report should be the coda. Enough is enough.

Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Schumer.

Senator Grassley.

**STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR
FROM THE STATE OF IOWA**

Senator GRASSLEY. I would like to welcome my friend, Senator Danforth, and his interim report to the committee. I had a chance to see it on C-SPAN almost in toto, as I was in a hotel room and didn't have a lot else to do, and was impressed with his statements.

The circumstances surrounding what happened at Waco have done much to shake public confidence in Federal law enforcement. The fact that the FBI withheld information about the use of military devices reinforced that shaken confidence. But the respect and credibility that Senator Danforth brings to this investigation as

Special Counsel obviously goes a long way toward restoring the public's confidence.

So I look forward to the report that he is going to give to us and his answers to the many questions the public has had for the past seven years about the Waco matter. Hopefully, we can learn the lessons we need to learn from this incident and then move ahead.

Senator SPECTER. Thank you, Senator Grassley.

At this point, I would like to enter into the record the prepared statements of Senators Thurmond and Leahy.

Senator Danforth, thank you very much for joining us on such short notice. Your report came out on Friday and we invited you promptly, and even more promptly you accepted, and I think it is very timely to hear your testimony before the subcommittee and we look forward to that testimony.

[The prepared statements of Senators Thurmond and Leahy follow:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE
STATE OF SOUTH CAROLINA

Mr. Chairman, in 1993, four Federal law enforcement agents and 80 members of the Branch Davidians lost their lives in a terrible tragedy in Waco, Texas. Last year, the Attorney General appointed the distinguished former senator John Danforth to conduct an inquiry into this matter and answer serious questions about the government's actions. I am pleased to have Senator Danforth with us today to discuss his interim findings.

It is reassuring that, after an extensive review, Senator Danforth has concluded that fault for tragedy lies squarely with the Branch Davidians and their leader, not the U.S. Government. As the Report shows, it is clear that the government was not responsible for the deadly fire, that F.B.I. agents did not fire shots during the final day, that military personnel were not used improperly, and that there has been no government conspiracy to cover-up the truth. This Report should put an end to the baseless questions that have been raised since 1993 about the Federal Government and its motives.

It is important to note that Senator Danforth reached some disturbing conclusions regarding efforts by the Department of Justice to resist some of his requests to get needed information. This subcommittee has faced more than its share of difficulty in obtaining documents and information from the Department in the course of our investigations. There is no excuse for this. The Executive Branch must cooperate fully with Congressional oversight, and certainly with special counsels that the Attorney General appoints.

Indeed, the entire investigation by Senator Danforth could have been avoided if the government had fully cooperated regarding Waco from the beginning. The review was initiated after it became public last year that pyrotechnic rounds were used on the final day, which a few government attorneys and others had failed to disclose, even though this use had no impact on the fire.

However, it is now clear that the largest and most serious questions have been answered in the government's favor. There is no need for extensive Congressional hearings into this matter.

I hope that this report will help restore the public confidence in our government that has been tarnished by Waco. It is time for the books to be closed on the Waco tragedy once and for all.

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE
OF VERMONT

Senator Danforth, thank you for being here today. You graciously met with me when you began this important project and I am glad to hear from you today as you complete this phase of your work.

In August a year ago, the American public learned for the first time that the FBI directed pyrotechnic tear gas rounds at the Branch Davidian complex on the final day of the stand-off, which ended in a fiery tragedy. The use by the FBI of such pyrotechnic tear gas rounds either during or on the final day of the stand-off had been vigorously denied by both Attorney General Janet Reno and then-FBI Director

William Sessions in public statements and testimony before congressional committees. Indeed, as documented in your Interim Report, Senator Danforth, “there is no dispute that Attorney General Reno expressly prohibited the use of pyrotechnics during her discussions of the plan [for the final day] with the FBI.” (p. 45). Thus, the Department of Justice dismissed renewed allegations in August, 1999, about the use of such pyrotechnic devices as “more nonsense.”

As it turns out, as documented in the Danforth Interim Report, the Attorney General was, at best, negligently served or, at worst, intentionally misled by subordinates at the FBI about the use of pyrotechnic tear gas canisters on the last day of the Waco stand-off.

In September, 1999, we also learned for the first time of the existence of so-called FLIR video recordings from the early morning of the final day of the stand-off. This disclosure came after repeated denials by the FBI that such tapes existed.

Americans rightly demanded answers to the serious questions raised by these disclosures about abuse of the Federal police power and then possible cover-ups. The Congress has a constitutional right and obligation to conduct oversight, particularly when such serious questions are at stake. At the same time, however, we have a responsibility to conduct our oversight duties in a manner that is even-handed and non-partisan. Partisan rhetoric and hyperbole in this context would only heighten public distrust of our law enforcement institutions. When we conduct oversight in this Committee, which has jurisdiction over the Department of Justice and the law enforcement components of our federal government, we should not allow political agendas to take precedence over effective law enforcement. That would do all Americans an injustice.

Unfortunately, the reaction of many Republicans in the Congress in August and September, 1999, did not bode well about our ability to constructively carry out our oversight responsibilities. On the contrary, in the wake of the outcry over the belated disclosures, Republican leaders in the Senate and the House of Representatives, including the Chairman of this Committee, prejudged the matter by calling for the Attorney General to resign or be fired and suggesting that the use and non-disclosure of the pyrotechnic devices were her fault.

In the face of this Congress' inability to carry out fair and constructive oversight of this matter, the Attorney General did the right thing by appointing our former colleague, Senator Danforth, as special counsel to evaluate this new evidence and allegations in a thorough, independent and non-partisan manner. He accepted the assignment in the spirit of public service that has distinguished his career.

Unfortunately, the very next week after Senator Danforth's appointment, the Republican Leadership decided that it wanted a piece of the action and announced that Senator Specter would lead a task force investigation into Waco and two other unrelated matters. Given the harsh rhetoric against the Attorney General at the outset, I voiced my concerns both privately and publicly about such a task force and urged that we allow Senator Danforth to conduct his inquiries without further political interference.

Just two weeks after his appointment, Special Counsel Danforth came face to face with interference from this Subcommittee when Republican staffers were sent to Waco to interview witnesses. In a September 17, 1999, letter to Chairman Hatch and myself, Senator Danforth warned that it “undermines the work of the Special Counsel when Judiciary Committee personnel attempt to conduct interviews without any coordination with [the Office of Special Counsel].” He went onto to say that “it is not within the spirit of cooperation for the Judiciary Committee to dispatch personnel to Waco without even troubling to give me a call.” On September 21, 1999, the Chairman and I received yet another letter from Senator Danforth informing us that Republican staff had again contacted relevant witnesses. Senator Danforth told us that “this activity by the Committee staff interferes with the work of the Special Counsel” and asked the Judiciary Committee to “forbear.”

Fortunately, the Committee heeded this reasonable request about contacting witnesses but forged ahead in demanding documents from the Department of Justice. On November 17, 1999, the Committee approved a resolution authorizing the Chairman to issue a subpoena to the Attorney General for Waco-related documents if such documents were not voluntarily produced. The subpoena was never issued since the Justice Department has been voluntarily producing Waco documents on a monthly basis for the past eleven months. The Committee now has over half a million pages of documents in hundreds of boxes, most of which have never even been opened.

The Danforth Interim Report should put to rest disturbing questions that were re-opened by the belated disclosures in August and September, 1999. Specifically, the United States government and its agents were not responsible for the April 19, 1993 tragedy. The report assures the American public that the U.S. government did

not cause the fire, did not direct gunfire at the Branch Davidian complex, and did not improperly employ the armed forces of the United States. Responsibility for the tragedy of Waco lies with the Branch Davidians, and their leader David Koresh.

I noted with particular interest the information Senator Danforth was able to obtain from Graeme Craddock, a former resident of the Branch Davidian complex who testified before the Senate Judiciary Committee on November 1, 1995. At that time, I questioned him about whether the Branch Davidians started the fires on the last day of the standoff and he responded that he did not know "for a fact how the fires got started," "did not" see any fires started and flatly denied that he knew how the fires got started. Then his attorney directed him not to answer any more questions. (Senate Judiciary Committee, Hearing on "The Aftermath of Waco: Changes in Federal Law Enforcement," Oct. 31 and Nov. 1, 1995, S. Hrg. 104-824, pp. 180-81). In addition, I wanted to know who fired the first shots on February 28, 1993, but before I could get a final answer to that question, Chairman Hatch intervened in accord with a prior agreement he had reached with Mr. Craddock that the witness would not have to respond to certain questions. (*Id.*, at pp. 183-84)

By contrast, the Danforth Interim Report contains admissions by Mr. Craddock that he saw other Davidians pouring fuel in the chapel area of the complex on April 19, 1993, and that he saw and heard another Davidian yelling, "Light the fire." (Interim Report, p. 8)

Senator Danforth, I understand that you continue to investigate whether the failure of subordinate Justice Department and FBI officials to reveal the use of pyrotechnic tear gas rounds until August 1999 rises to the level of a criminal cover-up, gross misconduct, or mere negligence. I have confidence that you will complete this investigation with the professionalism and independence you have demonstrated over the past ten months. This Committee and the American people thank you for your diligence.

**STATEMENT OF HON. JOHN C. DANFORTH, SPECIAL COUNSEL,
U.S. DEPARTMENT OF JUSTICE, ST. LOUIS, MO; ACCOMPANIED BY JAMES MARTIN, DIRECTOR OF INVESTIGATIVE OPERATIONS, ST. LOUIS, MO**

STATEMENT OF HON. JOHN C. DANFORTH

Senator DANFORTH. Mr. Chairman, thank you very much, and Senator Schumer, Senator Grassley. I arrived and saw that I was billed as the Honorable James C. Danforth, and I thought how quickly they forget.

Senator SPECTER. Around here, Senator Danforth, you were always known as Saint Jack. We are not going to make you Saint Jim.

Senator DANFORTH. Thank you, Mr. Chairman. I am joined by Jim Martin, who is really on loan to the investigation from the U.S. Attorney's Office in the Eastern District of Missouri. He is the person who really has been, still is, running the investigation. Also, Stuart Levy, who has been in charge of our Washington office and has been particularly involved in the so-called cover-up part of the investigation; and also Keith Thompson, who is a postal inspector assigned to our Washington office.

I want just before I begin to say a word about the quality of the people who have worked on this investigation. They came from the public sector, from the private sector—prosecutors, criminal defense lawyers, civil lawyers. I think, of the 38 investigators, 36 came from the U.S. Postal Inspection Service.

Most people don't hear much about the Postal Inspection Service. It is not nearly as high a visibility as other law enforcement agencies, but I can tell you that the quality of these people, their professionalism, their diligence, their good judgment, their values, are just excellent. And anybody who doubts the quality of people who work for the Government in law enforcement and who want reas-

surance should look at the work that was done for our office, particularly by the Postal Inspection Service.

Mr. Chairman, this was an investigation into whether or not there were bad acts by Federal agents, particularly on April 19 and with respect to the cover-up thereafter, April 19, 1993. It was not into questions of judgment. You don't get a group of lawyers and former prosecutors and present prosecutors and inspectors working on something that is just a matter of judgment, in my opinion.

And from the beginning, when I first talked to the Attorney General about the nature of this job, I wanted to make it clear that there were parameters on it. I didn't want this to be an investigation that got into judgment calls. We can all question people's judgment, but the charges that had been made were so dark that they had to be explored, and they had to be explored very, very thoroughly.

The dark charges were that Federal agents set a building on fire with 80 people in the building, that Federal agents directed gunfire at the building in order to pin people into the building, that the military was part of this operation, that people from the military were involved in doing such things as putting shaped charges in the building, and so on, and that thereafter there was this broad cover-up conspiracy to keep all of this under wraps.

And we have spent so far 10½ months looking into this, and the fact of the matter is that these allegations are simply not true. And it is not a close question. This isn't "well, they are probably not true," or "more likely than not, they are not true." They are clearly not true. The evidence is absolutely overwhelming. The Government did not start a fire, the Government did not direct gunfire at the Branch Davidians, the Government did not improperly use the military, and there wasn't any broad cover-up.

The Branch Davidians started the fire, spread fuel throughout this complex. The Branch Davidians then began shooting their own people, including children. People say it was a suicide. Well, maybe if people kill themselves, it is suicide. If they kill children, it is not. One of the children, somewhere around 3½ to 4½ years of age, we think, was stabbed to death. That is not suicide. It is murder. That is what happened.

So there is no evidence that the Government burned the building. There was no evidence that the Government directed gunfire into this complex. There is no evidence that the military was used in any improper fashion or was actively involved in this, and there is no evidence of a broad cover-up. The evidence is to the contrary.

Particularly those FBI agents who were most directly involved in the tragedy of April 19, the members of what was then called the HRT, were very open and direct in talking about everything, including the issue of pyrotechnics. There is no evidence that Attorney General Reno or former FBI Director Sessions or Director Freeh in any way misled anybody intentionally. There is plenty of evidence that they got bad information along the way.

Now, there have been a lot of suspicions that have been raised, and the basis for the suspicions has to do with the fact that at one point on the morning of April 19, three pyrotechnic tear gas rounds were fired, and that was not disclosed. It was not known by the At-

torney General, it was not known by Director Sessions, but it was known by somebody and it was not disclosed.

And we have spent, I would say, most of our time and effort trying to figure out why it was that the firing of the three pyrotechnic rounds was not disclosed. Well, why is this? What happened? But one thing that is absolutely clear is that the fact of their firing was inconsequential. It had nothing to do with the disaster.

The three pyrotechnic rounds were fired 4 hours before the fire broke out. They were fired in a direction away from the building itself and they caused no damage to anybody. Yet, the fact that any pyrotechnics were used was not disclosed, and the opposite was told to various people, including Members of the Congress. And so the issue is why were they not told, why was this something that was withheld.

The ongoing investigation—and as I said last Friday, about 5 percent of this investigation remains to be done, but it all has to do with the reasons why the fact that these pyrotechnics were not used. I want to give one example, and this has to do with something we do know; it has to do with the fact that in the civil case back in 1996, the information relating to the use of pyrotechnics was not made available in that civil case. I would like to talk about this for just a few minutes because I think that it, in my own mind, helps me to focus on what happened here and how it could have happened and how it is possible that information can come out or not come out and it is not the fault of anybody who is part of any conspiracy. It is just more or less a human foible.

This has to do with a fairly young lawyer, a junior lawyer in the FBI. And this junior lawyer back in 1996 in connection with the civil case came into information, and the information was that pyrotechnics had, in fact, been fired. And this fairly junior lawyer did not make that information available to a lawyer from the Justice Department, and the fact that the information was not made available to the lawyer from the Justice Department caused real harm.

We spent an awful lot of time trying to figure out what happened, and in interviewing this lawyer in the FBI we were given about four different stories about what happened, various kinds of misstatements about whether information was faxed to the Justice Department lawyer or read over the phone to the Justice Department lawyer or given to the superior of the FBI lawyer. And all of these statements were misstatements to us, to our investigation. And that is, of course, wrong to say something that is wrong to us.

But I have been thinking about why this was because I don't think for a minute that this FBI lawyer was part of any cover-up conspiracy. I don't think that this person took it upon herself to say, well, for the good of the FBI I am going to hide this. I believe what happened in this case was that this fairly young lawyer simply goofed, simply failed to do an adequate job. And then, having goofed, she thought, my gosh, if it is found out that I bungled this, if anybody finds out that I am the one responsible for not passing on this information, I am going to be ruined.

And in the face of the fear of personal ruin—I think that was the cause—she then began to concoct various stories of what she had done which were untrue. It is a classic case of some little thing—the use of the pyrotechnics itself under these circumstances was

not a big thing. The fact that she blundered in not turning over the information was a little thing, it was a human thing. But these little things get blown up into bigger and bigger and bigger things because people don't come clean with what happened.

And I think that the problem that she had was she was fearful. She was fearful that she would be ruined, that her mistake would be found out and that it would hurt her career. And if there is a moral to the whole story of Waco and the aftermath, and particularly the so-called cover-up aspect, to me the moral is that little things can be blown into very big things by fear, by people just being afraid for their own skins.

And I am for reducing the level of fear people have, and I think that somehow we have totally overblown our willingness to just trash people on the basis of mistakes. And we have overblown it in a way that sort of honest, even though bad mistakes are assumed to be just evil acts, part of something that is really terrible. So what turns out to be a flaw ends up into some kind of an expose where there is a total blurring of the line between bad judgment or human foibles, on one hand, and truly bad acts on the other.

So what I have attempted to do in this investigation is to be very clear in saying that there really is a distinction between bad judgment or human mistakes and truly bad acts. And with respect to the events on April 19, in particular, I want to again make it clear that the alleged bad acts just did not happen.

Senator SPECTER. Thank you very much, Senator Danforth. With respect to the firing of the pyrotechnics, was that part of the plan authorized by the Attorney General?

Senator DANFORTH. No; in fact, the Attorney General was quite concerned about the possibility of fire and, as she said, she asked for and received assurances that pyrotechnics would not be used in the compound. Now, the words that she used were "in the compound," and, of course, one of the problems is that the word "compound" is not a precise term. So her understanding of what the "compound" meant was not necessarily what other people understood.

Senator SPECTER. When you talk about the compound, we have a photograph here which shows the compound. And the pyrotechnics, as I understand it, were fired into an area off to the side. Is that correct?

Senator DANFORTH. That is right.

Senator SPECTER. How would you describe the area off to the side where the pyrotechnics were fired?

Senator DANFORTH. Well, we call that the construction pit. What it basically is is a foundation, concrete foundation, covered with plywood and with tar paper.

Senator SPECTER. How was it, Senator Danforth, that pyrotechnics were fired when they were not authorized by the Attorney General's plan?

Senator DANFORTH. The Attorney General takes the position that the firing of the pyrotechnics even under these circumstances was contrary to her order.

Senator SPECTER. Well, did Richard Rodgers, who was in charge of the Hostage Rescue Team, know that the firing of pyrotechnics was not authorized?

Senator DANFORTH. Well, his story is that he knew that, but that he did not understand this so-called construction pit, which is about 75 feet away from the building and which is—he did not feel was the fire hazard, that the building was. His belief was that the order did not cover that construction pit. Now, we asked Attorney General Reno what her understanding was and she said that her understanding was that her order did cover the construction pit.

Senator SPECTER. The missiles on the pyrotechnics were not found, correct, the three missiles which were fired?

Senator DANFORTH. That is right. Three of them are missing and two of the shells are missing. There is a photograph of one of the projectiles, but all three projectiles are missing and two of the three shells are missing.

Senator SPECTER. Senator Danforth, you concluded that those were the only three projectiles which were fired.

Senator DANFORTH. Yes.

Senator SPECTER. In a context where you haven't been able to find the three projectiles which were fired and two of the casings of the projectiles, how can you be so sure that there were not other projectiles fired which might not be discovered in the main part of the compound, where they might have caused a fire had they, in fact, been fired?

Senator DANFORTH. Well, first, we have questioned all of the FBI agents who were present and there is no evidence that has been presented of any other projectiles being fired. We particularly questioned the FBI agent who did fire the pyrotechnic projectiles and asked him if he fired into the building as well as firing these three projectiles, and his answer was no. And he was questioned by maybe six people in our office at different times, including myself, and we believed him. We found him to be very credible.

After I talked to him, I said to him, look, I am not even going to ask you to do this, but I can tell you that it would help the weight of our report if you would take a polygraph, but I am not going to ask you. And his response was, well, I will be happy to do that if it would help. And so he did and he passed the polygraph with flying colors. So for those reasons, I don't think that there was any firing of pyrotechnics into the building.

Finally, it is not just that we know that this didn't cause the fire, we know how the fire did start. The fire started because accelerants were spread throughout the building and the fire broke out relatively simultaneously in three different places. So it is absolutely clear that this was an intentional act. Burning down the building was an intentional act. It was also an act that was consistent with the religious beliefs of the Branch Davidians, who believed, our experts tell us, that they would be transcended, as they put it, into heaven if they died in a fire during a battle with what they considered to be Babylon, namely the U.S. Government.

So for all of those reasons, I am a hundred percent confident of how this fire started, and that the FBI did not have anything to do with starting the fire.

Senator SPECTER. My red light is on, but with Senator Grassley's permission I am going to pursue two more questions before I yield to Senator Grassley.

You just commented about the fire starting in three places, and I think it would be useful for the record if you could indicate where the fire did start on the photograph.

Senator DANFORTH. Well, I am going to ask Jim Martin to correct me if I am wrong.

Senator SPECTER. Well, let's ask Jim Martin to join you on the identification, if you wish.

Senator DANFORTH. All right. It started in three places. It started right in there, correct?

Senator SPECTER. Indicating on the photograph—let's mark it, Senator Danforth with an "A," if you would.

Senator DANFORTH. I am not sure about the time sequence.

Mr. MARTIN. They are all within a minute of each other.

Senator DANFORTH. They are all within a minute. A. B, right about there?

Mr. MARTIN. Yes.

Senator DANFORTH. C.

Mr. MARTIN. C is to the top end of the chapel area right where you have got your—where you had your—right there, right.

Senator SPECTER. How were you able to pinpoint through your investigation that the fire started in those spots?

Senator DANFORTH. We had experts on arson and the development of fires examine the flare tapes.

Senator SPECTER. Senator Danforth, in my opening statement I went through some of the items where the Government had denied the firing of pyrotechnics. When there is a concealment and such a pattern of concealment, it raises a question, if not an inference, of some purpose of concealment that the disclosure would constitute an admission that something wrong was done.

You have studied this case in great detail in your report. It particularizes the many places where the Government not only failed to disclose, but made affirmative representations to the contrary—right after the incident, the FBI spokesman; the Scruggs report, Scruggs telling congressional investigators.

The prosecuting attorney, Ray Jahn, told Congress that there had been no incendiary. There was a failure to disclose the incendiary in the Brady submissions; that is, the obligation of the Government to tell the defendants any exculpatory information, a very critical and serious part. You have the testimony of the Attorney General and the FBI Director. It is pretty hard to find any higher level representation. In fact, you can't. She is the chief law enforcement officer of the country. He, in a sense, is the chief investigator.

Then you had Richard Rodgers, head of the Hostage Rescue Team, sitting right behind. You had the filing in the civil case accusing the Government of using incendiaries, which the Government denied, then after the issue broke in August of last year, the press reports, again denied by the FBI.

How can you account—or how do you account, or maybe it is only speculation, as to such a series of denials if it is all innocent?

Senator DANFORTH. Well, first, let me, Mr. Chairman, say that there is a distinction between the word "incendiary" and "pyrotechnics." What we are talking about is pyrotechnics. Incendiary devices are intended to start fires. With pyrotechnics, it is incidental to the detonation of the tear gas.

Senator SPECTER. A pyrotechnic can start a fire, but it is not intended to do so.

Senator DANFORTH. Right.

Senator SPECTER. Contrasted with an incendiary.

Senator DANFORTH. On four aspects of the list that you went through, these are four of the remaining issues in the investigation. All of the issues in the investigation pertain to the broader question you have asked: how does it happen that the use of pyrotechnics was not generally known until the summer of 1999. What happened? How did all this get somehow lost?

And with respect to four components of your question, they remain under investigation. And because they remain under investigation, I really couldn't tell you because I don't know yet, but we have not ruled out anything in examining those four areas. It could be that there are nefarious reasons, or it could be that they are more in the nature of human error.

When I explained the civil case and the junior lawyer in the FBI, my own view of that was that a person in the FBI came into information, negligently probably did not pass it on, and then became very embarrassed that she would be criticized and that her job would be imperiled. And then she began doing what she should not have done, which was tell a series of different stories to our investigation.

With respect to the Scruggs report, what is my opinion of that? My opinion of the Scruggs report is that they reached an assumption, and their assumption was that the Davidians burned this building down. And because they reached that assumption, they really didn't dig very deeply into this whole issue of pyrotechnics. They should have; they should have gotten into it much more carefully than they did. They just did not do it.

I think that they did a sloppy job in their investigation, but I do not think that the Scruggs report—I don't think there is any indication that the Scruggs report was intentionally trying to hide things. I just think it was not well done.

With respect to Richard Rodgers, it is true that he was sitting in the hearing room. He was sitting behind Janet Reno, he was sitting behind William Sessions when they testified. He did not correct them. He should have. That is why he was there. That is why I have Jim Martin here and Stuart Levy here because, you know, a lot of this is pretty detailed stuff and if I say anything wrong, I want them to interrupt me.

Janet Reno said that at her hearing. She said that she has people in the room to correct her if she says anything wrong. He should have corrected her. He didn't. He claims that he wasn't paying any attention. I don't know. Who knows if somebody is paying attention or not? I know that it is not a crime not to correct somebody; at least I don't think it is. And it is certainly not provable whether he was listening or not.

Also, he says that he viewed—he was the one who gave the order for the firing of the pyrotechnics. He did not view the construction pit as being part of the compound. His view is that the prohibition on firing of pyrotechnics was designed to prevent a fire from starting. If pyrotechnics were directed into the residential quarters, that obviously would have created the problem of fire. But firing pyro-

technics aimed away from the building into something that is made out of concrete and filled with water, in his view, is a different matter. Now, that is his explanation.

I think it is important to look at all of the various pieces of your question and address them one at a time. And as I say, there are four pieces of your question that we are now in the process of addressing.

Senator SPECTER. Thank you very much, Senator Danforth. I will come back to that.

Let's add to the clock time to Senator Grassley, as much time as you want.

Senator GRASSLEY. OK, but I won't need much time. Thank you.

I understand that your report at the end of the year will address the issue of why the use of the military tear gas rounds was withheld by the FBI; that is, whether or not it was deliberate. And I am not asking you right now to get into the issue of whether or not it was deliberate. But in your judgment, how big of an impact would you say that the mere withholding of that information and the later discovery of it had on the public's confidence in their Government and in Federal law enforcement?

Senator DANFORTH. Well, it was disaster. I mean, this is why I am here. This is why I have spent now 10½ months at this. This is why we have had 74 people working on it, why it has already cost the taxpayer about \$12 million to investigate something that really never happened.

I mean, when you get to the substance of it, whether the Government caused the fire, whether the Government shot at people, that is something that shouldn't have taken very long at all because there is no evidence on the other side. Now, proving a negative is hard, which is what we have been trying to do. But while it is hard to prove a negative, it is possible to prove a negative, and we have proven a negative.

But what happened was that as far as the public is concerned, this information came out last summer that pyrotechnics were used and people had been told the opposite. And so people started saying, well, we are not paying any attention to whether it was 4 hours in advance or in a different direction or at a concrete foundation that it was shot; the fact of the matter is here is new information and we weren't told this 7 years ago when we should have been told it, and if the Government lies about a little thing, the Government lies about a big thing.

So everything then came under a cloud and it caused enormous damage. A Time magazine poll showed that 61 percent of the American people last August believed that the Government started the fire. Now, that is a serious problem for our country. If 61 percent of the people believe the Government started a fire, it is a big problem, and it is a problem that is created with no supporting evidence, none. All the evidence is in the other direction.

But all of this was brought about because people just did not come clean and they made misrepresentations. Some of them were innocent. Attorney General Reno's representations were innocent, the same with Director Sessions, same with Special-Agent-in-Charge Ricks right after the fire, the same with the Scruggs report.

It wasn't carefully done, but it was not something, in my opinion, that was intentional.

But for one reason or another, the wrong information was presented to the American people and it caused a real shaking of confidence of people in their Government, and that is what this investigation has been all about.

Senator GRASSLEY. Well, is there anything that we can do to repair the damage, or what should Congress or even the executive branch of Government do to restore confidence?

Senator DANFORTH. Well, Senator Grassley, thank you for asking because I have a double answer to that question and I think both things are important to say. I think, first of all, when people make dark charges, I mean really serious charges, the people who make those charges should bear some kind of burden of proof before we all buy into them, and I don't think that happened here.

I think that, in fact, in my investigation, had there been any burden of proof on people saying that the Government started the fire, this would have been over in days. But we had to operate without any burdens operating in anybody's favor. So I think that the first thing is that all of us should be reluctant to give credence to allegations of totally terrible things being done simply on the basis that somebody has got just some sort of passing charge to make.

And I think, second, the Government, and especially Government lawyers, have an obligation to be open and an obligation to be candid. And in this case, there were certainly instances when the Government and its people—and this is what we continue to investigate—were not candid.

Now, you know, when I talked about the young FBI lawyer—and you think why would anybody not be candid. Is it necessarily because that person is part of a cover-up conspiracy? I don't think so. I think one of the reasons people aren't candid—one reason people lie is that they are afraid, they are afraid of ruin. And I think this is something we should also think about. I mean, what causes this kind of fear? Why are people afraid that if they make a mistake, which may be a big mistake but is an innocent mistake, they will just be ruined?

You know, one of the problems back in 1995 during the congressional hearings is that the people in the Justice Department believed Congress was trying to get them. And if people think people are trying to get you, they are going to be hard to deal with. I believe myself that in dealing with the Justice Department in this case, they believed I was trying to get them, and that is why I think it was so difficult to deal with the Justice Department. They thought that I was the adversary.

So I think what I have said in the preface to my report, to me, is what this story is all about, and I have sort of outlined what my thoughts are.

Senator SPECTER. If I may interrupt my colleague for just one question, Senator Danforth, are you saying that the Justice Department thought you, as Special Counsel appointed by the Attorney General to do an impartial investigation, were out to get them?

Senator DANFORTH. I think that when people start investigating anybody, they begin to get their defenses up. I think that that is a very, very natural reaction. And here you had somebody who was

technically part of the Justice Department, and they could not therefore claim any privilege to withhold anything from me. And they thought here was this guy who is conducting an investigation and he has absolutely free rein. You know, there is no control over this person at all. And I believe that caused concern. I can't put myself in the minds of other people, other than to say this is what I think is an explanation.

Senator GRASSLEY. Could I follow up on your reference to this FBI attorney that bungled this thing? Is it possible that she knew of the Attorney General's order not to use pyrotechnics and withheld that information from the Justice Department so that it wouldn't embarrass the FBI?

Senator DANFORTH. You know, I am speculating as to what was on her mind, but I don't think that was what was on her mind because what happened was there was this so-called Cheroux declaration, and it was filed by the plaintiffs in the civil suit and it speculated that pyrotechnics were used. And this FBI lawyer inquired of the FBI—in fact, of the Hostage Rescue Team—well, what is your response to this?

And the FBI's response to the inquiry by the FBI lawyer was, yes, pyrotechnics were used. They just came absolutely clean with it. They always have; they have with us and they have with everybody else. So as far as the FBI agents were concerned, they told everybody. They told the civil lawyers, they told the prosecuting lawyers in the criminal case, they told us. They have never made any bones about it. So I don't think that they were trying to cover anything up.

I think what happened was that they fully presented the information to this junior lawyer in the FBI, and the junior lawyer should have, in turn, as part of her job, turned that information over to the Justice Department lawyer. And for one reason or another, she didn't do it. In fact, she had it on a "to do" list and she never checked it off on the "to do" list. The rest of her "to do" list had checkmarks. She never checked this off. So I think she just blew it. And then having blown it—some people say, my gosh, if my boss discovers I blew something, I am in big trouble. So they start hiding it, and I believe that is what happened.

Senator GRASSLEY. Let me follow up in my next question on something you discussed with Senator Specter, and that is about Mr. Rodgers, whether or not you feel that Mr. Rodgers intentionally kept his silence.

Senator DANFORTH. I don't know.

Senator GRASSLEY. Did you recommend any action with respect to Mr. Rodgers?

Senator DANFORTH. No; I will be happy to tell you why. First of all, with respect to any kind of prosecution, I don't think that there is any crime in simply not correcting somebody. If there was, the statute of limitations, I am sure, would have run on it. It would be very difficult—impossible, I think—to prove that he is wrong in saying that he just wasn't paying attention when this was said. So I didn't think there was any case there.

Senator GRASSLEY. In reviewing documents recently, it caught my attention very closely about the use of flash bangs by the FBI in and around the compound. It seems that on several occasions,

when a member of the Davidians would run out of the compound perhaps to escape, a flash bang was fired at them and then that would scare them back into the compound.

This is what puzzles me: if the goal of the FBI was to get the Branch Davidians to come out of the compound, why were flash bangs used to scare them back in? And did you look into this issue, and if so, what are your thoughts about the propriety of using them in that way?

Senator DANFORTH. Well, this is something that was really not central to any of the issues in our investigation, but what they did not want was an uncontrolled movement. If there had been an exodus—that was something they were trying to get for 51 days, but what they didn't want was people just leaving to do things, to get things out of the cars that were surrounding the complex, and so on. So they wanted to control their movements and they shot these flash bangs at them.

This was not on April 19. I don't think any—correct me if I am wrong, but no flash bangs were fired on April 19. But they are in the nature of, as I understand it, firecrackers. They make a flash and they make a bang, and they don't cause injury as a general rule, but they are designed to scare people back into the building.

Senator GRASSLEY. Thank you, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Grassley.

Senator Torricelli.

Senator TORRICELLI. Thank you, Mr. Chairman, very much.

Senator Danforth, first, as I think any member of the committee would attest, we are all in your debt for having taken on this assignment and giving your own considerable credibility to these conclusions. This is the kind of issue that should not go unanswered, and people should not want for a reliable reference point in something that is as traumatic in the life of our country as this.

I wanted to bring your attention not to your conclusions but the process by which you were actually brought to those conclusions. It is my understanding that since you are the first special counsel appointed under the Department of Justice regulations issued by the Attorney General, you are in a unique position to offer some commentary on the process and how it worked within the Department of Justice.

I am told that you have some thoughts on this subject of how the Attorney General might, by regulation or, if this Congress would ever address it, by legislation, adjust these procedures. Could you give me your commentary generally on how you think this functioned?

Senator DANFORTH. Yes; Senator, it is a very unusual situation to have a special counsel who is technically part of the Department of Justice carry on an investigation of the Department of Justice. And because I am technically part of the Department of Justice, there is no privilege that can be used against me. So I have just full access to all of the files, the e-mails, and everything else in the Department of Justice, and we have availed ourselves of that. And that has caused a working problem with the Department of Justice, and I can understand that problem from their standpoint. But there was no legal protection that they had against my having access to all of their information.

At the same time, you know, when you are just asking people, please give us all of your mail or all of your e-mail or whatever, even though there is no privilege to protect them against what I want, you are still relying more or less on their good graces to turn over everything.

We could have used grand jury power, theoretically, to subpoena information from the Department of Justice, but the problem with using grand jury power is that once you do that, you are under a rule of secrecy. And the purpose of this investigation was to find out as much as we could, as openly as we could, so that we could make the evidence available to the American people.

So I said from day one that I wanted to do this in a way that could make information available. So if the only subpoena power you have is through a grand jury and the evidence you subpoena through a grand jury cannot be made publicly accessible, then I would have been defeating my own purpose.

So I think that the lack of subpoena power, except through a grand jury, is a problem with the current special counsel. And I would recommend that future special counsels be given by Congress the power to subpoena without having to use the grand jury to get the subpoenas.

Senator TORRICELLI. Did you share this recommendation with the Attorney General?

Senator DANFORTH. No.

Senator TORRICELLI. Let me return, as my colleagues did, to the question of Ray Jahn, the U.S. attorney in the 1993 case against the Davidians, and then to FBI Special Agent Richard Rodgers.

I listened to your answer and I am sympathetic that indeed it is probably impossible as a matter of law to build a case against someone who is sitting silent while an incorrect answer is being given under oath if they are claiming they simply did not hear or did not listen, although I have actually found very little sympathy for that point of view when it comes to the Vice President of the United States sitting in campaign finance meetings. But, nevertheless, even if it is being selectively applied, I think as a matter of law you are undoubtedly right.

It does, however, raise a question about the performance of one's duties. To be an agent of the FBI or to be a U.S. attorney and to, while in the employment of this Government, listen to congressional testimony by the Attorney General or by others and know that the Congress is being given inaccurate information, but claim that they were negligent or claim that they did not hear or were not paying attention—while that may not be a crime, as you have stated, it does not say much about the performance of one's duties.

Has any communication been made to the Justice Department or the FBI given these explanations so that in these individuals' cases something is in their personnel files or it is otherwise noted that this Congress was misled because of this negligence or this failure to be attentive? Misleading this Congress, as I am sure you would attest, Senator Danforth, is a serious matter. It may be short of a crime, but it is more than a personal negligence of a witness; it is negligence in the performance of duties.

Senator DANFORTH. The reason that Richard Rodgers was in the hearing room, according to the Attorney General, at the time was

to correct her if she made a misstatement or a misleading statement. She made a misleading statement. It wasn't technically wrong, it was simply misleading. She didn't know it was misleading, and he did if he had been listening. And when I talked to Attorney General Reno, right at the end of the conversation she said, I just wish he had said something.

Senator TORRICELLI. Was he seated at the witness table or in the audience?

Senator DANFORTH. He was in the audience. And, yes, that was his purpose of being there. He wasn't there because he enjoyed sitting in on a hearing. He was there because he was supposed to be a resource to correct the Attorney General if she said something wrong, and he did not. He is now retired. Now, she knew at the time when I interviewed her that, you know, he should have done this and he didn't, and we certainly said that in our report.

Senator TORRICELLI. Well, if good is to come of this, then I hope for those in such positions who will find themselves in the future being relied upon by senior Government officials that these responsibilities are taken seriously enough to know that even if they fall short of a criminal act, it will be noted and it will have a career impact. This Congress relies upon its witnesses, who in turn are relying on these other individuals, and it is a serious matter.

Finally, I wanted to raise with you the question of involvement by the U.S. armed forces. I read that section of your report, which I thought was very thorough, and I am in sympathy with it as a matter of law. But quoting from it, in your Equipment Support section B on page 33, "The equipment included, among other things, two tanks, a transport aircraft, helicopters, ammunition, surveillance robots, classified television jamming equipment, classified thermal imagers, classified ground sensing systems, classified remote observation cameras, mine detectors, search lights, gas masks, night vision goggles, wire, tents, cots, generators, medical supplies."

I have read your definition of the law of when the line is crossed from operations to equipment, but when the statute was written, I doubt it was contemplated that this kind of equipment would ever exist or would ever be used in law enforcement involving the American people. I am not quarreling with your conclusion. I am simply saying that the statute as written may not be sufficient.

The Branch Davidians are not a sympathetic group of people, but we don't write laws based on the people involved. We write them on the circumstances, and the circumstances remain the question, should the U.S. military be involved, given its role in our society and its power and the divisiveness of its involvement for national unity and the armed forces' credibility, in operations against the American people themselves. As a matter of law, I expect you are correct. As a matter of policy, I find this very troubling.

Senator DANFORTH. Well, Senator, I have thought about this and it really is beyond the scope of our report because we were asked whether there was any unlawful use of the military, and the answer to that is clearly no. The Posse Comitatus Act was passed by Congress after the Civil War in response to the use of the military in the South and there has never been a prosecution under it. So,

you know, I mean it is not what you would call a live one as far as the statutes are concerned.

Senator TORRICELLI. But it is a question that the Congress should debate.

Senator DANFORTH. Yes, I agree, and I have thought about that and, you know, I mean there was no illegal use of the military. The military was not involved in the actual operation. It was involved principally through providing equipment, and the National Guard also, which is not covered by posse comitatus. It was used in certain training facilities, and so forth, but not what most people imagine, namely the military storming the complex.

But it was a huge commitment of military equipment to this, and the equipment was operated by FBI agents who, if you looked at them, looked pretty much like the military. And so, you know, you could say, well, what is the underlying policy behind posse comitatus, what are we trying to really get at. I think it is worth thinking about.

In my own mind, you don't want the military storming some building somewhere. On the other hand, you certainly want law enforcement people who are not going to be sitting ducks, and if law enforcement is faced with a case where there is a heavily armed fortress with people with very high-powered weapons, including .50-caliber weapons that could destroy, you know, big pieces of equipment, and you say, well, just use conventional law enforcement, have people in blue suits with sidearms try to deal with that, you can't do it.

So if you hadn't had the CEV's and you hadn't had the Bradley vehicles and you hadn't had the military equipment, it would have been an exceedingly dangerous situation for law enforcement.

Senator TORRICELLI. That is a legitimate, practical point. Let me just respond with why I asked the question, however. If the line is between equipment and operations by personnel, theoretically, as a tank was loaned by the Army, if an F-16 had been flown by an experienced FBI pilot with previous military background, this could have been bombed by an F-16. Had the Branch Davidians had a compound along the shore, the Navy could have loaned a cruiser and put an FBI agent in the turret of the gun.

There is a reason for the policy. Our armed forces are a symbol of national unity. It is important that they not become divisive. Now, this is less of an issue because we are talking about the Branch Davidians, for whom there is very little sympathy generally and none with me. But if this had been 40 years ago and these had been civil marchers, and rather than the local National Guard being called out the U.S. army was sent into States or into cities against our own people in a legitimate cause, one can imagine the reputation of our armed forces and the divisiveness it would cause.

My point is not to quarrel with your report, but to suggest that the Congress should consider that line between operations and equipment may no longer be sufficient now that the hardware and the equipment is such a dominant part of military operations.

Senator DANFORTH. I think it is a very worthwhile thing to consider. I would simply counsel Congress when you look at this, if you do look at it, to bear in mind that there are exigencies that exist under this kind of circumstance that you should bear in mind

because I mean if there are a number of people and they are very heavily armed—

Senator TORRICELLI. It is a real problem—

Senator DANFORTH [continuing]. And they are holed up, you don't want to pass some set of prohibitions against the use of equipment that leaves law enforcement in a highly vulnerable position.

Senator TORRICELLI. It might just require the authorization of the President or the Attorney General at an extraordinary level, to an extraordinary threshold, to get the armed forces of the United States involved in those circumstances. And hopefully, in the overwhelming number of cases, we have enough equipment in the direct ownership of law enforcement to deal with most of these. But it is a disconcerting issue that the Nation has not faced in a long time, and I was very pleased that you addressed it in the report.

In any case, Senator Danforth, thank you very much for your contributions and your work and your bringing this very troubling matter to, I believe, a conclusion.

Senator SPECTER. Senator Danforth, would you care to venture a judgment as to a repetition of this incident, whether it would be preferable to find an alternative way of addressing the problem contrasted with bringing in the special forces from DoD?

Senator DANFORTH. Well, the special forces for DoD were there for a very limited reason. It had to do with the furnishing and maintenance of certain equipment relating to detection and movement. It did not have to do with an assault.

Senator SPECTER. Are you making a distinction between the term "special forces" and other military personnel?

Senator DANFORTH. No; I mean, in other words, I think that it is important to say it was the military brought in or special forces brought in. They were not brought in to be part of any kind of assault or attempt to arrest people or anything like that. That would be clearly a violation of posse comitatus, and they were very aware of the law.

In fact, various lawyers at DoD were involved in this, giving legal opinions to what was appropriate and what wasn't. And in at least a couple of circumstances, the DoD Army lawyers said that the requested assistance was not appropriate under the law.

Senator SPECTER. Well, I ask the question because it is troubling, as has already been discussed at some length. And I shall not pursue it beyond an observation as to the desirability of someone in your position or someone in our position making a value judgment and a recommendation that even though the statute has not been breached—and there was a lot of care going into an analysis as to how far they could go under the statute—whether as a matter of choice or preference it would be a better idea to do it some other way. But I think you have explored it at some length and I thank you for that.

Senator Danforth, coming back to a question where I deferred to Senator Grassley, and going through this long litany of failures to disclose and concealment, is there any reason to think that they concealed the use of pyrotechnics because they thought the disclosure would show some fault or some contribution to the starting of the fire or some other bad act, as you characterize it?

Senator DANFORTH. I don't think anybody ever thought that the use of the—I can't say "anybody" because there have been filmmakers who have presented that possibility, but I don't think that there has been anybody that I know of connected with the Government who has ever believed that the use of pyrotechnics in this case had anything to do with the fire.

Senator SPECTER. There was withholding of the videotapes. They were available from 9 o'clock to noon, but there was an earlier video at 8:08 a.m. on April 19 which contained a discussion of the use of rounds. And the tape was not available for some 6 years, and that was what led the Attorney General to take the rather remarkable action on September 1 of last year in going to the FBI to seize the tapes.

What, if anything, did your investigation disclose as to the unavailability of those tapes for such a long period of time?

Senator DANFORTH. Mr. Chairman, that is one of the subjects still under investigation. As I said earlier, what remains in this investigation all has to do with the question of why information was not known about the use of pyrotechnics, even though the use of pyrotechnics was not related to the fire.

And one of the sub-questions under that has to do with the fact that, as you point out, flare tapes taken earlier in the morning—the existence of them was denied, and it turned out that they did, in fact, exist and we are trying to find out why.

Senator SPECTER. Well, that poses, as is evident, a big question on the credibility of the Government action. You have already outlined the evidentiary basis for your concluding that the pyrotechnics did not cause the fire and the fire was caused somewhere else. But there is an inevitable suspicion that when you deny the use of pyrotechnics and then you add to that the disappearance of the tape, especially in a context where the tape is available from 9 o'clock on, but not available from 8 o'clock to 9 o'clock and it has, if not incriminating evidence, evidence which ought to be available to evaluate—it is pretty hard to put speculation or a conspiracy theorists at bay when they have that much to say, why was all this concealed. But I respect your answer that you say you are continuing the investigation.

Senator DANFORTH. Well, as I say, the word that I used in the preface, Mr. Chairman, to the report is "puzzling." It is puzzling why there wasn't just total disclosure of everything relating to pyrotechnics because the use of pyrotechnics didn't do any harm. It was four hours before the fire.

Senator SPECTER. Well, it doesn't take conspiratorial theorists or people who question the Government very much to go on. And when they are left with concealment, affirmative representations about the pyrotechnics, and then the absence of the tapes, it is hard to remove the question mark.

Senator Danforth, what was the purpose in filing the report before you had concluded your investigation on those two subjects? I know you have said you are 95-percent finished, but what was your thinking on doing it in these two stages?

Senator DANFORTH. We were very confident months ago that the dark issues were being resolved, the darkest of the dark issues, namely whether the Government started the fire, whether Govern-

ment agents shot weapons, whether the military was wrongly used. And I was considering the advisability of filing an interim report a number of months ago to cover those big issues, and then something happened to me in the spring, around late May, in that there was a question of whether or not I would be a vice presidential candidate.

And I knew as soon as that was raised that if that would come to pass—and I, you know, was hopeful that it wouldn't, but if it did, I would have to resign as Special Counsel. And I wanted before I did that to be able to—if I had to do that, to take responsibility for the work of the Special Counsel's office. And if we had already learned 95 percent of the answer, I wanted my fingerprints to be on that answer.

And then also I thought that various people had been under a cloud, the Attorney General among them, and people have suspected that people in Government were just doing very bad things. If a cloud exists over somebody and you know that the cloud should not exist, it is best to dispel the cloud. So for those reasons, I thought that it was important to come out with the interim report.

And I think that since last Friday, when we issued the interim report, it really has increasingly been apparent that it was the right thing to do because I think most people have said when they read it, when they have looked at it, this is dispositive, that this really does put to rest the worst fears that people have had about Government. And I think that it is important to do that sooner rather than later.

Senator SPECTER. Senator Danforth, on the issue of the adequacy of special counsel, you have responded with a recommendation that Congress legislative subpoena power for special counsel under the Attorney General's regulations. Is there anything to stop special counsel from using a grand jury to investigate some matter if it is not the Department of Justice, because special counsel could go to a grand jury on matters generally? Could special counsel not go to a grand jury because the Department of Justice itself was under investigation?

Senator DANFORTH. Well, there is one practical reason why a special counsel just as a general principle would not want to use a grand jury just as a general rule. I mean, you might sort of in a very confined way, but—

Senator SPECTER. A secrecy matter?

Senator DANFORTH [continuing]. The problem is once you use a grand jury, then that is secret. You can't even discuss whether you have used one, much less what you have gotten out of it. And I think that the important thing, certainly, about this job for a special counsel, but probably as a general rule, is that you really want to satisfy the public.

I mean, the big issue here is public confidence in Government, and the only way to deal with issues of public confidence in Government is to find the truth in a way that you can tell people. And if you find the truth in a way that you can't tell people, you haven't really solved the problem. So, that is why I think to have subpoena power without having to use a grand jury so that the information is usable publicly is an important tool.

Senator SPECTER. The Congress and the Judiciary Committee and the Governmental Affairs Committee are all looking at the issue of independent counsel and reauthorizing the statute. And the Attorney General has used her own regulations to appoint special counsel.

As I look through the difficulties which you have had which you surmounted, at page 79 of your report you give examples. For example, the Department of Justice, attempted to deny the Office of Special Counsel access to internal documents post-dating the appointment of Senator Danforth, and resisted the production of important e-mail as being too burdensome; claimed to control the power to waive the Department of Justice's attorney-client privilege; and, demanded that the Department of Justice be consulted before the Office of Special Counsel took any action, such as proposing the flare forward-looking infrared tests that might affect the results of the civil litigation.

Let me ask you the first question that I am pretty sure I know the answer to, and that is did you ultimately have any problem in getting what you needed through your own investigation?

Senator DANFORTH. No, we didn't, and the Attorney General recused herself when she appointed me, and therefore Eric Holder, the Deputy Attorney General, became the person with whom we dealt and to whom the report was submitted. And I sometimes had to talk to him on the phone about these various problems, but always they were resolved to our satisfaction. It was just that along the way it was sort of a tug of war, but ultimately they were all resolved.

Senator SPECTER. Well, we know from the Watergate experience when special prosecutor, they called Archibad Cox at that time, ran afoul of the executive branch, he got fired, and you had the Richardson to Ruckelshaus to Bork sequence.

There are strong arguments to be made for special counsel as long as you are prepared to do it, Senator Danforth, or we find ex-Senators or ex-somebody or other with your credentials. And I have a judgment on the matter, but I would be interested in your thinking as to whether this role of special counsel is one which can survive the inherent conflicts in the Department of Justice, which you weathered but surpassed because of who you are, or whether the person who is undertaking this kind of an investigation of perhaps people more important than those whom you investigated, like the Vice President or the President, can do so if the person's authority is limited to being within the Department of Justice as special counsel as opposed to being an independent counsel under statutory authority.

Senator DANFORTH. I have a philosophical preference here and I am not a fan of the idea of an independent counsel totally separated from the three branches of Government. I think in our case we were able to get all the information that we needed. I do think it would be helpful to have subpoena power, short of a grand jury.

I think, further—and this is really not responsive to your question, but I think it is important for any special counsel, or if you want to reinstate the independent counsel, to have a very clear definition of what the job is, what the task at hand is, because the easiest thing in the world—and there were various temptations

along the road to do this—is to let control of the special counsel morph from one thing to another.

We insisted at the beginning on a very clear definition. I spent the first 3 or 4 days after I was appointed being available to the media before I went underground to try to explain what the parameters were, that we were involved in bad acts, not bad judgment. But I think whatever is done in the future, it is important to say to special counsel or independent counsel, your mission is to do A, B, and C, and not let that evolve into D, E, and F.

Senator SPECTER. Senator Danforth, I agree with you totally. The statute which has been introduced for reauthorization, cosponsored by Senator Levin, Senator Lieberman, Senator Collins, and myself, seeks to do just that, to limit the number of people subject to investigation by independent counsel, a time limit, profiting by the mistakes which we have seen on independent counsel. But you are in a unique position, having gone through special counsel, perhaps not as unique as somebody would be who wasn't Senator Danforth, as I have already suggested.

Senator Danforth, let me come back to a couple of questions about the raid itself. An issue was raised as to whether one of the exits was blocked, as I understand it, indicating right about point D, and I would be subject to correction by Mr. Martin as well. And your report dealt with the conclusion that there were other ways for people to get out of the building.

What was your thinking as to having anything done to block that potential exit, if you know what I am referring to?

Senator DANFORTH. Yes, I do. Well, Mr. Chairman, what happened was at the beginning of the operation, there was an effort to insert tear gas into that so-called light green corner of the complex, because there was a trap door underneath and then there was a tunnel and the tunnel led to a school bus and then to the construction site.

And the strategy of the FBI was to try to prevent people from getting into that construction pit. That is why the effort was made to put the pyrotechnic rounds in there. They were trying to shoot ferret rounds. They just bounced off, they didn't do any good. And they wanted to get gas into that construction pit so that people wouldn't go out through the tunnel into the construction pit and be a further danger there, more or less escape.

So at the beginning of the operation, they attempted to insert tear gas. They started the tear gas operation in that corner where you marked the letter D. And incidental to that, some debris fell on the trap door and did block the trap door.

At the same time, however, you know, the very use of the CEV's in various places created exit holes. That was, in fact, part of the strategy to create places where people could exit. So they clearly did not want them to exit into that construction pit, but part of the operation was to create holes in the building so that people could exit.

Senator SPECTER. Was the blocking of the trap door then not deliberate?

Senator DANFORTH. It was not deliberate. The blocking of the trap door was not deliberate. The insertion of gas at that place so

that people would be less likely to use the trap door and get into the construction pit was part of the plan.

Senator SPECTER. Senator Danforth, did your investigation take up the issue of who started the firing back on February 28, 1993, where the Alcohol, Firearms, and Tobacco unit was principally involved?

Senator DANFORTH. No.

Senator Specter. Did your investigation take up the issue of why there was a deviation from the plan not to knock down the principal building?

Senator DANFORTH. Yes.

Senator SPECTER. Why was—

Senator DANFORTH. I would say “whether,” not “why.”

Senator SPECTER. OK, I rephrase the question and I will look forward to your answer.

Senator DANFORTH. Yes; we looked into the question of whether there was any misleading representation made with respect to the purpose of using the CEVs to punch holes into the building and whether, instead of the stated purpose, which was to insert gas and to provide exit holes, the purpose was to destroy the building. And it is our opinion that the purpose was as stated, to create the exit holes and to insert gas, not to destroy the building.

The principal focus of that has to do with the so-called black side, which is on the top of the picture, which was a gymnasium, but it was used for storage. It was basically a storage area. It was not an area where there were people. But that was, in fact, demolished, but the reason for the demolition of that was to create a pathway—at least that was the effort—so that a CEV could then insert gas closer to that tower, which was where most of the people were congregated. The effort was to get gas from both the front and the back of the building into that tower area.

Senator SPECTER. Did your inquiry take up the issue of why there was not alternative firefighting equipment? The firefighters were not permitted to approach the building because it was very dangerous, but there could have been alternative firefighting—helicopters, water cannons, have been used in oil field firefighting in Kuwait. There were very sophisticated ways of dealing with fighting the fire. Was that subject taken up by your inquiry?

Senator DANFORTH. Yes; first of all, this building was really a fire trap, and accelerants were spread throughout the building. And the entire time that it took between the time that the fire was ignited to the building being really engulfed in flames was something like 18 minutes, a very, very short period of time.

I don't think that the existence of any amount of fire equipment would have done much, particularly given the fact that the Davidians seemed intent on having a fire and on dying in the fire. One of the people who fled the building attempted to go back into the building and was rescued, in fact, by one of the FBI agents. But she wanted to go back into that building to die in the fire.

So I think when you have a fire that spreads in an 18-minute period of time which is set by igniting accelerants, in my own view no amount of firefighting equipment would have done any good at all. There were discussions, contacts, made by the FBI with the fire

departments in the area to alert them to the fact that this raid was taking place.

Some people speculate that, you know, there is in the world fire-fighting equipment that is, as I understand it, essentially tanks with water inside of them. But I don't think there are any in the United States, at least were at that time. I am told that there was one in Czechoslovakia, or some in Czechoslovakia. Or maybe they were made in Czechoslovakia, but they were certainly not readily available. So I think that when people are intent on burning themselves up, it is pretty hard to do much about it.

Also, one of the things—and this was not known at the time because the enhancement has taken place after the fact, but there were electronic eavesdropping devices that were inside the complex, so that we know some of the discussion that was going on, including discussion about lighting the fire. And two days before the fire, there was a conversation involving David Koresh and the thrust of the conversation was when the fire trucks come—he is already talking about a fire—when the fire trucks come, we are going to shoot at the fire trucks.

So I think that, you know, the fire trucks would have been—first of all, I don't think they would have done any good, or much good. And, secondly, they would have been targets.

Senator SPECTER. Was a judgment made by Mr. Rodgers not to fight the fire?

Senator DANFORTH. There was a judgment made that it was too dangerous to have fire trucks approach the building until it was too late because there was still gunfire coming out of the building.

Senator SPECTER. Well, I can understand the point on the fire trucks. I just raise the issue as to whether there were some alternative ways it could have been found. It was anticipatable that there would be a fire, given what was known about Koresh and the Davidians.

Senator DANFORTH. Well, Mr. Chairman, I don't think it was anticipated that there was going to be a fire. I think that in the planning and in the general caution, there was anticipation that that was a possibility, but it was certainly not a known fact that there would be a fire.

Senator SPECTER. Senator Danforth, one final line of questioning, and that is with respect to the criminal process. And this is something you have to decide and the Department of Justice has to decide, but when you take up the issue of Richard Rodgers, who is in the hearing room and hears a very significant—never mind that it is a material misrepresentation of fact; it is a big point, what the Attorney General is testifying to, and the FBI Director, no pyrotechnics.

I had David Brog, my chief counsel, go take a look at a statute when we were talking here today, and there is a fairly famous provision, 18 U.S. Code 1001, which covers false official statements. But it covers somebody who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact. And the focus would be whether Mr. Rodgers concealed a fact, where you have someone saying I didn't pay any attention to it.

You can get convictions for perjury where somebody says "I don't know." It is hard to prove somebody knows when he says "I don't

know.” But if there is evidence as to the person having access to the knowledge, you can get a conviction.

You talk about the young woman—this is philosophical, and put them together—that you think she goofed, made a mistake. But then when it comes to concealment, a mistake is not a crime because it is not deliberate, because there is no mens rea, as you and I well know. But when there are four different stories concocted, as you said, then it comes to a little different level of conduct or what we call culpability.

In a context where the American people have been denied access to this information for so long—and part of what we are trying to do is set a pattern and a road map for future conduct—I would like to hear a little more of your thinking. You are a former attorney general, prosecutor. What is your thinking on bypassing the criminal process as a way to set down a marker to tell people we are not going to look at your mistakes, we are not going to look at your errors of judgment, but if you sit there and your job is to listen and you miss a point that big, or if you goof, okay, but if you concoct four stories, that is perhaps crossing the culpability line?

Senator DANFORTH. Well, I think there are two different cases. I think, one, in the case of Richard Rodgers, it is not prosecutable. In other words, I don’t think that—just talking with the people with very great prosecutorial experience in my office, they think that there is just no chance of a successful prosecution because, among other things, you would have to prove that somebody was lying to you when he said he wasn’t listening.

And, you know, that is different from saying you were lying if you said you didn’t know. You can show sometimes that people knew something, but how can you tell if somebody had just tuned out? Also, I am told that simply sitting there and not correcting somebody for a misleading statement, not even an inaccurate statement, but a statement that was unintentionally misleading, that that is not an offense. And then, finally, there would be the period of limitations.

Senator SPECTER. Has the statute run from five years? When did the Attorney General testify before the congressional committee?

Senator DANFORTH. 1993.

Senator SPECTER. Not 1995? 1993?

Senator DANFORTH. This was 1993.

With respect to the FBI lawyer, I think that misstatements to our office would be prosecutable. I think that it is like hitting a gnat with a sledge hammer. I mean, I think that if this Special Counsel, after a year and employing 74 people and spending \$12 million, ended up prosecuting a junior lawyer in the FBI for statements that, in my opinion or my guess, are simply covering up judgment as opposed to misdeeds by the FBI, I think that that is just overkill. And it would be, to me, a matter of prosecutorial discretion not to proceed.

Senator SPECTER. Senator Danforth, thank you very much. Thank you for coming on such short notice.

Senator DANFORTH. It is interesting to be on this side of the table, Senator Specter. Thank you very much.

Senator SPECTER. Senator Danforth, we would rather have you on this side of the table.

Senator DANFORTH. Thank you.

Senator SPECTER. Your departure was lamented by many, many of your colleagues, none more than I. We need centrists like Senator Danforth in the Senate. You made a great contribution, but then you are still making great contributions.

Senator DANFORTH. Thank you very much.

Senator SPECTER. That concludes the hearing.

[Whereupon, at 3:52 p.m., the subcommittee was adjourned.]

