

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. memo	Reed, Bruce to Chief of Staff re: Leadership Meeting on Counterterrorism (1 page)	04/25/1995	P5	577
001b. talking points	Draft Talking Points Bipartisan Leadership Meeting April 26, 1995 (1 page)	04/25/1995	P5	578
001c. briefing paper	Possible Questions (1 page)	n.d.	P5	579
002a. note	Dellinger, Walter to Mikva, Abner/Costello, James re: [Preliminary Analysis of Constitutional Issues] (1 page)	05/29/1995	P5	580
002b. memo	Benjamin, Stuart et al. to Dellinger et al. re: Preliminary Analysis of Constitutional Issues Involved in Regulating Activities of Paramilitary Organizations (19 pages)	05/28/1995	P5	581
003a. memo	O'Connor to Ickes, re: Counterterrorism Proposals (1 page)	09/18/95	~~P1/b(1), P5~~	
003b. memo	Gorelick to Ickes, re: Counterterrorism Proposals (2 pages)	09/15/95	~~P1/b(1), P5~~	
003c. memo	For the Attorney General through the Deputy Attorney General from Director, FBI, re: Domestic and International Counterterrorism Program Issues (1 page)	09/12/95	~~P1/b(1)~~	
003d. memo	For the Attorney General through the Deputy Attorney General from Director, FBI, re: Domestic and International Counterterrorism Program Issues (3 pages)	09/12/95	~~P1/b(1)~~	
004. memo	Morris, Dick to Panetta, Leon et al. re: [FBI Guidelines] (1 page)	10/06/1994	P5	582

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9158

FOLDER TITLE:

Terrorism - Oklahoma

Eric Holzer
2006-0326-F
eh36

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. memo	Morris, Dick to Panetta, Leon et al. re: [FBI Guidelines] (1 page)	10/06/1995	P5 583
006a. memo	Ickes, Harold to Panetta/Bowles, Erskine re: Counterterrorism Proposals (1 page)	09/25/1995	P5 584
006b. memo	O'Connor, Jennifer to Ickes re: Counterterrorism Proposals -- Not Classified (1 page)	09/23/1995	P5 585
007a. note	Dellinger, Walter to Mikva/Costello re: [Preliminary Analysis of Constitutional Issues] (1 page)	05/28/1995	P5 586
007b. memo	Benjamin, Stuart et al. to Dellinger et al. re: Preliminary Analysis of Constitutional Issues Involved in Regulating Activities of Paramilitary Organizations (19 pages)	05/28/1995	P5 587 - Dup of 581
008a. fax	Waxman, Seth P. to Ickes re: [Statement Regarding Domestic Terrorism] (1 page)	05/29/1995	P5 588
008b. memo	Waxman to Ickes re: Domestic Terrorism (5 pages)	05/29/1995	P5 589
009. memo	Ickes to the President and Panetta, re: Militia Groups [partial]. (1 page)	5/5/95	~~P6(b)(6)~~
010. memo	O'Connor to Enright, Janice A. re: Terrorism Note for H [Harold Ickes] (1 page)	05/25/1995	P5 590
011. paper	The Federal Government's Power to Regulate Paramilitary Organizations (8 pages)	05/10/1995	P5 591

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012. memo	Stuart et al. to Dellinger et al. re: Preliminary Analysis of Constitutional Issues Involved in Regulating the Activities of Paramilitary Organizations (19 pages)	05/28/1995	P5	592
013. notes	[FBI and Counterterrorism] (3 pages)	05/29/1995	P5	593
014a. memo	Mikva, Abner et al. to Panetta/Ickes re: Regulation of Militias or Terrorist Groups (2 pages)	05/25/1995	P5	594
014b. memo	Cerf, Chris to Mikva re: Federal Regulation of Paramilitary Groups (1 page)	05/10/1995	P5	595
015. paper	The Federal Government's Power to Regulate Paramilitary Organizations (8 pages)	05/10/1995	P5	596

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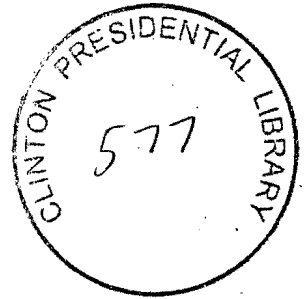
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April 25, 1995

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: BRUCE REED

SUBJECT: Leadership Meeting on Counterterrorism

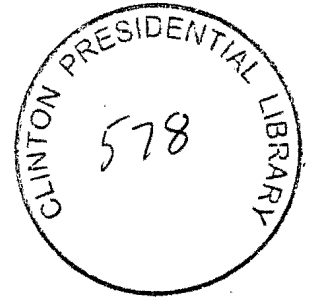
Pat Griffin and I drafted the attached talking points for tomorrow's leadership meeting. We strongly recommend that the President use the meeting to announce the remaining measures he wants Congress to include when it takes up terrorism legislation.

Senate Republicans have told us they are planning to announce their anti-terrorism bill as soon as Thursday, so tomorrow is our best chance to put a tough, reasonable package on the table. We do not have to resolve every issue by then. If the President needs more time to think about revising the domestic security guidelines -- which does not require legislation -- he should take it. But we should announce as much of our package as he is comfortable with: new investigative tools, new agents, new penalties, etc.

We met with the agencies today and resolved all the non-funding issues (new enforcement authority, new penalties). We are working with OMB to resolve the funding issues (new agents, new lab) by early tomorrow afternoon. The major sticking point will be agreeing upon FY96 offsets. We may have to decide how much we want to spend tomorrow and figure out how to offset it next week.

By midday tomorrow, we will have a fully scrubbed summary of the legislative package for the President's review (and for release after the meeting, if we decide to go forward). Nothing in the legislative package is particularly controversial, and none of it should take long for him to decide upon. Most of the controversy and debate will focus instead on the domestic security guidelines. Justice promised to send its recommendation on the guidelines to George sometime tonight.

**DRAFT TALKING POINTS
BIPARTISAN LEADERSHIP MEETING
April 26, 1995**



I. Opening Remarks

1. Report on your visit to Oklahoma City: For those who have not been there, you should tell them what it's like -- what you've seen, heard, and felt over the last several days.

2. Update on investigation: Let agencies in attendance report on any recent developments.

3. Recap what you've already called for:

- * Swift passage of the Omnibus Counter-Terrorism bill
- * Additional legislative measures on funding digital telephony, creating a special FBI counterintelligence fund, establishing a domestic counterterrorism center, and giving the FBI expanded authority to seek credit, hotel, and common carrier records and make use of pen registers
- * Threat assessment of all federal facilities
- * Rebuilding Oklahoma City
- * Presidential Decision Directive on additional steps

4. Announce additional measures you hope they will consider for their anti-terrorism legislation. Subject to your review, here is a partial list of what this package might include:

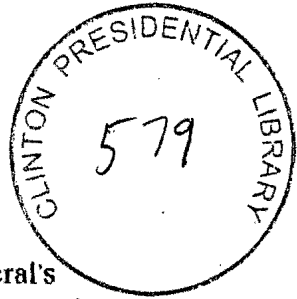
A. New investigative tools: Allowing the military to assist on cases involving chemical, biological, and weapons of mass destruction; building a new FBI lab; and whatever revisions you're prepared to recommend in the domestic security guidelines.

B. New enforcement measures: More agents (FBI, ATF, Secret Service, Treasury, Customs); a new federal crime for possessing stolen explosives; requiring ATF to work with explosives industry to develop ways of tagging explosive materials; an ATF study on how to render inert common chemicals used to manufacture explosives.

C. New and tougher penalties: Doubling the penalty for transferring a firearm or explosive knowing that it will be used to commit a crime of violence; making it a federal crime to attack or kill current and former federal employees.

5. Let's do this without partisanship, and do it quickly: This is no time for politics. The country needs us to put aside our partisan differences, and come together quickly on a swift, certain, non-political response to deal with this tragedy and prevent terrorist actions in the future. We should work on this together, without blame or rancor, and we should move as quickly as we can while still respecting the important and weighty issues involved.

6. Ask them for their ideas, and pledge to work together in the coming weeks.



II. Possible Questions

Two issues may divide the room: habeas, and revisions to the Attorney General's domestic security guidelines. Gingrich and other Republicans might challenge you to break habeas out of the crime bill and tack it onto the terrorism bill. You might respond by saying that you support habeas reform and would support breaking it out and passing it as a stand-alone bill, but that it would be a mistake to attach what it is bound to be a divisive, partisan, drawn-out issue to a bipartisan anti-terrorism bill that for the good of the country needs to pass quickly and without a big partisan struggle.

On the guidelines, we will have to watch out for congressional efforts either to go further than we want or to codify changes into law. If they press you about your plans, you might remind them that this, too, is a matter of enormous import that should be considered carefully and not be driven by politics or legislated in haste.

You may also be asked about whether we will be asking for an FY95 emergency supplemental. A small supplemental may be necessary, but we are doing everything we can to minimize the need for FY95 money, because it will get entangled in the rescission conference.



8/28. TO - ON

- En order

Militia

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

May 28, 1995

Handwritten notes:
To Harold -
we can
contribute to this
the function is
to be as policy??
(7)

NOTE TO ABNER MIKVA AND JAMES COSTELLO

From: Walter Dellinger *WD*

Attached is a preliminary analysis of Constitutional issues involved in regulating the activities of paramilitary organizations. This was prepared this weekend by Stuart Benjamin, Neil Kinkopf, Marty Lederman and Michael Small who worked under the supervision of Dawn Johnsen. Richard Shiffrin provided a second review.

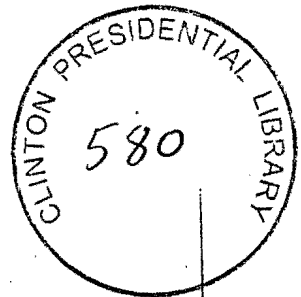
Given the urgency of the request, as relayed to me by James Costello, I will deliver this memo to the White House at mid-day on Sunday. I need to emphasize to you, however, that our conclusions are tentative, and that this memorandum, finished early Sunday morning, has not yet been review by our paralegal staff, nor have its conclusions been subjected to the internal review process that leads to a final OLC opinion.

We will be pleased, if so requested, to provide further analysis on these and related issues.

Handwritten notes:
~~Legal~~
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Don H. [unclear]
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(8/28)

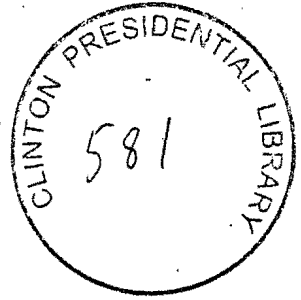
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John -
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U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

Washington, D. C. 20530

May 28, 1995

**MEMORANDUM FOR
WALTER DELLINGER
DAWN JOHNSEN
RICHARD SHIFFRIN**

From: Stuart Benjamin
Neil Kinkopf
Marty Lederman
Michael Small

Re: Preliminary Analysis of Constitutional Issues Involved in Regulating the Activities of
Paramilitary Organizations

You have asked us to determine the extent to which the Constitution authorizes federal legislation to regulate private paramilitary organizations and whether the Constitution, especially through the First Amendment, imposes any limitation on these powers. In the limited time allotted, we have not been able to complete all of the research that would be necessary to formulate final legal conclusions (nor have we had time to citecheck this memorandum). This memorandum sets forth the results of the research and analysis that we have been able to complete this weekend, and the preliminary conclusions that we think are supported. We note, however, that our conclusions are so tentative at this point that they should not form the basis for any significant actions. If it would be timely and helpful, we of course would be happy to continue to research the matter and provide a final draft opinion.

In section I of the memorandum, we examine two possible sources of affirmative authority for federal regulation of paramilitary organizations: the Militia Clauses and the Commerce Clause. The Militia Clauses grant Congress broad power to enact laws to organize a militia and ensure that it is able effectively to fulfill its statutory and constitutional role. Because Congress has not previously sought to regulate the conduct of private actors under this power, there is no judicial precedent ratifying such action. Nevertheless, as explained below, we believe that Congress's authority permits it to regulate any activities that undermine the ability of the militia to achieve its constitutional and statutory purposes. Regulation of this type must be supported by appropriate congressional findings. If so supported and absent other constitutional limitations, a statute could ban paramilitary

activities outright, prohibit contributions to paramilitary organizations, or require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

Congress's authority under the Interstate Commerce Clause extends to the regulation -- including the prohibition -- of the use of firearms that have ever traveled in interstate commerce (which includes the vast majority of firearms). As a result, the commerce power, absent other constitutional limitations, allows Congress to regulate all of the activities of paramilitary organizations that involve firearms -- such as training and maneuvers -- and to require organizations and members to register an inventory of firearms used in such activities. The commerce power would also permit Congress to regulate paramilitary organizations' use of interstate wire, electronic, and mail communications networks and to regulate their economic activities, at least when the regulation is part of a larger regulatory scheme.

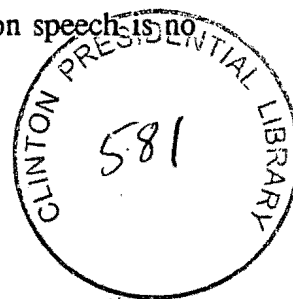
In section II, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate paramilitary activities and organizations. First, we consider whether Congress may ban or regulate certain activities -- namely, paramilitary operations and maneuvers. We conclude that there would be no constitutional bar on a simple statute reading something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce, or if the military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce." However, because this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat -- such a statute probably should contain exceptions for activities such as these to avoid constitutional difficulties, or add an intent requirement that the proscribed activity be "with the intent to prepare for actual armed combat."

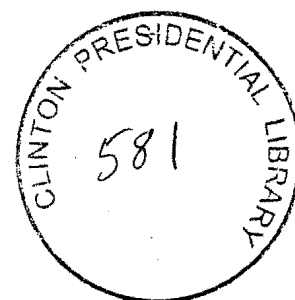
Congress alternatively could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. In order to avoid self-incrimination concerns under the Fifth Amendment, however, Congress must ensure that the required disclosures are not "invariably indicative" of unlawful activity by the affected individuals.

Next, we consider whether the Constitution would impose constraints on Congress's ability to regulate paramilitary organizations, as such. We conclude that it would be constitutionally unproblematic to require paramilitary groups to register with the government and to disclose their officers and paramilitary activities -- and to have the state make public

such information -- as a condition for engaging in concerted paramilitary activity. Nor would the Constitution bar a requirement that an organization disclose any firearms and weapons that the organization owns or possesses. (Again, Fifth Amendment concerns would be raised insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization.) The First Amendment almost certainly would, however, invalidate any statute requiring such organizations to disclose the names of their members or persons who have made contributions to the organizations, at least with respect to organizations that, in addition to paramilitary activity and training, engage in advocacy of particular beliefs and ideas.

Finally, we discuss whether Congress may prohibit certain financial contributions. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary exercises, also advocate particular political views and goals. Thus, a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment. Nonetheless, assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions that are made with the intent of assisting paramilitary activities, where such activities are themselves unlawful under federal law. Such a prohibition would not violate the First Amendment if (i) the statute specifies that the contribution must be made with the knowledge that paramilitary activities were illegal and with the intent of furthering illegal aims, and (ii) the knowledge and intent requirements are sufficiently clear to survive a claim that the statute is either unconstitutionally vague or overbroad. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations. In that regard, a ban on financial contributions for paramilitary activities arguably relates to separately identifiable conduct that may be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest.





I. Sources of Authority over Private Militias

A. The Militia Clauses

With respect to militias, the Constitution empowers Congress

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. art. I, § 8, cls. 15, 16. The Constitution further sets forth that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. 2.

As used in the Constitution, the term "militia" was meant to refer to "all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.'" United States v. Miller, 307 U.S. 174, 179 (1939). Prior to the ratification of the Constitution, militias were maintained in each of the colonies and, after the Revolutionary War, were maintained by the states. The framers of the Constitution were uneasy about the prospect of maintaining a standing army. It was feared that a standing army could become an instrument for domestic oppression and tyranny. The framers sought to alleviate these fears by providing for the maintenance of a militia. Because the militia was composed of men who were "citizens primarily, soldiers on occasion," id., it was considered unlikely that it could be coopted in this manner. It was thought that by providing for the militia, the need to raise a standing army might be obviated altogether and, to the extent it was not, the need to resort to a standing army for the enforcement of domestic laws would be greatly diminished because the federal government could first resort to the militia. See id. at 178-79; Joseph Story, Commentaries on the Constitution of the United States, 420-24 (1987); The Federalist No. 29, at 182-87 (Clinton Rossiter, ed., 1961) (Hamilton).

As the term "militia" is broadly inclusive, the Constitution vests the government with complete authority to regulate the militia. See, e.g., Arver v. United States, 245 U.S. 366 (1918); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). Pursuant to its authority to organize, arm, and discipline the militia, Congress has long provided for an organized, or "well regulated," militia, which presently consists of the National Guard. While individual citizens may, in a technical sense, continue to be encompassed within the militia, there is no right in individuals outside the

governmentally organized militia and the national armed forces¹ to associate as a military company or to parade, drill, or engage in maneuvers as such. Presser v. Illinois, 115 U.S. 252, 264 (1886). The Supreme Court has held that states may prohibit all such private military associations. Id. The states derive this authority from their general police power. See, e.g., Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982); Commonwealth v. Murphy, 166 Mass. 171 (1896).

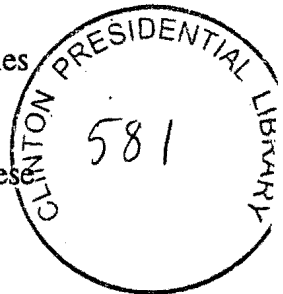
The federal government has never sought to prohibit or regulate private military associations and for that reason there are no authoritative pronouncements as to its power in this sphere. It is clear that the federal government does not have a general police power. See United States v. Lopez, 115 S. Ct. 1624 (1995). The Constitution grants Congress authority to organize, arm, and discipline the militia, which represents extremely broad power over the militia. See U.S. Const. art. I, § 8, cl. 16. The groups that we have been asked about, however, are not part of the militia within the meaning of the Constitution, although some appropriate that name. The constitutional militia comprises the National Guard and the "unorganized militia," which is defined as all other "able-bodied males at least 17 years of age and . . . under 45 years of age." 10 U.S.C. § 311. It may well be that many members of the private military organizations we have been asked to discuss are also members of the militia, but that does not render any of these private organizations themselves a part of the militia, just as it would not render any other organization to which an able-bodied male between the ages of 17 and 45 might belong a component of the militia. To avoid confusion on this point, we will refer to private military associations as paramilitary organizations.

Although paramilitary organizations are not themselves part of the militia, they are not necessarily beyond Congress's regulatory authority under the Militia Clauses. The Supreme Court has admonished that

If "the power of regulating the militia and of commanding its services in times of insurrection and invasion are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence and watching over the internal peace of the confederacy" (Federalist No. 29), these powers must also be so construed as to the modes of their exercise as not to defeat the great end in view.

Martin, 25 U.S. (12 Wheat.) at 30. Thus, the Militia Clauses are to be read as a broad grant of authority to Congress to secure the "great end" of those Clauses. The great end is an effective, well-regulated militia force that could contribute to the common defense and secure the internal peace and thereby obviate the need to call upon a standing army to

¹ By armed forces we refer to the organs of the military established and maintained under Congress's war powers and organized under the Department of Defense, specifically the Army, Navy, Air Force, and Marines. See U.S. Const. art. I, § 8, cls. 11-14.



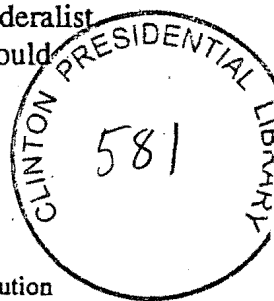
enforce domestic law in response to the founding generation's deep-seated fear of such a deployment of a standing army.

Congress has the extremely broad authority to enact provisions that it deems necessary and proper to securing these ends. See, e.g., M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 313 (1819). So, for example, we opined that the President, acting pursuant to a general delegation of authority from Congress, could require the states to maintain a racially integrated National Guard, even though the Constitution gives the states authority to appoint the officers of the militia and the National Guard had not been called into federal service.² See Executive Action to Eliminate Racially Discriminatory Practices in the National Guard while Operating as a State Unit (May 17, 1963); see also Advisory Opinion, 14 Gray 614 (Mass. 1859). If Congress were to determine that the existence or practices of paramilitary organizations tend to undermine the militia, as Congress has structured it, from achieving its purpose, Congress may take appropriate regulatory steps, including banning paramilitary organizations. In doing so, it would be incumbent upon Congress to define paramilitary organizations with reference to the specific activities that tend to undermine the militia; groups that do nothing that has such negative effects should be exempted.

There are a number of ways in which paramilitary organizations might be found to diminish the achievement of the goals underlying the Militia Clauses and the federal enactments on the subject. Given appropriate findings, Congress may view paramilitary groups as impeding the ability of the constitutional militia, in particular the National Guard, to "watch over the internal peace of the" United States. This conclusion could be supported in one of two ways. First any paramilitary group might in a specific situation purposefully attempt to block the militia from maintaining the peace. Second because paramilitary organizations are not organized, trained, disciplined, or equipped by the government within the militia system, they might take actions that, even if intended to assist the militia, actually undermine it. This was a concern of the framers, who urged that the militia be limited to a select corps that could be thoroughly trained and well-regulated. See, e.g., The Federalist No. 29, at 184-85 (Hamilton). If supported by adequate findings, such concerns would

² The militia has a dual status, as it serves both the federal and state governments. The Constitution contemplates and provides for this duality, authorizing the states to appoint officers of the militia and to train them, subject to the rules prescribed by Congress. The Constitution vests in Congress all remaining authority with respect to the militia, specifically empowering it to provide for the organizing, arming, and disciplining of the militia.

The militia is subject to the plenary authority of the President, pursuant to authority delegated by Congress, to call it into the service of the United States. In this status it is subject to the exclusive control of the federal government. See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). Otherwise, the militia is subject to the concurrent jurisdiction of the federal and state governments, but the authority of the states in this instance is subordinate to that of the federal government. See, e.g., Houston, 18 U.S. (5 Wheat.) at 16.



justify banning paramilitary organizations³ and, a fortiori, prohibiting contributions to such organizations.

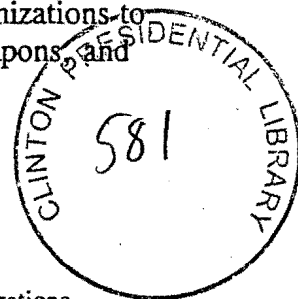
In addition to the foregoing concerns, there is a well-established constitutional interest in uniformity with respect to the militia that, in our view, would support imposing less drastic regulations on paramilitary organizations. The experience of the Revolutionary War demonstrated that, if the militia was to be effective, it was necessary that there be uniformity, especially as to organization, discipline, and equipment. See The Federalist No. 25 (Hamilton). As Justice Story explained,

It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia will be attended with the most beneficial effects, whenever they are called into service. It will enable them to discharge the duties of the camp and field with mutual intelligence and concert, an advantage of peculiar moment in the operations of an army; and it will enable them to acquire, in a much shorter period, that degree of proficiency in military functions, which is essential to their usefulness.

Joseph Story, Commentaries on the Constitution of the United States 422; accord The Federalist No. 29 (Hamilton). Throughout the nation's first century, efforts to maintain an effective militia force were constantly retarded by the lack of uniformity, especially as to equipment. See generally Perpich v. Department of Defense, 110 S. Ct. 2418, 2423 & n.10 (1990).

In conjunction with this interest in uniformity, we see no reason to doubt that there is ample basis for Congress to conclude that a substantial percentage of the members of paramilitary organizations are also members of the unorganized militia. Because, as such, these individuals might be called into service, see 10 U.S.C. § 312, Congress has a legitimate interest in knowing who these individuals are, what they have been taught, and what sort of weapons and military equipment they are trained to employ. On these grounds, Congress possesses the constitutional authority (subject, of course, to other constitutional limitations, discussed in Part II of this memorandum) to require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

³ We believe it likely that there is an additional source of authority to ban paramilitary organizations. When the Militia Clauses are read together with the various war powers, particularly the power to raise armies, that the Constitution grants to Congress, see U.S. Const. art. I, § 8, cls. 11-16, it appears that Congress is granted plenary authority over military force and activity in the United States. If so, it would be well within that authority for Congress to determine to provide for one armed force -- those currently arrayed within the Department of Defense -- and one militia and to ban all competing military, or paramilitary, organizations. Again, we have not had the opportunity to research this point fully.

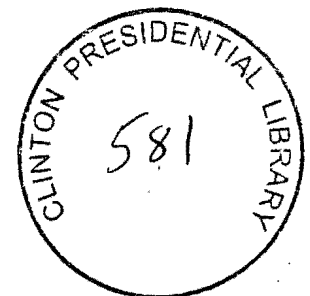


We hasten to point out that, so far as we have been able to research, the Militia Clauses have never been used as a source of authority to regulate private conduct. The text of the Militia Clauses would bear a construction that limited the authority of the federal government to acting directly and exclusively upon the militia. Nevertheless, experience with the other constitutionally enumerated powers of the federal government as well as judicial dicta regarding the extent of the militia power lead us to believe that this limited construction is inappropriate and that a broader assertion of authority would most likely be sustained. Because this authority has never been tested, it is advisable that it be exercised to the extent possible together with additional bases of jurisdiction, such as the power over interstate commerce.

B. The Interstate Commerce Clause

A second source of authority is the Interstate Commerce Clause, art. I, § 8, cl. 3. The Supreme Court has in the past interpreted Congress's commerce power broadly, as a "grant of plenary authority to Congress" that extends to all activities affecting commerce. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). The Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), however, creates some uncertainty, as it may signal a more narrow construction of the Commerce Clause. Moreover, because the decision is so recent, there is no body of case law assessing its impact. Nonetheless, we believe that, under Lopez, Congress has the commerce power to regulate (which includes prohibiting) many, but perhaps not all, of the activities of paramilitary organizations, subject of course to separate constitutional limitations on the exercise of that power.

In Lopez the Court set out three categories of activity that Congress may regulate under its commerce power: first, "the use of the channels of interstate commerce"; second, "the instrumentalities of interstate commerce, including persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and third, "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." Id. at 1629-30 (citation omitted). The Court concluded that the activity in question -- the possession of a firearm within 1000 feet of a school -- could not be considered to fall within either of the first two categories. Id. at 1630. The Court then held that the activity also did not fall within the third category, noting that the possession of a gun near a school "has nothing to do with 'commerce' or any sort of economic enterprise," that the statute contained no jurisdictional element that would insure an effect on commerce, that the statute contained no legislative findings regarding the effect on interstate commerce, and that education was an area "where States historically have been sovereign." Id. at 1630-32.



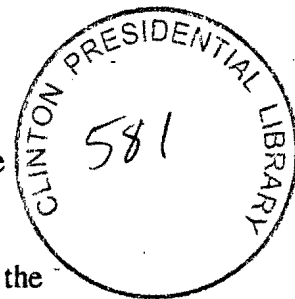
Lopez was concerned only with the third category, and nothing in the opinion purported to limit the scope of the first two categories.⁴ Thus, Lopez does not appear to affect Congress's authority to regulate channels or instrumentalities of commerce, even if the threat comes only from intrastate activities. Lopez, 115 S. Ct. at 1629. Moreover, Lopez did not overrule -- or even reject the reasoning of -- any prior cases. In fact, the Court cites many of the earlier cases that involved expansive uses of Congress's commerce power as consistent with its holding in Lopez and merely states that it is not willing to allow further expansion of that power. See id. at 1627-29 & 1634.

We believe that, consistent with Lopez and prior cases, the government can regulate activities that involve the possession or use of firearms that have ever moved in interstate commerce. The Supreme Court suggested in United States v. Bass, 404 U.S. 336 (1971), and squarely adopted in Scarborough v. United States, 431 U.S. 563 (1977), a statutory construction under which felons could be convicted of mere receipt or possession of a firearm if that firearm had traveled in interstate commerce -- even if the defendant had not been a felon when he received it and even if the firearm's travel occurred before it reached the felon. See Scarborough, 431 U.S. at 565 & nn.2, 3 & 5.⁵ The Court in Lopez did not intimate any disagreement with Bass and Scarborough; in fact, Lopez invalidated the Gun-Free School Zones Act in part because, "[u]nlike the statute in Bass, [it] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez 115 S. Ct. at 1631. Lopez, Bass, and Scarborough thus strongly support the proposition that statutes with an explicit connection to interstate commerce -- which can be satisfied by

⁴ In fact, in a case decided just five days after Lopez, the Court held that a gold mine was "engaged in . . . interstate or foreign commerce" within the meaning of a statute -- because some of the mining equipment had been shipped in interstate commerce and because the proprietor had sought workers from another state and had taken some of the gold with him out of state. On this basis, the Court concluded that the government had no obligation to demonstrate that the gold mine "affected" interstate commerce. United States v. Robertson, No. 94-251, slip op. at 2-3 (U.S. May 1, 1995).

⁵ Admittedly, in neither Bass nor Scarborough did the Court directly address the constitutionality of allowing the movement of a firearm across state lines to satisfy the statutory interstate commerce requirement, as both cases focused on statutory construction. The Court's explicit approval of the statutory construction without mentioning any constitutional concerns strongly implies, however, that this construction raises no constitutional problems. Furthermore, the Court noted in Scarborough that it had construed the statute in Bass to extend the interstate commerce requirement to the entire provision because "there was some concern about the constitutionality" of a statute that proscribed mere possession. 431 U.S. at 575. If the Court in Scarborough had had any concerns about the constitutionality of the statute as construed by Bass, it presumably would not have relied on Bass's construction as eliminating the potential constitutional concerns. Moreover, it should be noted that, in Bass, the Court suggested on its own that the government could meet its burden by showing that the gun had traveled in interstate commerce, and it is difficult to imagine that the Court would have suggested a construction that it considered to be constitutionally problematic; the Court has repeatedly stated that statutes are to be construed to avoid constitutional problems, so we must assume that the Court's own suggested construction also avoids such problems.

showing that a firearm has ever traveled in interstate commerce -- are a permissible application of Congress's commerce power.



The significance for paramilitary organizations is that, under this reasoning, the government can regulate those activities of paramilitary organizations that involve firearms that have moved in interstate commerce. The experience of the Department of Justice has been that substantially all firearms have moved in commerce, so the interstate commerce requirement should present no real barrier to the regulation of such activities. See Memorandum for the President from the Attorney General, re: Recommended Strategy in Response to Lopez, at 3 (May 5, 1995). Accordingly, Congress's commerce power extends to regulation of paramilitary organizations' use of firearms.

Thus, paramilitary organizations can be required to give an inventory of their firearms that have moved in interstate commerce, to report any maneuvers or training that involve such firearms, and to register as an organization whose members possess these firearms.⁶ Moreover, even if a paramilitary organization itself does not possess any firearms, individual members' firearms can be subject to the same regulation. Thus, all members who have engaged in the group's activities that involve firearms can be required to give an inventory of the weapons that they use in such activities. In addition, it should be noted that this commerce power would permit Congress not only to regulate but also to prohibit the use of such firearms in specified activities, which would thereby prohibit the firearm-related activities of paramilitary organizations.⁷

There are, in addition, other bases for regulating certain activities of paramilitary organizations. For instance, Congress can regulate paramilitary organizations' use of the instrumentalities of interstate commerce. Obvious examples of such instrumentalities are wire and electronic communications networks and the mail system. In fact, a number of current statutes regulate such communications pursuant to Congress's commerce power. See, e.g., 18 U.S.C. §§ 2510 - 2521. Accordingly, we believe that the commerce power allows Congress to regulate paramilitary organizations' use of the mail system as well as interstate wire and electronic communications networks (e.g., through telephone calls, faxes, or computer modems), which would likely include most forms of organizing and other communication among members. This power would extend not only to interstate communications but also, at least when part of a national regulatory scheme, to intrastate communications. In addition, we believe that Congress could, pursuant to its commerce power, regulate the economic activities of paramilitary organizations, at least when it does so as part of a larger regulatory scheme.

⁶ We do not address the possible application of Congress's commerce power to maneuvers that do not involve firearms but instead involve replicas.

⁷ We also note that the commerce power would give Congress the authority to regulate fund-raising that is related to commercial activities or to the use of firearms.

Arguably, Congress's power over the various commerce-related aspects of paramilitary organizations' activities (i.e., involving firearms, instrumentalities of commerce, and commercial activity) would allow Congress to regulate every aspect of paramilitary organizations, not just those that are directly related to one of the three spheres. Also, it may be possible to regulate all aspects of paramilitary organizations on the theory that the impact of their activities is so great that the groups substantially affect interstate commerce (akin to the impact of weapons of mass destruction, use of which is prohibited by 18 U.S.C. § 2332a). We are uncertain of the viability of these arguments (unless the paramilitary organizations could be characterized as commercial enterprises), particularly in light of Lopez. In any event, the commerce-related aspects that can be regulated would cover many of the activities of paramilitary organizations, especially in light of the breadth of permissible regulations of firearms.

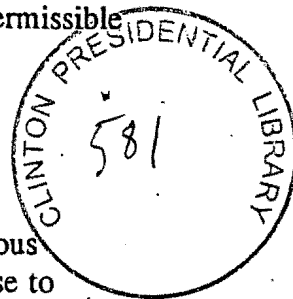
II. Constitutional Limitations on Congress's Powers

Drawing upon the sources of federal legislative power discussed in the previous section -- i.e., the Commerce Clause and the Militia Clauses -- Congress may choose to address paramilitary activities and paramilitary organizations in several different ways. In this section, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate such activities and organizations. In section A, we consider whether Congress may ban or regulate certain paramilitary operations and maneuvers. In section B, we discuss whether Congress may ban or regulate paramilitary organizations qua organizations. In section C, we consider whether Congress may impose certain restrictions on financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

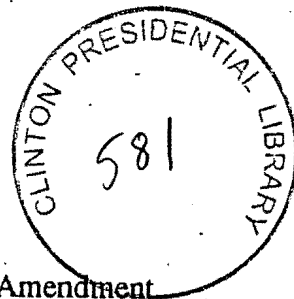
A. Regulation of Paramilitary Operations, Drills and Maneuvers

Congress can avoid certain constitutional and definitional problems associated with the regulation of organizations, see infra section II-B, by instead banning or regulating certain paramilitary activities, without respect to who engages in such activity.

1. The Constitution does not bar Congress from banning the possession of certain weapons, nor from banning certain uses of those weapons (within the scope of its affirmative powers under the Militia and Commerce Clauses). Furthermore, even where Congress has not barred individuals from certain uses of weapons, it may bar such persons from banding together to engage in similar activity, such as paramilitary operations, maneuvers, and exercises. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981). Thus, a simple statute could read something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce or if the



military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce."⁸



We do not believe that such a ban would impermissibly infringe the First Amendment right to free association. It is possible, of course, that in a particular case, the paramilitary operations, drills, and maneuvers in question may have some expressive element or other associational component that is possibly worthy of some constitutional solicitude. But even where that is so, it would not change our conclusion, so long as Congress's purpose in outlawing such concerted action was unrelated to suppressing such expression or association but was instead designed solely to prevent certain conduct -- such as paramilitary operations, the formation of private armies, and the dangers associated with privately run military forces. Under the test articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), such conduct-focused regulation is permissible so long as any "incidental" restrictions on First Amendment freedoms are no greater than is essential to the furtherance of a substantial or important governmental interest. As the court explained in Vietnamese Fishermen's Ass'n v. Knights of the KKK, 543 F. Supp. 198, 208-09, 216 (S.D. Tex. 1982), a statute such as that suggested here, *i.e.*, one barring individuals from engaging in paramilitary activity, passes the O'Brien test comfortably. In particular, the proposed statute in essence would only ban association insofar as such association took the form of the conduct that Congress wishes to eliminate -- paramilitary preparation. Organizations and their members, and unaffiliated individuals, would remain entirely free to band together for other purposes, to meet as a group, and to express any viewpoints they desire.

Of course, this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat. Even under the O'Brien test, such an incidental restriction on activity protected by the First Amendment might in such cases be considered greater than is "essential" to further the government's interest. The statute probably should, therefore, contain exceptions for activities such as these. Care should be used, however, to ensure that the line between covered and noncovered activity is not implicitly drawn pursuant to impermissible content-based distinctions, for that would raise independent First Amendment concerns. Perhaps, therefore, Congress could add an intent requirement so as adequately to address these concerns -- for example, a requirement that the activity be "with the intent to prepare for actual armed combat."⁹

⁸ The age restriction is suggested so as to exclude from coverage the ubiquitous childhood playground cops-and-robbers escapade.

⁹ In most of the cases currently in the public eye, such an intent requirement will be susceptible of easy proof: the persons engaged in the activities readily acknowledge that such is their intent. This requirement would also have the benefit of being closely tied to the purpose underlying the statute. Another possibility is to limit the prohibition to operations undertaken with actual weapons that are operable or potentially operable. But

2. Instead of banning certain activity, Congress could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. This would be similar to disclosure requirements that Congress attaches to all sorts of activity, such as business transactions, lobbying, solicitation of charitable donations, and political activities. Moreover, the government can require that individuals register their firearms and other weapons. We therefore see no first constitutional bar to a congressional requirement that individuals register with, and reveal pertinent information to, the government as a condition for engaging in concerted paramilitary activity.

However, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the individual, requiring such disclosure could violate the Fifth Amendment's protection against self-incrimination. Haynes v. United States, 390 U.S. 85, 96 (1968) (requiring disclosure of certain firearms impermissible because it almost automatically indicated illegal possession). If the "pervasive effect of the information called for . . . is incriminatory," the disclosure may not be compelled. Albertson v. SACB, 382 U.S. 70, 79 (1965) (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory). In order to trigger Fifth Amendment problems, however, the correlation between disclosure and incrimination must be "exceedingly high." Haynes, 390 U.S. at 97. Only "real and appreciable" risks of incrimination are impermissible, id.; "speculative and insubstantial" risks do not raise constitutional concerns, see Marchetti v. United States, 390 U.S. 39, 54 (1968).

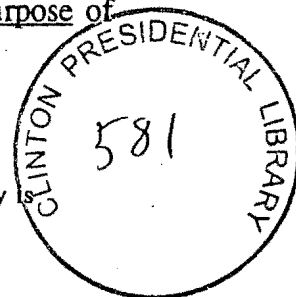
B. Regulating Private Paramilitary Organizations

In this section we discuss whether the Constitution bars Congress from regulating, not activity as such, but paramilitary organizations. Congress might, for example, decide to regulate such organizations through registration and disclosure requirements.

As far as we are aware, Connecticut is the only state that has taken such an approach. See Conn. Gen. Stat. Ann. § 27-102 (1991) (requiring officers of "private military force" to file annual sworn statements with secretary of state including copy of organization's bylaws, rules and membership roster).¹⁰ Connecticut appears to impose its reporting requirements only upon groups or organizations with some continuity of structure and existence, such as a club or society. See id. (assuming that a "private military force" will have officers, members, bylaws and rules). The Connecticut statute further defines "private military force" as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of

such a limitation may not cover all of the instances of concern.

¹⁰ As we explain below, Connecticut's requirement of membership disclosure almost certainly is unconstitutional.



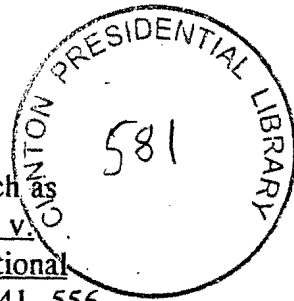
drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience." Id. § 27-101. Even this definition might subsume many associations of individuals who have no intent of ever banding together for actual concerted paramilitary activities. Therefore, Connecticut explicitly excludes from its definition various groups such as governmental military units, reserve corps of any institution of learning, a society of war veterans, the Boy Scouts, and any person acting or appearing in any theatre, motion picture or television production while actually engaged in representing therein military characters or scenes. Id. If a federal statute is drafted, certain constitutional challenges could be avoided by including a similar list. Alternatively, it might be wise to track the definition of "military organization" offered by an expert witness in the Vietnamese Fishermen case, i.e., an organization that makes use of a "command structure, training and discipline so as to function as a combat or combat-support unit." 543 F. Supp. at 203.¹¹

Assuming that neither Congress nor the states made the activities of such organizations unlawful (that is, unless such organizations would be virtually certain to be breaking the law in some respect), there would be no constitutional bar to requiring "paramilitary groups" to register with the government, to disclose their officers, and to have the state make public such information, so long as the affected groups are defined with sufficient specificity.¹²

Indeed, even where there would be a first amendment violation in requiring disclosure or revelation of an organization's members, see below, it has never been disputed that if an organization engages in certain activity that the state properly may regulate, the state can require the organization to register with the state and to disclose its officers (i.e., the persons who speak and act on the organization's behalf) as a condition of engaging in such regulated activity. See, e.g., Communist Party of the United States v. SACB, 367 U.S. 1, 97-101 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463-64 (1958). The state may require information about an organization's purposes, activities, officials and even

¹¹ So, for example, Congress could define regulated "paramilitary organizations" as those organizations that are formed for the purpose of engaging in drills or maneuvers with firearms or other dangerous weapons, and that make use of paramilitary training and a command structure, in order to function as a combat unit or as a combat-support unit or to prepare for actual paramilitary combat. So as to avoid First Amendment problems, the definition should be drafted without reference to the organization's ideologies, beliefs, and advocacy.

¹² The characteristics of banned organizations would have to be defined with sufficient specificity to ensure fair notice to potential defendants of what constitutes a criminal offense and to protect against arbitrary and/or discriminatory enforcement. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747, 1754 (1994) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). For an example of a possible definition that likely would pass constitutional muster, see supra note 11.



employees. Id.¹³ This is true with respect to all sorts of organizational activity, such as business transactions, see NAACP, 357 U.S. at 464-65; lobbying, see United States v. Harriss, 347 U.S. 612 (1954), solicitation of charitable donations, see, e.g., International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, 689 F.2d 541, 556 (5th Cir. Unit A 1982), political activities, see, e.g., Buckley, 424 U.S. at 63 (discussing requirement that political committees and candidates register with FCC), etc. There is, therefore, no reason that the state could not require paramilitary groups to register with, and reveal pertinent information to, the state as a condition for engaging in concerted paramilitary activity. For example, such an organization could be required to disclose its officers and its bylaws. Similarly, we see no difficulty in requiring such an organization to disclose any firearms and weapons that the organization itself (as opposed to its members) owns or possesses. Nor does the Constitution bar Congress from requiring such organizations to notify the state of any paramilitary activities or training in which it plans to engage.¹⁴

On the other hand, serious constitutional problems would be raised by a statute requiring paramilitary organizations to disclose the names of their members or persons who have made contributions to the organizations. In a long line of cases, the Supreme Court has ruled that such disclosure requirements are subject to the "closest scrutiny," because they impose considerable burdens on the organizations' members' freedom of association. See, e.g., Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, 424 U.S. at 64-66; Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460-61. That scrutiny almost certainly would prohibit a requirement that paramilitary organizations disclose their membership or list of contributors, at least with respect to organizations that (in addition to mere paramilitary activity and training) engage in advocacy of particular beliefs and ideas. Such a requirement invariably would chill the associational rights of persons who wish to become members of, or contribute to, such organizations. Accordingly, a court would invalidate such a requirement, absent an

¹³ However, insofar as the services performed by employees of an organization may be motivated by a desire to thereby "contribute" to the group and associate themselves with the causes of the group, disclosure of the names of such employees may be barred, pursuant to a showing of actual deterrence of such association. See Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 94-98 (1982) (suggesting that first amendment may permit small, unpopular party to decline to reveal persons who have provided services thereto, because of likelihood that such revelation would chill associational rights of those persons who "choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion").

¹⁴ However, as explained above, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization, requiring such disclosure could well violate the Fifth Amendment's protection against self-incrimination. If the disclosure requirements are "directed at a highly selective group inherently suspect of criminal activities," and if the "pervasive effect of the information called for . . . is incriminatory," such disclosure may be not be compelled. Albertson, 382 U.S. at 79 (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory).

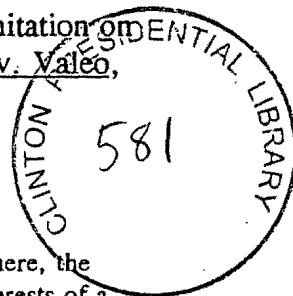
"overriding and compelling state interest" and a "substantial relation" between the information sought and the state's interest. Brown, 459 U.S. at 92 (citations omitted). This is a test that is virtually impossible for the state to meet.¹⁵ Moreover, even if that strict test somehow were met in a particular case, unpopular organizations (and the private paramilitary groups certainly would fall in this category) nonetheless would receive an exemption from such a requirement upon a showing of a "reasonable probability that the compelled disclosure . . . will subject [the members or contributors] to threats, harassment, or reprisals from either Government officials or private parties." Id. at 93 (quoting Buckley, 424 U.S. at 74).

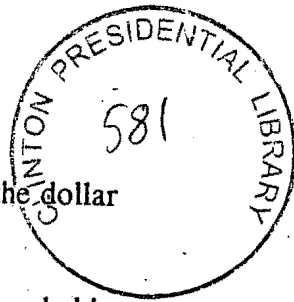
C. Contributions

In this section we discuss whether the Constitution bars Congress from banning either financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

1. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary activities, advocate particular political perspectives. There is a strong argument that a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment, and thus restrictions on such contributions warrant exacting constitutional review. See Buckley v. Valeo, 424 U.S. 1, 16-25 (1976) (per curiam) (political contributions implicate freedoms of expression and association). See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression."). A statute barring contributions to paramilitary organizations probably would not be subject to the more lenient O'Brien standards that govern First Amendment challenges to the regulation of conduct that happens to have an expressive component. Indeed, in assessing a limitation on the dollar amount that persons could contribute to political campaigns in Buckley v. Valeo,

¹⁵ Buckley is the only recent case in which such a requirement has survived such scrutiny. There, the Court upheld a campaign-contributor disclosure requirement because of threefold governmental interests of a high magnitude: alerting voters of the sources of a candidate's funding, which would facilitate predictions of the candidate's future performance in office; deterring corruption; and detecting violations of contribution limitations. See 424 U.S. at 66-68. These sorts of interests would not be present in the case of a membership disclosure requirement for paramilitary organizations. Much older precedents in which the Ku Klux Klan and the Communist Party were required to disclose membership lists -- see Bryant v. Zimmerman, 278 U.S. 63 (1928) (KKK); Communist Party of the United States v. SACB, 367 U.S. 1, 97-105 (1961) (Communist Party) -- are of little lasting value, and arguably have implicitly been overruled or have lapsed into desuetude. See, e.g., Albertson, supra (disclosure of membership in Communist Party would violate Fifth Amendment); Courier-Journal v. Marshall, 828 F.2d 361, 365-366 (6th Cir. 1987) (Bryant has been implicitly overruled and should no longer be relied upon).



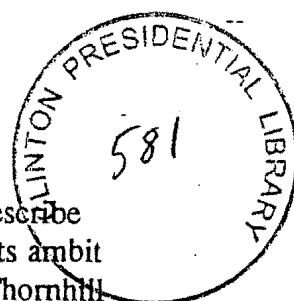


the Supreme Court said that the O'Brien standard did not apply to a limitation on the dollar amount that persons could contribute to political candidates.¹⁶

Although it applied heightened First Amendment scrutiny, the Court in Buckley upheld the limitation, on the grounds that it served the constitutionally sufficient interest of "prevent[ing] of corruption and the appearance of corruption spawned by real or imagined coercive influence of large financial contributions' on candidates' positions and on their actions if elected to office." Id. at 26. It is unclear whether a ban on contributions to paramilitary organizations could survive strict scrutiny. For one, the Court subsequently has described Buckley as "identif[y]ing" a single narrow exception to the principle that limits on political activity [are] contrary to the First Amendment: . . . the perception of undue influence of large contributors to a candidate." Citizens Against Rent Control, 454 U.S. at 296-97 (emphasis in original). The "narrow exception" of Buckley would be unavailable to justify restrictions on contributions to private military organizations. Cf. Brown v. Socialist Workers' '74 Campaign Committee, 459 U.S. 87 (1982) (interests advanced and accepted by the Court in Buckley are inapplicable when it comes to minor political parties). Moreover, Buckley involved a limitation on the amount of contributions that an individual could make, not an outright ban, thus leaving an outlet for persons to "assist in a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U.S. at 28.

2. Assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions to paramilitary organizations that are made for the purpose of assisting private military activities, where such activities are themselves made unlawful by federal law. Under principles articulated in cases involving restrictions related to affiliation with certain types of groups, such a ban would not violate the First Amendment if (i) the contribution was made with the knowledge that private military operations were illegal, and (ii) with the specific intent of furthering illegal aims. See Healy v. James, 408 U.S. 169, 186 (1972); Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 511 (1964). In addition, the statute would have to be written so as to describe the "knowledge and intent" requirements with sufficient clarity to survive a claim that it is unconstitutionally vague. See Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

¹⁶ The full protection afforded political contributions in Buckley probably cannot be explained away on the grounds that Buckley is just a case about participation in electoral politics. Rather, as the Court in Buckley itself indicated, it was about political advocacy generally. See Buckley, 424 U.S. at 16-17. And in a later case involving campaign contributions, the Court defined that form of speech as encompassed within the broad First Amendment right to "discuss publicly and truthfully all matters of public consequence." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)). See also McIntyre v. Ohio Election Comm'n, No. 93-986, slip op. at 13 (April 19, 1995) (core political speech need not center on advocacy for particular candidates or for particular election issues; it involves the general "advocacy of a politically controversial viewpoint").



enforcement."). At the same time, the statute would have to be written so as to describe those requirements sufficiently narrowly to survive a claim that it "sweeps within its ambit other activities that constitute an exercise" of protected First Amendment rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). See Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980) (ordinance prohibiting door-to-door solicitations of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes" was overbroad in violation of the First Amendment).

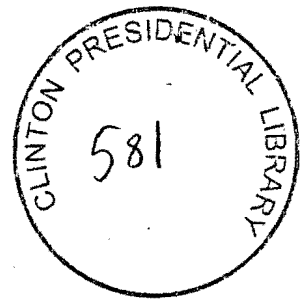
3. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. Again, such a statutory ban would have to be within the scope of congressional power, and it would need to be carefully drafted so as to avoid vagueness and overbreadth problems. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations that we believe would raise serious First Amendment concerns under Buckley v. Valeo. Although the issue is far from clear, plausible distinctions could be made.

To begin with, Buckley is not directly on point. Buckley involved a limitation on the purest form of political speech and political association: expression of support for a candidate. It was apparently for that reason that the Court said that it could not decouple any nonspeech elements that may have been reflected in campaign contributions from the speech elements. A ban on contributions to paramilitary organizations triggers concerns under Buckley, because it has a direct impact on the right to express support for, and associate with, a group with a particular set of values.

By contrast, a ban on financial contributions for paramilitary activities arguably relates to "separately identifiable conduct [that may] be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message." Cohen v. California, 403 U.S. 15, 18 (1971). Compare Elrod v. Burns, 427 U.S. 347, 363 n.17 (1976) (plurality opinion) (political affiliation requirements imposed on government employees sought to control "association and belief *per se*, not any particular form of conduct"). That the contributor could still voice support for the values and goals of private military organizations by making a general purpose donation to such groups -- let alone speaking out on behalf of and joining one -- lends further credence to the distinction between the ban on financial contributions for paramilitary activities and a ban on contributions to paramilitary organizations. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest. O'Brien, 391 U.S. at 377. See Texas v. Johnson, 491 U.S. 397, 410 (1989) (asserted interest underlying statute prohibiting desecration of flag -- the preservation of the flag as a symbol

of nationhood and national unity -- was directly related to the suppression of expression, because it reflected concern over the expression of "less positive concepts" of the flag).

In Buckley, the Court said that even if expenditures on campaigns could be characterized as conduct, the restriction at issue in the case was directly related to the suppression of expression -- curbing the voice of individual voters in elections -- and therefore failed the O'Brien test. 424 U.S. at 17. A ban on contributions for paramilitary activities seemingly would not have the same relationship to expression as the limitation in Buckley. Therefore, that part of the O'Brien test would be satisfied. However, the ban still would have to serve an important or substantial interest. We do not assess in this memorandum the possible interests that might be weighty enough to justify the ban.



TO: LEON PANETTA
ERSKINE BOWLES
HAROLD ICKES

FROM: DICK MORRIS

DATE: OCTOBER 6, 1995

Jennifer O'Connor tells me that Justice has decided not to revise or expand the FBI guidelines on militias, but rather only to issue a low-key internal clarification which does little to expand the FBI mandate.

The public overwhelmingly supports a significant expansion in the FBI's ability to investigate militia groups. If you and the Justice department believe such an expansion would be in the public interest, I would recommend that we go ahead with it with a high profile announcement.

If Justice is "gun-shy" as a result of the hammering the FBI has been taking from Republicans in Congress, it should not be. The FBI receives incredibly high marks from the public for its honesty and effectiveness.

Jennifer also says that the FBI feels that it might be possible to detail government personnel from other agencies to supply the 1,000 extra agents the President requested of Congress to fight terrorism. I urge that we move in this direction if you agree with it.

TO Harold -
explore the extra
agent issue.

10/10

✓ copy this

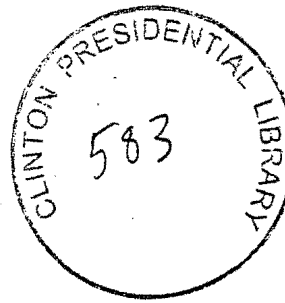
+ get to Jean O' ASAP

Notes are
from Jen

TO: **LEON PANETTA**
ERSKINE BOWLES
HAROLD ICKES

FROM: **DICK MORRIS**

DATE: **OCTOBER 6, 1995**



Harold -
DoJ worried
go nuts they
fear looking like
the image
they were
portrayed
to be
in this
manner
hearings
plus,
they've
already
issued
the
clarification

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Jennifer also says that the FBI feels that it might be possible to detail government personnel from other agencies to supply the 1,000 extra agents the President requested of Congress to fight terrorism. I urge that we move in this direction if you agree with it.

Harold, as you know,
DoJ doesn't think anywhere
near this # is needed
for detailing because
they think they'll get
the money for the
1000 agents in their
CJS appropriations
bill. Hence, POTUS could
just hire them even
without the

THE WHITE HOUSE

WASHINGTON

25 September 1995

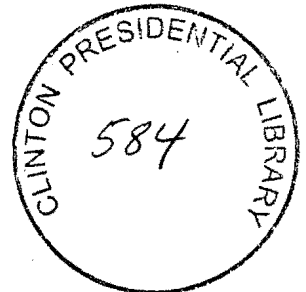
MEMORANDUM FOR LEON PANETTA
ERSKINE BOWLES

FROM: HAROLD ICKES

SUBJECT: COUNTERTERRORISM PROPOSALS

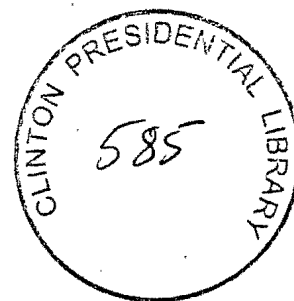
Attached is a memorandum from Jennifer O'Connor that lists and explains proposals that the President could, by Executive Order, implement to enhance the Counter-terrorism Section of the FBI. Deputy Attorney General Jamie Gorelick suggested four ways in which the President could do this. The attached memorandum is a summary of Deputy Attorney General Gorelick's suggestions.

Harold
"Let's Talk
about this"
— Leon



Harold -
Let's Talk about
This
[Signature]

THE WHITE HOUSE
WASHINGTON



September 23, 1995

MEMORANDUM FOR HAROLD ICKES

FROM: JENNIFER O'CONNOR

SUBJECT: COUNTERTERRORISM PROPOSALS -- Not Classified

This memorandum is in response to your request that we explore ways the President could, by executive action, provide additional resources to the FBI's Counter-terrorism Section.

First, the FBI Counter-terrorism Section will receive 125 agents when the Commerce, Justice & State appropriation bill is signed. The FBI expects another 107 in FY '97. In addition, in response to your request, Deputy Attorney General Jamie Gorelick has suggested four ways in which the President could, through an Executive Order, enhance the Counter-terrorism Section at the FBI. Her memorandum regarding this subject, which includes specific numbers and types of personnel, is classified; however, the following summary is not classified.

First, the President could provide needed analytical and technical personnel from other elements of the federal government to the FBI's Counterterrorism Section. This will enable the FBI to better analyze information from a variety of sources and increase coordination among agencies and departments throughout the government.

Second, the President could provide technical, non-personnel, resources to assist the FBI in countering threats which could come from terrorists using chemical or biological resources.

Third, the President could extend the current detail of Department of Defense language specialists to the FBI.

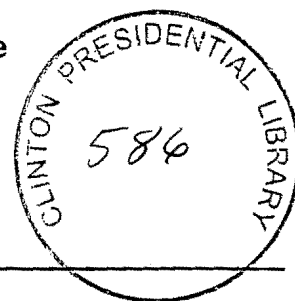
Fourth, the President could direct the Department of State to expeditiously approve the permanent placement of FBI special agents in Islamabad, Cairo and Tel Aviv.

All of these actions could be taken through Executive Order. If you would like to proceed, these ideas need to be vetted with approximately 20 affected agencies. Option 2 requires budgetary action, options 1 & 3 require other agencies to provide personnel at no cost to the FBI, and option 4 appears to have no budgetary implications, as the FBI is already prepared to fund these positions once the State Department has approved them.



U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

Washington, D. C. 20530

May 28, 1995

NOTE TO ABNER MIKVA AND JAMES COSTELLO

From: Walter Dellinger *wh*

Attached is a preliminary analysis of Constitutional issues involved in regulating the activities of paramilitary organizations. This was prepared this weekend by Stuart Benjamin, Neil Kinkopf, Marty Lederman and Michael Small who worked under the supervision of Dawn Johnsen. Richard Shiffrin provided a second review.

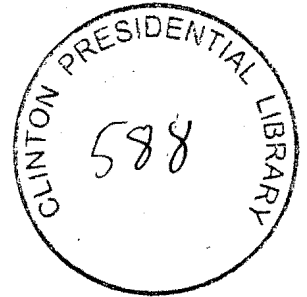
Given the urgency of the request, as relayed to me by James Costello, I will deliver this memo to the White House at mid-day on Sunday. I need to emphasize to you, however, that our conclusions are tentative, and that this memorandum, finished early Sunday morning, has not yet been review by our paralegal staff, nor have its conclusions been subjected to the internal review process that leads to a final OLC opinion.

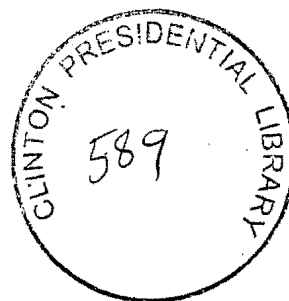
We will be pleased, if so requested, to provide further analysis on these and related issues.

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This is not exactly what I had in mind, but it should give you a little help. I cannot overemphasize how strongly the Department and the FBI feel that the statement as presently worded is inconsistent with their law-enforcement mission. I will have something more for you tomorrow.

Seth





M E M O R A N D U M

To: HAROLD ICKES
Deputy Chief of Staff

From: SETH P. WAXMAN
Associate Deputy Attorney General

Re: Domestic Terrorism

Date: May 29, 1995

Summary

We have been asked to comment on the following proposed statement regarding domestic terrorism that might be included in the current draft of the President's speech to be given in Colorado on May 31, 1995. That statement reads:

"I have ordered Attorney General Janet Reno to draft an Executive Order requiring the FBI to report on the true nature of terrorist groups in our Nation. Americans should have access to information on the purpose and tactics of such groups before they give money or get involved."

As explained more fully below, we strongly recommend that a revised version of the foregoing statement be given. In place of the language quoted above, we suggest the following:

"I am ordering Attorney General Janet Reno to coordinate an interagency assessment of the domestic terrorist threat and to report promptly to me the results of that assessment."

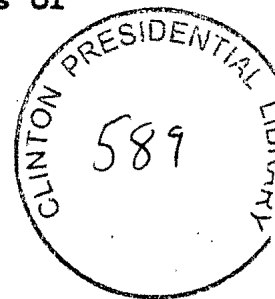
In addition, if the President wishes to address specifically the so-called "militia" organizations, the statement could include the following:

"I also direct the Attorney General and the Secretary of Defense to prepare legislation to permit lawful regulation of paramilitary organizations currently operating in this country without any meaningful control."

We believe this revised version carries forward the central concept of the original statement -- the creation of a report on domestic terrorism -- while avoiding any misconception that the Administration intends to create a publicly-distributed "subversives" list that might be inconsistent with the First Amendment, the Privacy Act, or the Attorney General's Guidelines for Domestic Terrorism Investigations. The revised version also answers the serious concerns expressed by the FBI that a public report regarding terrorism would compromise ongoing investigations and reveal sensitive or classified law-enforcement information. Finally, the revised statement better accords with the proposal that Congress act to regulate militia groups.

Discussion

- I. The Department and the FBI Already Have Begun an Assessment of Terrorist Activity Pursuant to the Attorney General's Guidelines for Domestic Terrorism Investigations.
 - A. The Department of Justice already has begun an interagency assessment of the domestic terrorist threat. That assessment, which is being led by the Criminal Division and the FBI, has resulted in an agreement by all relevant federal law enforcement agencies to supply the FBI with any information in their possession regarding domestic terrorist organizations or activities.
 - B. The interagency assessment is being conducted pursuant to the Attorney General's Guidelines for Domestic Terrorism Investigations. Those Guidelines limit FBI investigations to circumstances in which there is a possibility or reasonable indication of criminal activity.
 1. The Attorney General's Guidelines were first promulgated in 1976 by Attorney General Levi as a response to the excesses of internal security investigations such as the FBI's COINTELPRO. By requiring that investigations be premised on indications of criminal activity -- including the advocacy of violence -- the Guidelines were intended to end investigations based merely on speech that advocated unpopular opinions or ideologies.

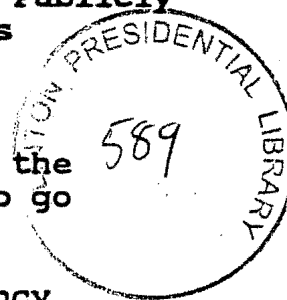


II. It Would Be Appropriate for the President to Direct Publicly That This Assessment Go Forward, As the Department's Proposed Revised Statement Suggests.

- A. Given the interagency nature of this ongoing assessment, it would be highly appropriate for the President to announce that he has ordered it to go forward.
- B. Such an announcement would facilitate interagency cooperation.
- C. The downsides to such a public announcement would be that, by alerting targetted organizations, the announcement itself might make the assessment somewhat more difficult and would engender criticism of the Department's efforts. Nonetheless, if an announcement is to be made, this is far preferable to the proposed language.

III. If the President Elects To Make the Statements As Originally Indicated, A Number of Legal and Constitutional Constraints Would likely Make Any Report Issued So General As to Be of Little Use To the Public.

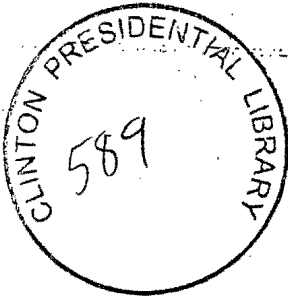
- A. The original version of the President's statement contemplates that the Department would provide a report that gives "Americans access to information on the purpose and tactics of such groups before they give money or get involved."
- B. But, given the constraints imposed by the Attorney General's Guidelines, the Privacy Act, and the First Amendment, any such report would have to be so generalized as to be virtually meaningless.
- C. In the first place, as noted above, it would be improper under the Attorney General's Guidelines for the FBI to initiate domestic security investigations of groups or individuals absent circumstances indicating the possibility of criminal activity.
 - 1. It follows with even greater force that the FBI could not, consistent with the Attorney General's Guidelines, create a list for public distribution of "suspected" terrorist organizations.
- D. Similarly, the Privacy Act would limit the compilation and release of any such report.
 - 1. Since 1983, the Department has taken the position that the FBI cannot gather publicly-available information regarding an individual's or group's



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exercise of First Amendment rights, except in the context of a preliminary inquiry or an investigation into possible criminal activity.

E. Finally, the First Amendment would constrain any publication of a list of "suspect" groups unrelated to ongoing criminal investigations.



1. As the Supreme Court has recognized, "[n]ational security cases ... often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime.... Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." U.S. v. U.S. District Court, 407 U.S. 297, 313 (1972).
2. The creation of a list designed to "chill" membership in particular groups that have not been accused of crimes would create obvious First Amendment issues.
3. Any public list of "suspected" terrorist groups might give rise to charges that the Administration is in essence reinstituting the discredited Attorney General's List of Subversive Organizations, which was abolished by a 1974 Executive Order issued by President Nixon.

IV. Similarly, Any Report Pursuant to the Original Proposed Statement Would Be Constrained by the Need to Protect Against the Public Release of Sensitive or Classified Law Enforcement Information.

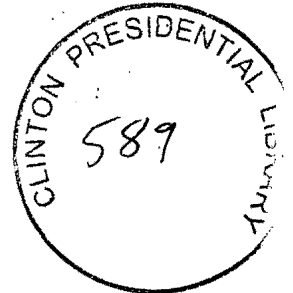
- A. The Department's proposed revised statement leaves open the question whether any portion of the domestic terrorism assessment might be made public in the future. This provides appropriate protection to sensitive law enforcement information.
- B. Indeed, in addition to the limitations imposed by the Guidelines, the Privacy Act, and the First Amendment, any release of information in this context would be constrained by the need to protect such information.
- C. The FBI has expressed its strong opposition to any suggestion that information regarding terrorism investigations be released publicly. To do so, they argue would do grave damage to ongoing investigations.
- D. This is particularly so in the foreign intelligence field, which apparently also would be covered by the original proposed statement.

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E. In sum, then, this consideration also would require that any report would have to be so generalized as to be of little use to the public in assessing particular groups.

V. The Revised Statement Also Takes Into Account the Department's Proposal that Congress Regulate the Militia Groups.

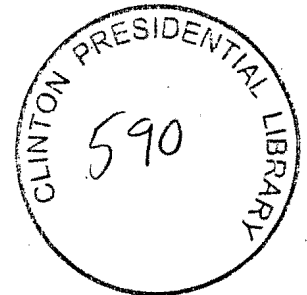
- A. ~~To the extent that the underlying goal here is that militas be regulated, the Department has taken the position that such a task should be performed by Congress.~~
- B. The revised statement proposed by the Department thus properly places the President's direction to the Attorney General within the traditional bounds of law enforcement activity, while leaving to Congress regulation of militias.



EXECUTIVE OFFICE OF THE PRESIDENT

25-May-1995 11:27am

TO: Janice A. Enright
FROM: Jennifer M. O'Connor
Office of The Chief of Staff
SUBJECT: Terrorism note for H



Hi -- please pass on to H:

Harold:

The Justice Department has stopped working on the terrorism question. They say this is because Ab instructed them that this is not information that should be on paper. Justice says they are caught between two White House offices saying opposite things and they need us to sort it out. They're happy to do whatever the White House collectively wants.

I have left a message for Castello to call me but have not spoken with him yet. He is usually very prompt in getting back to me so I assume he is out of the office. I also stopped by his office and he wasn't there.

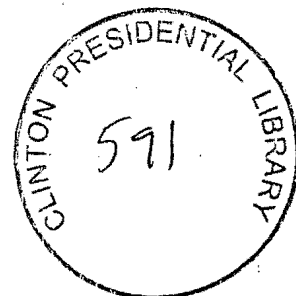
I believe Ab is getting you something on paper, drafted by him, in the next few hours, that will explain that politically, the ideas we talked about are really bad ideas. (A shock to you, I'm sure.)

Please let me know what you want me to do next.

HERRICK, FEINSTEIN LLP
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2 PARK AVENUE NEW YORK, N.Y. 10016 (212) 592-1400

May 10, 1995



**THE FEDERAL GOVERNMENT'S POWER TO
REGULATE PARAMILITARY ORGANIZATIONS**

1. Summary

The federal government, by legislation, may require paramilitary groups to:

- register their existence with federal authorities;
- notify federal and state authorities when they engage in combat maneuvers and military training;
- disclose a list of members; and
- provide an inventory of weapons.

2. The Power to Regulate Private Military Organizations

It is well-settled that private military associations can be regulated by the state government. Both the Supreme Court in 1886, and, more recently, a United States District Court in 1982, have upheld the power of state governments to ban private military activities. These cases make clear that there is no constitutional right to associate as a private military organization.

In Presser v. Illinois, 116 U.S. 252 (1886), the defendant was indicted under an Illinois statute which prohibited "any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms ... without license of the Governor thereof, which license may at any time be revoked...." 116 U.S. at 253. In upholding the prosecution, the Court stated:

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under

HERRICK. FEINSTEIN LLP

our political system they are subject to the regulation and control of the State and Federal Governments....

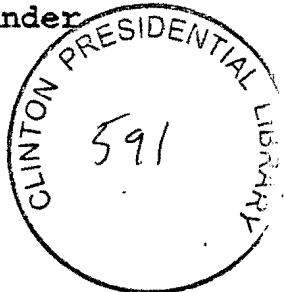
116 U.S. at 267 (emphasis supplied).

More recently, in Vietnamese Fishermen's Association v. The Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Texas 1982), an association of Vietnamese fishermen sought to enjoin the military arm of the Ku Klux Klan (the self styled Texas Emergency Reserve) from associating in private military or paramilitary companies under a Texas statute which was virtually identical to the one at issue in Presser. The group sought the injunction on the ground that it was necessary to remedy violations of their civil rights, and to protect them from racial intimidation and violence.

In reviewing the KKK's challenge, the district court stated that it could find "no authority for the proposition that military operations ... are protected by the First Amendment." Id. at 208. As an initial matter, the court concluded that military activities constitute "conduct," rather than "speech." The court further noted that even if such military activity could be characterized as speech, "the threat of violence ... is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words,' and, therefore, is not protected by the First Amendment." Id. (citing L. Tribe, American Constitutional Law, § 12-8, at 605). See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Most importantly, the court held that private military activity could be regulated even if it assumed that such conduct were an exercise of free speech. The Court noted that, under United States v. O'Brien, 391 U.S. 367 (1968):

"A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."



Id. at 209 (quoting O'Brien, supra, 391 U.S. at 377).

The court pointed out that (a) under Presser, the state has the power to regulate private military activity; (b) the government interest in regulating such activity -- in view of its inherent danger -- is weighty; (c) the government interest is not intended to, nor does it, suppress free expression; and (d) any

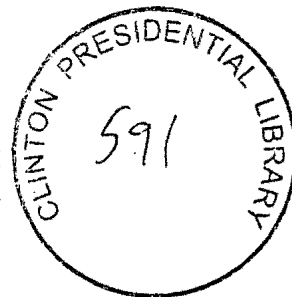
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restriction on First Amendment rights would be minimal, as the defendants were free to express their views by means other than the threat of military force. Id. See also Person v. Miller, 854 F.2d 656 (4th Cir. 1986), cert. denied, 489 U.S. 1011 (1989), (upholding contempt finding based upon a North Carolina statute similar to those in Presser and Vietnamese Fishermen's Ass'n).¹

Finally, it is important to note that regulation of paramilitary groups does not violate the "right of the people to keep and bear arms" under the Second Amendment. The courts in both Presser and Vietnamese Fishermen's Ass'n rejected arguments based upon the Second Amendment. See Presser, supra, 116 U.S. at 266-67; Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 210. Indeed, we are unaware of any federal court decision striking down any gun control legislation on Second Amendment grounds.

Thus, in United States v. Miller, 307 U.S. 174 (1939), the defendant challenged, on Second Amendment grounds, his conviction for interstate transportation of a short-barrel shotgun under the National Firearms Act of 1934. In rejecting the defendant's argument, the Court explained that the Second Amendment's right to bear arms exists only within the context of a "well regulated militia." As the Court explained:

In the absence of any evidence tending to show that possession or use of a [short-barrel shotgun] at this time has some reasonable relation to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument ... With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.



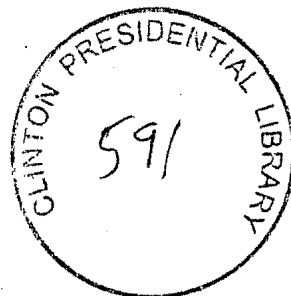
Id. at 178 (emphasis supplied). See also United States v. Lewis, 445 U.S. 55, 66 (1980) ("legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties"); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992), cert. denied, 113 S.Ct. 1614 (1993); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).

Hence, the district court in Vietnamese Fishermen's Ass'n, supra, rejected the defendants' Second Amendment challenge to the injunction on private military action, stating:

¹ At least twenty-two other states have statutes barring private military associations. See, e.g., Cal. Penal Code § 11460; Conn. Gen. Stat. §§ 27-101, 27-102; N.Y. Mil. Law § 240. We are unaware of any state statute that has been successfully challenged.

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An injunction against defendants' military activities does no violence to the Second Amendment. By its express language, that Amendment prohibits only such infringement on the bearing of weapons as would interfere with "the preservation or efficiency of a well-regulated militia," organized by the State. United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939); United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976).... In short, the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies. See United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); United States v. Cruikshank, 92 U.S. 542, 553, 23 L.Ed. 588 (1876).



543 F.Supp. at 210 (footnote omitted).

3. Implying Federal Powers to Regulate Private Military Groups

The Supreme Court, in Presser, recognized that the federal government, as well as the states, could regulate private military associations:

Military organizations and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments....

116 U.S. at 267 (emphasis supplied).

There are a number of additional sources from which to imply federal power to regulate private military activity. First, Article I, section 8 of the Constitution, gives to Congress broad powers to raise and regulate armies.² Implicit in these powers (or necessary and proper to their implementation) is the right to prevent others from taking military force into their own hands.

Second, federal sovereignty under Article I, section 8, includes the power to regulate state militias as well. The National Guard is the only authorized militia on the state level. Gilligan v. Morgan, 413 U.S. 1, 9 (1973). As the Court recognized,

² Article I, section 8 provides that Congress shall have the power: "[t]o raise and support armies ... [t]o make rules for the Government and Regulation of the land and naval forces ... [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming and disciplining, the Militia ... reserving to the States ... the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"

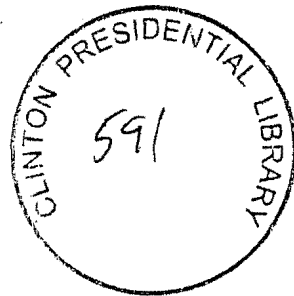
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the federal government is authorized under Article I, section 8, to provide for organizing, arming and disciplining the Guard. King v. St. Vincent's Hospital, 502 U.S. 215, 216 n.2 (1991); Perpich v. Department of Defense, 496 U.S. 334, 344-46 (1990). Plainly, the federal government's authority to regulate state militias should permit similar restrictions upon private military activity as well.

Third, federal power to regulate paramilitary activity can be derived from the government's right to prevent insurrections; implicit in that right is the prerogative to take reasonable steps to prevent an insurrection before its occurrence. Cf. Martin v. Mott, 25 U.S. 19 (1827); Raymond v. Thomas, 91 U.S. 712 (1875).

Fourth, the federal government undoubtedly has broad power to protect itself from destabilizing forces. As a New York State appellate court observed in another context:

There can be no justification for the organization of [a private military] force. Its existence would be incompatible with the fundamental concept of our form of government. The inherent potential danger of any organized private militia, even if never used or even if ultimately placed at the disposal of the government is obvious. Its existence would be sufficient, without more, to prevent a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandates.



Application of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202, 205 (2d Dept. 1944), aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1947) (emphasis supplied). See also Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 216 (finding regulation furthered a "vital government interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos").³

Fifth, and finally, notwithstanding the recent Supreme Court ruling in United States v. Lopez, 1995 W.L. 238424 (April 26, 1995), federal regulation of private militias can be based upon the authority of Congress "[t]o regulate Commerce ... among the several

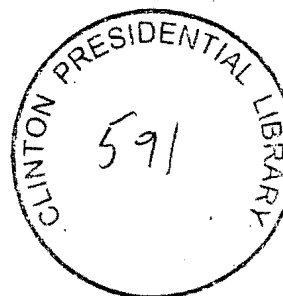
³ In Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 95 (1961), the Supreme Court upheld the Subversive Activities Control Act based upon the unremarkable proposition that the federal government can take action to protect against threats to itself -- even without evidence of military training or military activity in the United States. While the cases upholding regulation of the Communist Party have not been explicitly overruled, they have been largely discredited.

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States...." under Article I, section 8, clause 3 of the Constitution (the Commerce Clause). While the Court's decision in Lopez may engender some uncertainty concerning the scope of Congressional authority under the Commerce Clause, it seems clear that legislation regulating private military organizations meets the criteria established by the Court's decision.⁴

In Lopez, the Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A). In reaching its decision, the Court distilled its prior decisions based upon the Commerce Clause, and identified three categories of activity that Congress may regulate under the Commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities that have a "substantial affect" on interstate commerce. Id. at * 6. After noting that the statute did not implicate the first two areas, the Court focused its analysis on the "substantial affect," concluding as follows:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

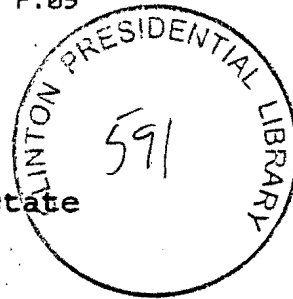


Id. at * 11.

There are several factors that distinguish regulation of private military activity from the legislation at issue in Lopez. Most importantly, the regulation concerns groups of people -- and weapons that have, presumably, been transported across state lines -- "in interstate commerce." Id. at * 6. Moreover, the activities of these organizations, which are comprised of large groups of

⁴ In his majority opinion, Chief Justice Rehnquist noted that the Court's decision "may in some cases result in legal uncertainty," but pointed out that "Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty 'to say what the law is'" Lopez, 1995 WL 238424 at * 10 (quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803)).

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individuals, have a far more "substantial affect" on interstate commerce than a "local student at a local school."⁵ Id.

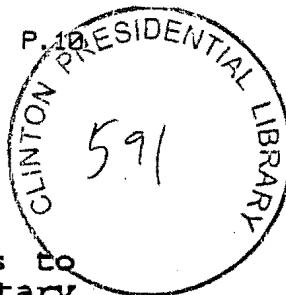
4. Disclosure of Membership Lists

In New York ex rel Bryant v. Zimmerman, 273 U.S. 63 (1928), the Supreme Court allowed disclosure of Ku Klux Klan membership lists under a New York state statute directing any association of more than twenty persons which requires an oath as a prerequisite or condition of membership to register and file with the secretary of state a copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and list of its officers.

The authority to compel such disclosure was limited, however, by the Supreme Court in NAACP v. State of Alabama, 357 U.S. 449 (1958) and its progeny. In that case, the Court recognized that an order of a state court requiring the NAACP to make its membership lists available to the state would have a deterrent effect upon the members' right to freedom of association guaranteed by the First and Fourteenth Amendments. Consequently, the Court held that the NAACP did not have to turn over its membership lists because the state had failed to show a substantial interest in obtaining them. Similarly, in Gibson v. Florida Legislative Investigation Co., 372 U.S. 539 (1963), the Court stated that the test to reconcile the government's interest in seeking disclosure of an organization's members and the members' right to freedom of association is whether the state can "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546. See also Bates v. Little Rock, 361 U.S. 516 (1960); Louisiana ex rel. Gremlion v. NAACP, 366 U.S. 293 (1961).⁶

⁵ This is even more likely if the definition of a paramilitary organization were to require the participation of a minimum number of persons. For example, Connecticut's statute defines a private military force as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience...." Conn.Gen.St. § 27-101.

⁶ In several of the "Communist Party" cases, the Court found a compelling interest justifying disclosure of the names of members. See, e.g., Uphaus v. Wyman, 360 U.S. 72 (1959) (state's compelling interest in self-preservation justified disclosure of the names of persons who attended summer camps allegedly operated by subversive organizations). See also Communist Party of United (continued...)



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There are several compelling government interests to justify obtaining the membership lists of private military associations. For example, the identity of members would be important to the federal government for the purpose of locating weapons and understanding the nature of the military activities engaged in or contemplated by the groups.

In addition, the federal government's well-recognized power under the Commerce Clause to require licensing and registration in connection with firearms and ammunition would similarly provide the authority to require disclosure of membership lists and an inventory of weapons. See generally 18 U.S.C. S 921, et seq.; 26 U.S.C. S 5841, et seq.

5. Conclusion

Regulation of paramilitary groups by the federal government is both permissible under the Constitution and appropriate in view of the threat these organizations pose. Any regulation should be based upon clear legislative findings, and should define the groups to be regulated, focusing on their military activities. Statutes which are already on the books in close to two dozen states provide guidance for defining the groups and the prohibited activities.

Elizabeth Holtzman
Ronald J. Levine
Joshua F. Scheier

⁶(...continued)

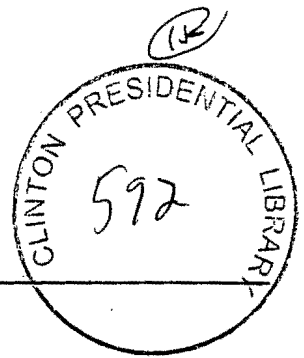
States v. Subversive Activities Control Board, supra, 367 U.S. 1; Barenblatt v. United States, 360 U.S. 109 (1959); Wilkinson v. United States, 365 U.S. 399 (1961). As noted above, however, the continuing viability of the "Communist Party" precedents is questionable.

⁷ A number of constitutional scholars at Harvard University, New York University, the University of Southern California and other institutions were consulted in the preparation of this memorandum. None seriously doubted the federal government's power to regulate paramilitary organizations under appropriately drafted statutes.



U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

Washington, D.C. 20530

May 28, 1995

**MEMORANDUM FOR
WALTER DELLINGER
DAWN JOHNSEN
RICHARD SHIFFRIN**

From: Stuart Benjamin
Neil Kinkopf
Marty Lederman
Michael Small

Re: Preliminary Analysis of Constitutional Issues Involved in Regulating the Activities of Paramilitary Organizations

You have asked us to determine the extent to which the Constitution authorizes federal legislation to regulate private paramilitary organizations and whether the Constitution, especially through the First Amendment, imposes any limitation on these powers. In the limited time allotted, we have not been able to complete all of the research that would be necessary to formulate final legal conclusions (nor have we had time to citecheck this memorandum). This memorandum sets forth the results of the research and analysis that we have been able to complete this weekend, and the preliminary conclusions that we think are supported. We note, however, that our conclusions are so tentative at this point that they should not form the basis for any significant actions. If it would be timely and helpful, we of course would be happy to continue to research the matter and provide a final draft opinion.

In section I of the memorandum, we examine two possible sources of affirmative authority for federal regulation of paramilitary organizations: the Militia Clauses and the Commerce Clause. The Militia Clauses grant Congress broad power to enact laws to organize a militia and ensure that it is able effectively to fulfill its statutory and constitutional role. Because Congress has not previously sought to regulate the conduct of private actors under this power, there is no judicial precedent ratifying such action. Nevertheless, as explained below, we believe that Congress's authority permits it to regulate any activities that undermine the ability of the militia to achieve its constitutional and statutory purposes. Regulation of this type must be supported by appropriate congressional findings. If so supported and absent other constitutional limitations, a statute could ban paramilitary

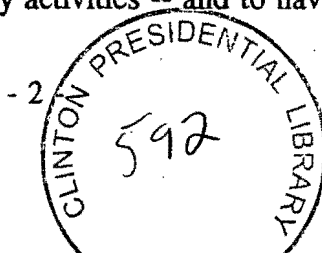
activities outright, prohibit contributions to paramilitary organizations, or require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

Congress's authority under the Interstate Commerce Clause extends to the regulation -- including the prohibition -- of the use of firearms that have ever traveled in interstate commerce (which includes the vast majority of firearms). As a result, the commerce power, absent other constitutional limitations, allows Congress to regulate all of the activities of paramilitary organizations that involve firearms -- such as training and maneuvers -- and to require organizations and members to register an inventory of firearms used in such activities. The commerce power would also permit Congress to regulate paramilitary organizations' use of interstate wire, electronic, and mail communications networks and to regulate their economic activities, at least when the regulation is part of a larger regulatory scheme.

In section II, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate paramilitary activities and organizations. First, we consider whether Congress may ban or regulate certain activities -- namely, paramilitary operations and maneuvers. We conclude that there would be no constitutional bar on a simple statute reading something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce, or if the military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce." However, because this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat -- such a statute probably should contain exceptions for activities such as these to avoid constitutional difficulties, or add an intent requirement that the proscribed activity be "with the intent to prepare for actual armed combat."

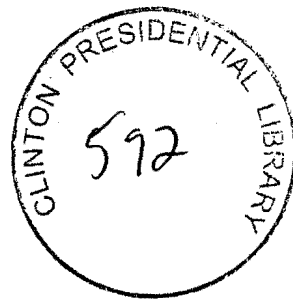
Congress alternatively could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. In order to avoid self-incrimination concerns under the Fifth Amendment, however, Congress must ensure that the required disclosures are not "invariably indicative" of unlawful activity by the affected individuals.

Next, we consider whether the Constitution would impose constraints on Congress's ability to regulate paramilitary organizations, as such. We conclude that it would be constitutionally unproblematic to require paramilitary groups to register with the government and to disclose their officers and paramilitary activities -- and to have the state make public



such information -- as a condition for engaging in concerted paramilitary activity. Nor would the Constitution bar a requirement that an organization disclose any firearms and weapons that the organization owns or possesses. (Again, Fifth Amendment concerns would be raised insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization.) The First Amendment almost certainly would, however, invalidate any statute requiring such organizations to disclose the names of their members or persons who have made contributions to the organizations, at least with respect to organizations that, in addition to paramilitary activity and training, engage in advocacy of particular beliefs and ideas.

Finally, we discuss whether Congress may prohibit certain financial contributions. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary exercises, also advocate particular political views and goals. Thus, a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment. Nonetheless, assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions that are made with the intent of assisting paramilitary activities, where such activities are themselves unlawful under federal law. Such a prohibition would not violate the First Amendment if (i) the statute specifies that the contribution must be made with the knowledge that paramilitary activities were illegal and with the intent of furthering illegal aims, and (ii) the knowledge and intent requirements are sufficiently clear to survive a claim that the statute is either unconstitutionally vague or overbroad. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations. In that regard, a ban on financial contributions for paramilitary activities arguably relates to separately identifiable conduct that may be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest.



I. Sources of Authority over Private Militias

A. The Militia Clauses

With respect to militias, the Constitution empowers Congress

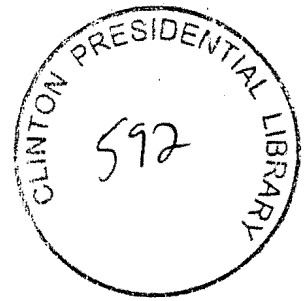
To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

U.S. Const. art. I, § 8, cls. 15, 16. The Constitution further sets forth that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. 2.

As used in the Constitution, the term "militia" was meant to refer to "all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.'" United States v. Miller, 307 U.S. 174, 179 (1939). Prior to the ratification of the Constitution, militias were maintained in each of the colonies and, after the Revolutionary War, were maintained by the states. The framers of the Constitution were uneasy about the prospect of maintaining a standing army. It was feared that a standing army could become an instrument for domestic oppression and tyranny. The framers sought to alleviate these fears by providing for the maintenance of a militia. Because the militia was composed of men who were "citizens primarily, soldiers on occasion," id., it was considered unlikely that it could be coopted in this manner. It was thought that by providing for the militia, the need to raise a standing army might be obviated altogether and, to the extent it was not, the need to resort to a standing army for the enforcement of domestic laws would be greatly diminished because the federal government could first resort to the militia. See id. at 178-79; Joseph Story, Commentaries on the Constitution of the United States, 420-24 (1987); The Federalist No. 29, at 182-87 (Clinton Rossiter, ed., 1961) (Hamilton).

As the term "militia" is broadly inclusive, the Constitution vests the government with complete authority to regulate the militia. See, e.g., Arver v. United States, 245 U.S. 366 (1918); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820). Pursuant to its authority to organize, arm, and discipline the militia, Congress has long provided for an organized, or "well regulated," militia, which presently consists of the National Guard. While individual citizens may, in a technical sense, continue to be encompassed within the militia, there is no right in individuals outside the



governmentally organized militia and the national armed forces¹ to associate as a military company or to parade, drill, or engage in maneuvers as such. Presser v. Illinois, 115 U.S. 252, 264 (1886). The Supreme Court has held that states may prohibit all such private military associations. Id. The states derive this authority from their general police power. See, e.g., Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex. 1982); Commonwealth v. Murphy, 166 Mass. 171 (1896).

The federal government has never sought to prohibit or regulate private military associations and for that reason there are no authoritative pronouncements as to its power in this sphere. It is clear that the federal government does not have a general police power. See United States v. Lopez, 115 S. Ct. 1624 (1995). The Constitution grants Congress authority to organize, arm, and discipline the militia, which represents extremely broad power over the militia. See U.S. Const. art. I, § 8, cl. 16. The groups that we have been asked about, however, are not part of the militia within the meaning of the Constitution, although some appropriate that name. The constitutional militia comprises the National Guard and the "unorganized militia," which is defined as all other "able-bodied males at least 17 years of age and . . . under 45 years of age." 10 U.S.C. § 311. It may well be that many members of the private military organizations we have been asked to discuss are also members of the militia, but that does not render any of these private organizations themselves a part of the militia, just as it would not render any other organization to which an able-bodied male between the ages of 17 and 45 might belong a component of the militia. To avoid confusion on this point, we will refer to private military associations as paramilitary organizations.

Although paramilitary organizations are not themselves part of the militia, they are not necessarily beyond Congress's regulatory authority under the Militia Clauses. The Supreme Court has admonished that

If "the power of regulating the militia and of commanding its services in times of insurrection and invasion are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence and watching over the internal peace of the confederacy" (Federalist No. 29), these powers must also be so construed as to the modes of their exercise as not to defeat the great end in view.

Martin, 25 U.S. (12 Wheat.) at 30. Thus, the Militia Clauses are to be read as a broad grant of authority to Congress to secure the "great end" of those Clauses. The great end is an effective, well-regulated militia force that could contribute to the common defense and secure the internal peace and thereby obviate the need to call upon a standing army to

¹ By armed forces we refer to the organs of the military established and maintained under Congress's war powers and organized under the Department of Defense, specifically the Army, Navy, Air Force, and Marines. See U.S. Const. art. I, § 8, cls. 11-14.

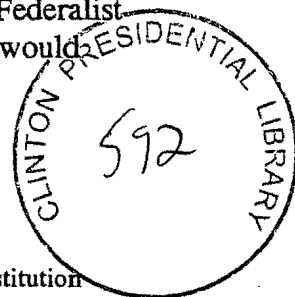
enforce domestic law in response to the founding generation's deep-seated fear of such a deployment of a standing army.

Congress has the extremely broad authority to enact provisions that it deems necessary and proper to securing these ends. See, e.g., M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 313 (1819). So, for example, we opined that the President, acting pursuant to a general delegation of authority from Congress, could require the states to maintain a racially integrated National Guard, even though the Constitution gives the states authority to appoint the officers of the militia and the National Guard had not been called into federal service.² See Executive Action to Eliminate Racially Discriminatory Practices in the National Guard while Operating as a State Unit (May 17, 1963); see also Advisory Opinion, 14 Gray 614 (Mass. 1859). If Congress were to determine that the existence or practices of paramilitary organizations tend to undermine the militia, as Congress has structured it, from achieving its purpose, Congress may take appropriate regulatory steps, including banning paramilitary organizations. In doing so, it would be incumbent upon Congress to define paramilitary organizations with reference to the specific activities that tend to undermine the militia; groups that do nothing that has such negative effects should be exempted.

There are a number of ways in which paramilitary organizations might be found to diminish the achievement of the goals underlying the Militia Clauses and the federal enactments on the subject. Given appropriate findings, Congress may view paramilitary groups as impeding the ability of the constitutional militia, in particular the National Guard, to "watch over the internal peace of the" United States. This conclusion could be supported in one of two ways. First any paramilitary group might in a specific situation purposefully attempt to block the militia from maintaining the peace. Second because paramilitary organizations are not organized, trained, disciplined, or equipped by the government within the militia system, they might take actions that, even if intended to assist the militia, actually undermine it. This was a concern of the framers, who urged that the militia be limited to a select corps that could be thoroughly trained and well-regulated. See, e.g., The Federalist, No. 29, at 184-85 (Hamilton). If supported by adequate findings, such concerns would

² The militia has a dual status, as it serves both the federal and state governments. The Constitution contemplates and provides for this duality, authorizing the states to appoint officers of the militia and to train them, subject to the rules prescribed by Congress. The Constitution vests in Congress all remaining authority with respect to the militia, specifically empowering it to provide for the organizing, arming, and disciplining of the militia.

The militia is subject to the plenary authority of the President, pursuant to authority delegated by Congress, to call it into the service of the United States. In this status it is subject to the exclusive control of the federal government. See, e.g., Tarble's Case, 80 U.S. (13 Wall.) 397 (1871). Otherwise, the militia is subject to the concurrent jurisdiction of the federal and state governments, but the authority of the states in this instance is subordinate to that of the federal government. See, e.g., Houston, 18 U.S. (5 Wheat.) at 16.



justify banning paramilitary organizations³ and, a fortiori, prohibiting contributions to such organizations.

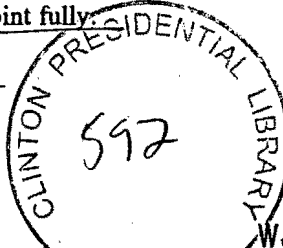
In addition to the foregoing concerns, there is a well-established constitutional interest in uniformity with respect to the militia that, in our view, would support imposing less drastic regulations on paramilitary organizations. The experience of the Revolutionary War demonstrated that, if the militia was to be effective, it was necessary that there be uniformity, especially as to organization, discipline, and equipment. See The Federalist No. 25 (Hamilton). As Justice Story explained,

It requires no skill in the science of war to discern, that uniformity in the organization and discipline of the militia will be attended with the most beneficial effects, whenever they are called into service. It will enable them to discharge the duties of the camp and field with mutual intelligence and concert, an advantage of peculiar moment in the operations of an army; and it will enable them to acquire, in a much shorter period, that degree of proficiency in military functions, which is essential to their usefulness.

Joseph Story, Commentaries on the Constitution of the United States 422; accord The Federalist No. 29 (Hamilton). Throughout the nation's first century, efforts to maintain an effective militia force were constantly retarded by the lack of uniformity, especially as to equipment. See generally Perpich v. Department of Defense, 110 S. Ct. 2418, 2423 & n.10 (1990).

In conjunction with this interest in uniformity, we see no reason to doubt that there is ample basis for Congress to conclude that a substantial percentage of the members of paramilitary organizations are also members of the unorganized militia. Because, as such, these individuals might be called into service, see 10 U.S.C. § 312, Congress has a legitimate interest in knowing who these individuals are, what they have been taught, and what sort of weapons and military equipment they are trained to employ. On these grounds, Congress possesses the constitutional authority (subject, of course, to other constitutional limitations, discussed in Part II of this memorandum) to require paramilitary organizations to file reports disclosing their existence, their membership, an inventory of their weapons, and other relevant information regarding their instruction, drilling, and maneuvers.

³ We believe it likely that there is an additional source of authority to ban paramilitary organizations. When the Militia Clauses are read together with the various war powers, particularly the power to raise armies, that the Constitution grants to Congress, see U.S. Const. art. I, § 8, cls. 11-16, it appears that Congress is granted plenary authority over military force and activity in the United States. If so, it would be well within that authority for Congress to determine to provide for one armed force -- those currently arrayed within the Department of Defense -- and one militia and to ban all competing military, or paramilitary, organizations. Again, we have not had the opportunity to research this point fully.

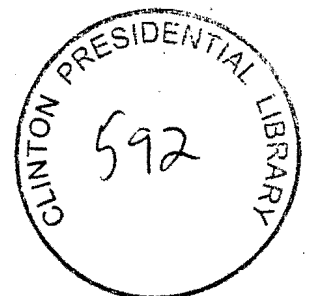


We hasten to point out that, so far as we have been able to research, the Militia Clauses have never been used as a source of authority to regulate private conduct. The text of the Militia Clauses would bear a construction that limited the authority of the federal government to acting directly and exclusively upon the militia. Nevertheless, experience with the other constitutionally enumerated powers of the federal government as well as judicial dicta regarding the extent of the militia power lead us to believe that this limited construction is inappropriate and that a broader assertion of authority would most likely be sustained. Because this authority has never been tested, it is advisable that it be exercised to the extent possible together with additional bases of jurisdiction, such as the power over interstate commerce.

B. The Interstate Commerce Clause

A second source of authority is the Interstate Commerce Clause, art. I, § 8, cl. 3. The Supreme Court has in the past interpreted Congress's commerce power broadly, as a "grant of plenary authority to Congress" that extends to all activities affecting commerce. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). The Court's recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995), however, creates some uncertainty, as it may signal a more narrow construction of the Commerce Clause. Moreover, because the decision is so recent, there is no body of case law assessing its impact. Nonetheless, we believe that, under Lopez, Congress has the commerce power to regulate (which includes prohibiting) many, but perhaps not all, of the activities of paramilitary organizations, subject of course, to separate constitutional limitations on the exercise of that power.

In Lopez the Court set out three categories of activity that Congress may regulate under its commerce power: first, "the use of the channels of interstate commerce"; second, "the instrumentalities of interstate commerce, including persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and third, "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." Id. at 1629-30 (citation omitted). The Court concluded that the activity in question -- the possession of a firearm within 1000 feet of a school -- could not be considered to fall within either of the first two categories. Id. at 1630. The Court then held that the activity also did not fall within the third category, noting that the possession of a gun near a school "has nothing to do with 'commerce' or any sort of economic enterprise," that the statute contained no jurisdictional element that would insure an effect on commerce, that the statute contained no legislative findings regarding the effect on interstate commerce, and that education was an area "where States historically have been sovereign." Id. at 1630-32.

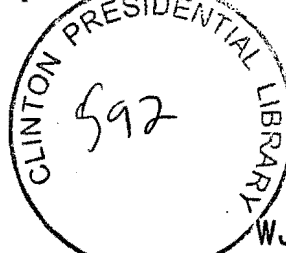


Lopez was concerned only with the third category, and nothing in the opinion purported to limit the scope of the first two categories.⁴ Thus, Lopez does not appear to affect Congress's authority to regulate channels or instrumentalities of commerce, even if the threat comes only from intrastate activities. Lopez, 115 S. Ct. at 1629. Moreover, Lopez did not overrule -- or even reject the reasoning of -- any prior cases. In fact, the Court cites many of the earlier cases that involved expansive uses of Congress's commerce power as consistent with its holding in Lopez and merely states that it is not willing to allow further expansion of that power. See id. at 1627-29 & 1634.

We believe that, consistent with Lopez and prior cases, the government can regulate activities that involve the possession or use of firearms that have ever moved in interstate commerce. The Supreme Court suggested in United States v. Bass, 404 U.S. 336 (1971), and squarely adopted in Scarborough v. United States, 431 U.S. 563 (1977), a statutory construction under which felons could be convicted of mere receipt or possession of a firearm if that firearm had traveled in interstate commerce -- even if the defendant had not been a felon when he received it and even if the firearm's travel occurred before it reached the felon. See Scarborough, 431 U.S. at 565 & nn.2, 3 & 5.⁵ The Court in Lopez did not intimate any disagreement with Bass and Scarborough; in fact, Lopez invalidated the Gun-Free School Zones Act in part because, "[u]nlike the statute in Bass, [it] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez 115 S. Ct. at 1631. Lopez, Bass, and Scarborough thus strongly support the proposition that statutes with an explicit connection to interstate commerce -- which can be satisfied by

⁴ In fact, in a case decided just five days after Lopez, the Court held that a gold mine was "engaged in . . . interstate or foreign commerce" within the meaning of a statute -- because some of the mining equipment had been shipped in interstate commerce and because the proprietor had sought workers from another state and had taken some of the gold with him out of state. On this basis, the Court concluded that the government had no obligation to demonstrate that the gold mine "affected" interstate commerce. United States v. Robertson, No. 94-251, slip op. at 2-3 (U.S. May 1, 1995).

⁵ Admittedly, in neither Bass nor Scarborough did the Court directly address the constitutionality of allowing the movement of a firearm across state lines to satisfy the statutory interstate commerce requirement, as both cases focused on statutory construction. The Court's explicit approval of the statutory construction without mentioning any constitutional concerns strongly implies, however, that this construction raises no constitutional problems. Furthermore, the Court noted in Scarborough that it had construed the statute in Bass to extend the interstate commerce requirement to the entire provision because "there was some concern about the constitutionality" of a statute that proscribed mere possession. 431 U.S. at 575. If the Court in Scarborough had had any concerns about the constitutionality of the statute as construed by Bass, it presumably would not have relied on Bass's construction as eliminating the potential constitutional concerns. Moreover, it should be noted that, in Bass, the Court suggested on its own that the government could meet its burden by showing that the gun had traveled in interstate commerce, and it is difficult to imagine that the Court would have suggested a construction that it considered to be constitutionally problematic; the Court has repeatedly stated that statutes are to be construed to avoid constitutional problems -- so we must assume that the Court's own suggested construction also avoids such problems.



showing that a firearm has ever traveled in interstate commerce -- are a permissible application of Congress's commerce power.

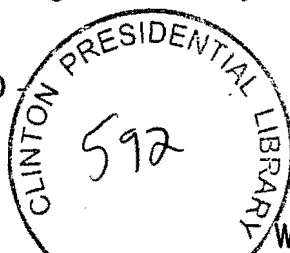
The significance for paramilitary organizations is that, under this reasoning, the government can regulate those activities of paramilitary organizations that involve firearms that have moved in interstate commerce. The experience of the Department of Justice has been that substantially all firearms have moved in commerce, so the interstate commerce requirement should present no real barrier to the regulation of such activities. See Memorandum for the President from the Attorney General, re: Recommended Strategy in Response to Lopez, at 3 (May 5, 1995). Accordingly, Congress's commerce power extends to regulation of paramilitary organizations' use of firearms.

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Thus, paramilitary organizations can be required to give an inventory of their firearms that have moved in interstate commerce, to report any maneuvers or training that involve such firearms, and to register as an organization whose members possess these firearms.⁶ Moreover, even if a paramilitary organization itself does not possess any firearms, individual members' firearms can be subject to the same regulation. Thus, all members who have engaged in the group's activities that involve firearms can be required to give an inventory of the weapons that they use in such activities. In addition, it should be noted that this commerce power would permit Congress not only to regulate but also to prohibit the use of such firearms in specified activities, which would thereby prohibit the firearm-related activities of paramilitary organizations.⁷

There are, in addition, other bases for regulating certain activities of paramilitary organizations. For instance, Congress can regulate paramilitary organizations' use of the instrumentalities of interstate commerce. Obvious examples of such instrumentalities are wire and electronic communications networks and the mail system. In fact, a number of current statutes regulate such communications pursuant to Congress's commerce power. See, e.g., 18 U.S.C. §§ 2510 - 2521. Accordingly, we believe that the commerce power allows Congress to regulate paramilitary organizations' use of the mail system as well as interstate wire and electronic communications networks (e.g., through telephone calls, faxes, or computer modems), which would likely include most forms of organizing and other communication among members. This power would extend not only to interstate communications but also, at least when part of a national regulatory scheme, to intrastate communications. In addition, we believe that Congress could, pursuant to its commerce power, regulate the economic activities of paramilitary organizations, at least when it does so as part of a larger regulatory scheme.

⁶ We do not address the possible application of Congress's commerce power to maneuvers that do not involve firearms but instead involve replicas.

⁷ We also note that the commerce power would give Congress the authority to regulate fund-raising that is related to commercial activities or to the use of firearms.



Arguably, Congress's power over the various commerce-related aspects of paramilitary organizations' activities (i.e., involving firearms, instrumentalities of commerce, and commercial activity) would allow Congress to regulate every aspect of paramilitary organizations, not just those that are directly related to one of the three spheres. Also, it may be possible to regulate all aspects of paramilitary organizations on the theory that the impact of their activities is so great that the groups substantially affect interstate commerce (akin to the impact of weapons of mass destruction, use of which is prohibited by 18 U.S.C. § 2332a). We are uncertain of the viability of these arguments (unless the paramilitary organizations could be characterized as commercial enterprises), particularly in light of Lopez. In any event, the commerce-related aspects that can be regulated would cover many of the activities of paramilitary organizations, especially in light of the breadth of permissible regulations of firearms.

II. Constitutional Limitations on Congress's Powers

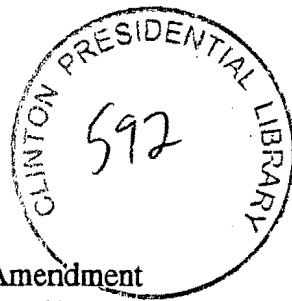
Drawing upon the sources of federal legislative power discussed in the previous section -- i.e., the Commerce Clause and the Militia Clauses -- Congress may choose to address paramilitary activities and paramilitary organizations in several different ways. In this section, we consider whether the Bill of Rights -- in particular, the First and Fifth Amendments -- imposes any affirmative restrictions on Congress's power to regulate such activities and organizations. In section A, we consider whether Congress may ban or regulate certain paramilitary operations and maneuvers. In section B, we discuss whether Congress may ban or regulate paramilitary organizations qua organizations. In section C, we consider whether Congress may impose certain restrictions on financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

A. Regulation of Paramilitary Operations, Drills and Maneuvers

Congress can avoid certain constitutional and definitional problems associated with the regulation of organizations, see infra section II-B, by instead banning or regulating certain paramilitary activities, without respect to who engages in such activity.

Banning 1. The Constitution does not bar Congress from banning the possession of certain weapons, nor from banning certain uses of those weapons (within the scope of its affirmative powers under the Militia and Commerce Clauses). Furthermore, even where Congress has not barred individuals from certain uses of weapons, it may bar such persons from banning together to engage in similar activity, such as paramilitary operations, maneuvers, and exercises. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981). Thus, a simple statute could read something like the following: "It shall be unlawful for any person over 18 years of age to engage in military or paramilitary operations, drills or maneuvers in association with X or more persons, using firearms or other dangerous weapons, if those weapons have moved in interstate commerce or if the

military or paramilitary operations, drills or maneuvers otherwise affect interstate commerce."⁸



We do not believe that such a ban would impermissibly infringe the First Amendment right to free association. It is possible, of course, that in a particular case, the paramilitary operations, drills, and maneuvers in question may have some expressive element or other associational component that is possibly worthy of some constitutional solicitude. But even where that is so, it would not change our conclusion, so long as Congress's purpose in outlawing such concerted action was unrelated to suppressing such expression or association but was instead designed solely to prevent certain conduct -- such as paramilitary operations, the formation of private armies, and the dangers associated with privately run military forces. Under the test articulated in United States v. O'Brien, 391 U.S. 367, 377 (1968), such conduct-focused regulation is permissible so long as any "incidental" restrictions on First Amendment freedoms are no greater than is essential to the furtherance of a substantial or important governmental interest. As the court explained in Vietnamese Fishermen's Ass'n v. Knights of the KKK, 543 F. Supp. 198, 208-09, 216 (S.D. Tex. 1982), a statute such as that suggested here, i.e., one barring individuals from engaging in paramilitary activity, passes the O'Brien test comfortably. In particular, the proposed statute in essence would only ban association insofar as such association took the form of the conduct that Congress wishes to eliminate -- paramilitary preparation. Organizations and their members, and unaffiliated individuals, would remain entirely free to band together for other purposes, to meet as a group, and to express any viewpoints they desire.

may be further
Of course, this type of broad ban on activity might sweep within its scope some activity that not only is explicitly and uniquely expressive in nature, but that also does not threaten the harms that Congress wishes to address -- for example, Civil War battle reenactments and the filming of television productions depicting combat. Even under the O'Brien test, such an incidental restriction on activity protected by the First Amendment might in such cases be considered greater than is "essential" to further the government's interest. The statute probably should, therefore, contain exceptions for activities such as these. Care should be used, however, to ensure that the line between covered and noncovered activity is not implicitly drawn pursuant to impermissible content-based distinctions, for that would raise independent First Amendment concerns. Perhaps, therefore, Congress could add an intent requirement so as adequately to address these concerns -- for example, a requirement that the activity be "with the intent to prepare for actual armed combat."⁹

⁸ The age restriction is suggested so as to exclude from coverage the ubiquitous childhood playground cops-and-robbers escapade.

⁹ In most of the cases currently in the public eye, such an intent requirement will be susceptible of easy proof: the persons engaged in the activities readily acknowledge that such is their intent. This requirement would also have the benefit of being closely tied to the purpose underlying the statute. Another possibility is to limit the prohibition to operations undertaken with actual weapons that are operable or potentially operable. But

2. Instead of banning certain activity, Congress could impose certain restrictions on such activity, or require persons wishing to engage in such activity to register with the government and provide certain information that is germane to Congress's regulatory interests. This would be similar to disclosure requirements that Congress attaches to all sorts of activity, such as business transactions, lobbying, solicitation of charitable donations, and political activities. Moreover, the government can require that individuals register their firearms and other weapons. We therefore see no first constitutional bar to a congressional requirement that individuals register with, and reveal pertinent information to, the government as a condition for engaging in concerted paramilitary activity.

However, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the individual, requiring such disclosure could violate the Fifth Amendment's protection against self-incrimination. Haynes v. United States, 390 U.S. 85, 96 (1968) (requiring disclosure of certain firearms impermissible because it almost automatically indicated illegal possession). If the "pervasive effect of the information called for . . . is incriminatory," the disclosure may not be compelled. Albertson v. SACB, 382 U.S. 70, 79 (1965) (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory). In order to trigger Fifth Amendment problems, however, the correlation between disclosure and incrimination must be "exceedingly high." Haynes, 390 U.S. at 97. Only "real and appreciable" risks of incrimination are impermissible, id.; "speculative and insubstantial" risks do not raise constitutional concerns, see Marchetti v. United States, 390 U.S. 39, 54 (1968).

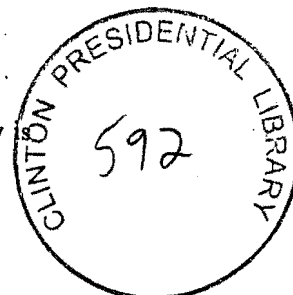
B. Regulating Private Paramilitary Organizations

In this section we discuss whether the Constitution bars Congress from regulating, not activity as such, but paramilitary organizations. Congress might, for example, decide to regulate such organizations through registration and disclosure requirements.

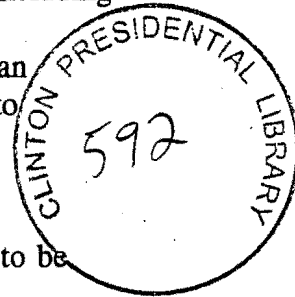
As far as we are aware, Connecticut is the only state that has taken such an approach. See Conn. Gen. Stat. Ann. § 27-102 (1991) (requiring officers of "private military force" to file annual sworn statements with secretary of state including copy of organization's bylaws, rules and membership roster).¹⁰ Connecticut appears to impose its reporting requirements only upon groups or organizations with some continuity of structure and existence, such as a club or society. See id. (assuming that a "private military force" will have officers, members, bylaws and rules). The Connecticut statute further defines "private military force" as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of

such a limitation may not cover all of the instances of concern.

¹⁰ As we explain below, Connecticut's requirement of membership disclosure almost certainly unconstitutional.



drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience." Id. § 27-101. Even this definition might subsume many associations of individuals who have no intent of ever banding together for actual concerted paramilitary activities. Therefore, Connecticut explicitly excludes from its definition various groups such as governmental military units, reserve corps of any institution of learning, a society of war veterans, the Boy Scouts, and any person acting or appearing in any theatre, motion picture or television production while actually engaged in representing therein military characters or scenes. Id. If a federal statute is drafted, certain constitutional challenges could be avoided by including a similar list. Alternatively, it might be wise to track the definition of "military organization" offered by an expert witness in the Vietnamese Fishermen case, i.e., an organization that makes use of a "command structure, training and discipline so as to function as a combat or combat-support unit." 543 F. Supp. at 203.¹¹



Assuming that neither Congress nor the states made the activities of such organizations unlawful (that is, unless such organizations would be virtually certain to be breaking the law in some respect), there would be no constitutional bar to requiring "paramilitary groups" to register with the government, to disclose their officers, and to have the state make public such information, so long as the affected groups are defined with sufficient specificity.¹²

Indeed, even where there would be a first amendment violation in requiring disclosure or revelation of an organization's members, see below, it has never been disputed that if an organization engages in certain activity that the state properly may regulate, the state can require the organization to register with the state and to disclose its officers (i.e., the persons who speak and act on the organization's behalf) as a condition of engaging in such regulated activity. See, e.g., Communist Party of the United States v. SACB, 367 U.S. 1, 97-101 (1961); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463-64 (1958). The state may require information about an organization's purposes, activities, officials and even

¹¹ So, for example, Congress could define regulated "paramilitary organizations" as those organizations that are formed for the purpose of engaging in drills or maneuvers with firearms or other dangerous weapons, and that make use of paramilitary training and a command structure, in order to function as a combat unit or as a combat-support unit or to prepare for actual paramilitary combat. So as to avoid First Amendment problems, the definition should be drafted without reference to the organization's ideologies, beliefs, and advocacy.

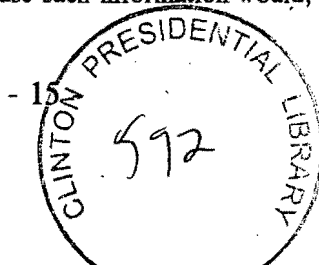
¹² The characteristics of banned organizations would have to be defined with sufficient specificity to ensure fair notice to potential defendants of what constitutes a criminal offense and to protect against arbitrary and/or discriminatory enforcement. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Posters 'N' Things, Ltd. v. United States, 114 S. Ct. 1747, 1754 (1994) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). For an example of a possible definition that likely would pass constitutional muster, see supra note 11.

employees. Id.¹³ This is true with respect to all sorts of organizational activity, such as business transactions, see NAACP, 357 U.S. at 464-65; lobbying, see United States v. Harriss, 347 U.S. 612 (1954), solicitation of charitable donations, see, e.g., International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, 689 F.2d 541, 556 (5th Cir. Unit A 1982), political activities, see, e.g., Buckley, 424 U.S. at 63 (discussing requirement that political committees and candidates register with FCC), etc. There is, therefore, no reason that the state could not require paramilitary groups to register with, and reveal pertinent information to, the state as a condition for engaging in concerted paramilitary activity. For example, such an organization could be required to disclose its officers and its bylaws. Similarly, we see no difficulty in requiring such an organization to disclose any firearms and weapons that the organization itself (as opposed to its members) owns or possesses. Nor does the Constitution bar Congress from requiring such organizations to notify the state of any paramilitary activities or training in which it plans to engage.¹⁴

Names of members
On the other hand, serious constitutional problems would be raised by a statute requiring paramilitary organizations to disclose the names of their members or persons who have made contributions to the organizations. In a long line of cases, the Supreme Court has ruled that such disclosure requirements are subject to the "closest scrutiny," because they impose considerable burdens on the organizations' members' freedom of association. See, e.g., Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91-92 (1982); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295-96 (1981); Buckley v. Valeo, 424 U.S. at 64-66; Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460-61. That scrutiny almost certainly would prohibit a requirement that paramilitary organizations disclose their membership or list of contributors, at least with respect to organizations that (in addition to mere paramilitary activity and training) engage in advocacy of particular beliefs and ideas. Such a requirement invariably would chill the associational rights of persons who wish to become members of, or contribute to, such organizations. Accordingly, a court would invalidate such a requirement, absent an

¹³ However, insofar as the services performed by employees of an organization may be motivated by a desire to thereby "contribute" to the group and associate themselves with the causes of the group, disclosure of the names of such employees may be barred, pursuant to a showing of actual deterrence of such association. See Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 94-98 (1982) (suggesting that first amendment may permit small, unpopular party to decline to reveal persons who have provided services thereto, because of likelihood that such revelation would chill associational rights of those persons who "choose to express their support for an unpopular cause by providing services rendered scarce by public hostility and suspicion").

¹⁴ However, as explained above, insofar as any of the required disclosures would be "invariably indicative" of unlawful activity by the organization, requiring such disclosure could well violate the Fifth Amendment's protection against self-incrimination. If the disclosure requirements are "directed at a highly selective group inherently suspect of criminal activities," and if the "pervasive effect of the information called for . . . is incriminatory," such disclosure may be not be compelled. Albertson, 382 U.S. at 79 (requiring disclosure of membership in Communist party impermissible because such information would, virtually by necessity, be incriminatory).



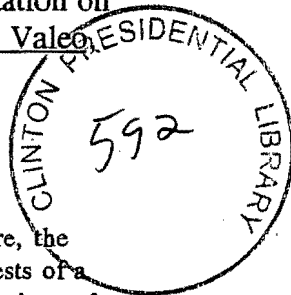
"overriding and compelling state interest" and a "substantial relation" between the information sought and the state's interest. Brown, 459 U.S. at 92 (citations omitted). This is a test that is virtually impossible for the state to meet.¹⁵ Moreover, even if that strict test somehow were met in a particular case, unpopular organizations (and the private paramilitary groups certainly would fall in this category) nonetheless would receive an exemption from such a requirement upon a showing of a "reasonable probability that the compelled disclosure . . . will subject [the members or contributors] to threats, harassment, or reprisals from either Government officials or private parties." Id. at 93 (quoting Buckley, 424 U.S. at 74).

C. Contributions

In this section we discuss whether the Constitution bars Congress from banning either financial contributions to paramilitary organizations, or contributions intended to be used for paramilitary operations.

1. A prohibition on financial contributions to paramilitary organizations may be at odds with the First Amendment. Many paramilitary organizations, in addition to engaging in paramilitary activities, advocate particular political perspectives. There is a strong argument that a contribution to such an organization is a form of political expression and association that is at the heart of the First Amendment, and thus restrictions on such contributions warrant exacting constitutional review. See Buckley v. Valeo, 424 U.S. 1, 16-25 (1976) (per curiam) (political contributions implicate freedoms of expression and association). See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression."). A statute barring contributions to paramilitary organizations probably would not be subject to the more lenient O'Brien standards that govern First Amendment challenges to the regulation of conduct that happens to have an expressive component. Indeed, in assessing a limitation on the dollar amount that persons could contribute to political campaigns in Buckley v. Valeo,

¹⁵ Buckley is the only recent case in which such a requirement has survived such scrutiny. There, the Court upheld a campaign-contributor disclosure requirement because of threefold governmental interests of a high magnitude: alerting voters of the sources of a candidate's funding, which would facilitate predictions of the candidate's future performance in office; deterring corruption; and detecting violations of contribution limitations. See 424 U.S. at 66-68. These sorts of interests would not be present in the case of a membership disclosure requirement for paramilitary organizations. Much older precedents in which the Ku Klux Klan and the Communist Party were required to disclose membership lists -- see Bryant v. Zimmerman, 278 U.S. 63 (1928) (KKK); Communist Party of the United States v. SACB, 367 U.S. 1, 97-105 (1961) (Communist Party) -- are of little lasting value, and arguably have implicitly been overruled or have lapsed into desuetude. See, e.g., Albertson, *supra* (disclosure of membership in Communist Party would violate Fifth Amendment); Courier-Journal v. Marshall, 828 F.2d 361, 365-366 (6th Cir. 1987) (Bryant has been implicitly overruled and should no longer be relied upon).

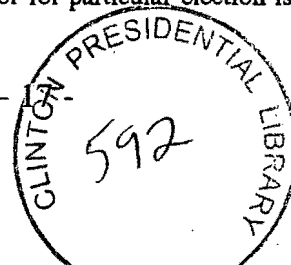


the Supreme Court said that the O'Brien standard did not apply to a limitation on the dollar amount that persons could contribute to political candidates.¹⁶

Although it applied heightened First Amendment scrutiny, the Court in Buckley upheld the limitation, on the grounds that it served the constitutionally sufficient interest of "prevent[ing] of corruption and the appearance of corruption spawned by real or imagined coercive influence of large financial contributions' on candidates' positions and on their actions if elected to office." Id. at 26. It is unclear whether a ban on contributions to paramilitary organizations could survive strict scrutiny. For one, the Court subsequently has described Buckley as "identif[y]ing" a single narrow exception to the principle that limits on political activity [are] contrary to the First Amendment: . . . the perception of undue influence of large contributors to a candidate." Citizens Against Rent Control, 454 U.S. at 296-97 (emphasis in original). The "narrow exception" of Buckley would be unavailable to justify restrictions on contributions to private military organizations. Cf. Brown v. Socialist Workers' '74 Campaign Committee, 459 U.S. 87 (1982) (interests advanced and accepted by the Court in Buckley are inapplicable when it comes to minor political parties). Moreover, Buckley involved a limitation on the amount of contributions that an individual could make, not an outright ban, thus leaving an outlet for persons to "assist in a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U.S. at 28.

2. Assuming that it would be within its enumerated powers, Congress could pass a statute prohibiting financial contributions to paramilitary organizations that are made for the purpose of assisting private military activities, where such activities are themselves made unlawful by federal law. Under principles articulated in cases involving restrictions related to affiliation with certain types of groups, such a ban would not violate the First Amendment if (i) the contribution was made with the knowledge that private military operations were illegal, and (ii) with the specific intent of furthering illegal aims. See Healy v. James, 408 U.S. 169, 186 (1972); Elfbrandt v. Russell, 384 U.S. 11, 16-17 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 511 (1964). In addition, the statute would have to be written so as to describe the "knowledge and intent" requirements with sufficient clarity to survive a claim that it is unconstitutionally vague. See Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

¹⁶ The full protection afforded political contributions in Buckley probably cannot be explained away on the grounds that Buckley is just a case about participation in electoral politics. Rather, as the Court in Buckley itself indicated, it was about political advocacy generally. See Buckley, 424 U.S. at 16-17. And in a later case involving campaign contributions, the Court defined that form of speech as encompassed within the broad First Amendment right to "discuss publicly and truthfully all matters of public consequence." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)). See also McIntyre v. Ohio Election Comm'n, No. 93-986, slip op. at 13 (April 19, 1995) (core political speech need not center on advocacy for particular candidates or for particular election issues; it involves the general "advocacy of a politically controversial viewpoint").



enforcement."). At the same time, the statute would have to be written so as to describe those requirements sufficiently narrowly to survive a claim that it "sweeps within its ambit other activities that constitute an exercise" of protected First Amendment rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). See Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620 (1980) (ordinance prohibiting door-to-door solicitations of contributions by charitable organizations that did not use at least 75% of their receipts for "charitable purposes" was overbroad in violation of the First Amendment).

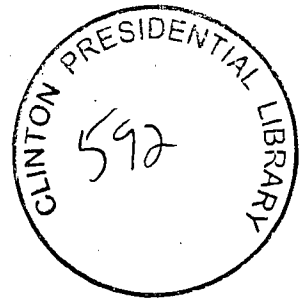
3. It is a difficult question whether Congress also may prohibit financial contributions that are made with the intent of assisting paramilitary activities, even where such activities are not themselves unlawful. Again, such a statutory ban would have to be within the scope of congressional power, and it would need to be carefully drafted so as to avoid vagueness and overbreadth problems. The critical inquiry is whether it is possible to distinguish a ban on contributions made for the purpose of assisting lawful private military activities from a ban on contributions to lawful private military organizations that we believe would raise serious First Amendment concerns under Buckley v. Valeo. Although the issue is far from clear, plausible distinctions could be made.

To begin with, Buckley is not directly on point. Buckley involved a limitation on the purest form of political speech and political association: expression of support for a candidate. It was apparently for that reason that the Court said that it could not decouple any nonspeech elements that may have been reflected in campaign contributions from the speech elements. A ban on contributions to paramilitary organizations triggers concerns under Buckley, because it has a direct impact on the right to express support for, and associate with, a group with a particular set of values.

By contrast, a ban on financial contributions for paramilitary activities arguably relates to "separately identifiable conduct [that may] be perceived by others as expressive of particular views, but which, on its face, does not necessarily convey any message." Cohen v. California, 403 U.S. 15, 18 (1971). Compare Elrod v. Burns, 427 U.S. 347, 363 n.17 (1976) (plurality opinion) (political affiliation requirements imposed on government employees sought to control "association and belief per se, not any particular form of conduct"). That the contributor could still voice support for the values and goals of private military organizations by making a general purpose donation to such groups -- let alone speaking out on behalf of and joining one -- lends further credence to the distinction between the ban on financial contributions for paramilitary activities and a ban on contributions to paramilitary organizations. To the extent that the contribution made for the purpose of paramilitary activities does contain elements of protected political expression and association, the prohibition would satisfy First Amendment requirements if it serves an important or substantial interest that is unrelated to the suppression of communication and the incidental restriction on speech is no greater than essential to the achievement of that interest. O'Brien, 391 U.S. at 377. See Texas v. Johnson, 491 U.S. 397, 410 (1989) (asserted interest underlying statute prohibiting desecration of flag -- the preservation of the flag as a symbol

of nationhood and national unity -- was directly related to the suppression of expression, because it reflected concern over the expression of "less positive concepts" of the flag).

In Buckley, the Court said that even if expenditures on campaigns could be characterized as conduct, the restriction at issue in the case was directly related to the suppression of expression -- curbing the voice of individual voters in elections -- and therefore failed the O'Brien test. 424 U.S. at 17. A ban on contributions for paramilitary activities seemingly would not have the same relationship to expression as the limitation in Buckley. Therefore, that part of the O'Brien test would be satisfied. However, the ban still would have to serve an important or substantial interest. We do not assess in this memorandum the possible interests that might be weighty enough to justify the ban.



④



①

* I am ^{directing} ~~directing~~ P.G. to coordinate
an inter agency agreement of donated materials
termed ~~as~~ ^{as} I found that to the poor
people & to ^{report} ~~report~~ projects to see
the ^{result} ~~result~~ of that agreement
[going a quality at present]

- Probable whether FBI can assemble info that met a federal criminal law resolution
- T. the extent they are assembling info on federal criminal law resolution ~~resolution~~

- F B I Charter chart permit - F B I to

- pre primary act - predicate

1. plank inty has good and not really

Spence draft

⑥ 7-8 board contracts = 13.5 $\times$ 106 ops operating incl

① Organized that have been selected a arrested -

OK to publish now a book

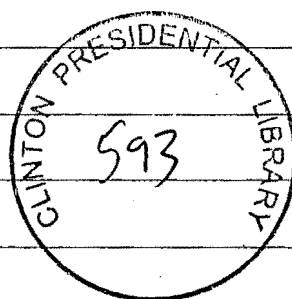
I it would be a very ~~small~~ ~~small~~ ~~group~~ but
one last 10 years -

(2) list of agencies that FBI has or going back
for investigation -
- FBI should ^{should} ~~can~~ publish info name of ags -
yes, analyze

- ③ groups where FBI doesn't have an investigation but reports that of advocating violence -
- FBI reporting guidelines can preclude investigation
 - also not present info credible evidence that they have
 - real constitutional problem ~~where~~ where there is no credible evidence of violation of law

④ only that are engaged expect primary for illegal activity - there are few of ~~these~~ these

⑤ I have asked AG to direct E.O. to require FBI to report on true nature of terrorist ~~organized~~ groups



- Want to hold off on promising to publish or name of organized - real not actual problem -

Eng and - no ~~long~~ just started

→ Paramilitary organizations -

probably yes
Have found in
prior related
reports

⑥ SC could order AG to list all paramilitary ~~orgs~~ ~~orgs~~ of which AG knows

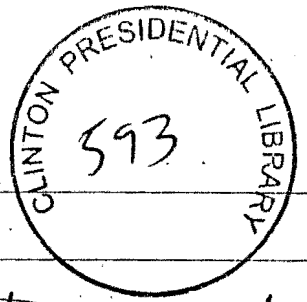
⑦ AG probably doesn't have authority to ask paramilitary ~~orgs~~ ~~orgs~~ to they forward a disclosure that

⑧ Purpose of publishing this names is ~~very~~ ~~difficult~~ difficult

⑨ Congress has power to regulate paramilitary ~~orgs~~ ~~orgs~~

BC could

→ President Duménil



⑥ FBI could ~~gather~~ ~~not~~ can't gather info about
who any about who else there is
no credible info ~~from~~ [even to
believe] that the sig of has revealed
for now -

⑦ PC can:

① ask AG for interview and ques to conduct
study around

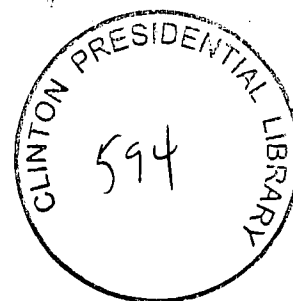
② AG/Sec defense propose committee to regulate
para-military

③ Difference between para military organized &
diverted terrorist activity -

• we are unclear about para military organized
even if no intent to conduct ~~a~~ ~~some~~
armed activity

THE WHITE HOUSE
WASHINGTON

May 25, 1995



PRIVILEGED AND CONFIDENTIAL

MEMORANDUM FOR LEON PANETTA
HAROLD ICKES

CC: RAHM EMANUEL

FROM: ABNER MIKVA
JAMES CASTELLO J.E.C.
CHRIS CERF

SUBJECT: Regulation of Militias or Terrorist Groups

Two weeks ago, you asked White House Counsel to provide a "quick" legal judgment as to the constitutionality of several proposals to regulate militias. Our provisional opinion was reflected in a memo of May 10, which was forwarded to Leon and a copy of which is attached. To summarize, we concluded that one of the proposals--to require militias to publish membership lists--was almost surely unconstitutional, while others--such as to require militias to register with the federal government--raised less serious constitutional issues, which probably could be surmounted.

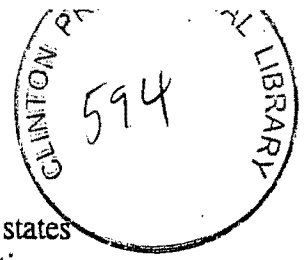
More recently, you asked DOJ to provide, by this weekend, definitive judgments about the constitutionality of several similar proposals to regulate "organizations that support terrorism." These questions *may* yield different answers from those that we gave with respect to regulating "militias." But, in any event, it is not possible for DOJ to give *definitive* answers to these questions quickly, since many of the questions are ones of first impression and will require surveying a number of relevant but not dispositive constitutional cases and then determining their likely application to the proposals now under review. Given the time and effort this will require, both our office and the lawyers at DOJ thought it would be advisable at the outset to share our policy views about the proposals under review.

All of the lawyers analyzing these proposals (in this office and at DOJ) strongly believe it is a serious mistake--as a policy *but especially* as a political matter--to impose militia controls of the type now being discussed, even if they would be constitutional.

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- As a *policy* matter, such controls are of doubtful necessity, given that 41 states already have laws that ban either the creation of private military organizations or private paramilitary training that threatens civil disorder. Nor does it seem likely that the proposed federal controls would enhance federal law enforcement, given DOJ's reinterpretation of the terrorism investigation guidelines and Congress' expected passage of an anti-terrorism bill. Rather, the most likely effect of the proposed controls would be to greatly increase fears about government encroachment on individual freedom and thus, paradoxically, to fuel public sympathy for militia organizations. A recent Gallup poll found that 39% of Americans already believe the federal government "has become so large and powerful it poses an immediate threat to the rights and freedoms of ordinary citizens."
- It follows, in our judgment, that as a *political* matter the proposed controls would be extremely ill-advised. The President's anti-terrorism legislation has already brought about an unprecedented alliance on legal issues between groups like the ACLU and the NRA, who have issued a joint public statement warning that an overreaction to the bombing will jeopardize "basic freedoms." If the President were now to call for registration of militias, for publication of their membership lists, or for reporting of their activities, he would likely prompt these and other groups on the left and right to join together in even stronger opposition, with renewed calls for investigation of Waco and so on. A recent Los Angeles Times poll found that, among those who owned guns or who described themselves as "conservative" or "white fundamentalist Christians," substantially more people were "concerned that government would excessively restrict the average person's civil liberties" than were worried that government "would fail to enact strong new anti-terrorism legislation." Only respondents describing themselves as "liberals" disagreed.

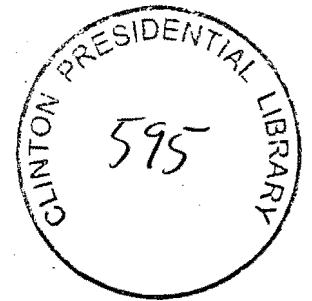
Thus far, we believe the President's statements and actions in the wake of the Oklahoma City tragedy have placed him just where he should be: a) with a clear record of responding to a new threat with sensible new policies, and b) with an equally clear record of sensitivity to the rights of individuals. We worry that further proposals of the type now being discussed could be depicted in very menacing terms to average citizens and could tip the political balance against the President.

Attachment

THE WHITE HOUSE

WASHINGTON

May 10, 1995



MEMORANDUM TO ABNER MIKVA

FROM: CHRIS CERF *Che*

RE: Federal Regulation of Paramilitary Groups

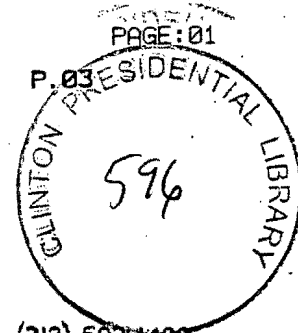
Leon has asked for your "quick" reaction to a proposal to regulate paramilitary groups by requiring them (1) to release membership lists; (2) report military-style maneuvers and training to the FBI and local authorities; (3) release an inventory of weapons; (4) and register with federal authorities.

The question raises two constitutional issues: whether congress has the power to regulate such groups and whether the exercise of that power would violate the first amendment rights of the groups or its members. OLC is currently considering these issues and will report back on Thursday. My preliminary conclusion, however, is that Congress has the power to regulate paramilitary organizations under either the Commerce Clause (with appropriate findings) or Article I Sec. 8, which gives it the power to "discipl[ine] the Militia." This power should provide a sufficient basis for federal regulation along the lines of items (3) and (4) above, and probably item (2) as well.

Requiring such an organization to release its membership list, however, would likely contravene the associational rights identified in NAACP v. Alabama. Congress nonetheless could take even this step in the case of a true paramilitary organization bent on terrorist activities or acts of intimidation. In such an instance, Congress presumably would have a sufficiently substantial interest to trump the First Amendment.

The fact that the above-described regulations may be constitutional does not make them a good idea. The biggest problem is one of definition: How do you distinguish between a hunt club that favors military-style characteristics (fatigues, officers, etc.) and a true paramilitary organization? My strong view is that, no matter how carefully crafted the statute is, the Administration would be picking a huge fight with such organizations and the interest groups that represent them. My sense is that we would reap more political negatives than positives if we choose to go down this road.

An Alternative: Many states already ban true paramilitary operations, which prohibitions have survived constitutional challenges. Why not simply urge the states to take an even more aggressive stance in monitoring, regulating and, where appropriate, banning such activities.



HERRICK, FEINSTEIN LLP
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

2 PARK AVENUE NEW YORK, N.Y. 10016 (212) 592-1400

For Harold
From Jen

May 10, 1995

**THE FEDERAL GOVERNMENT'S POWER TO
REGULATE PARAMILITARY ORGANIZATIONS**

1. Summary

The federal government, by legislation, may require paramilitary groups to:

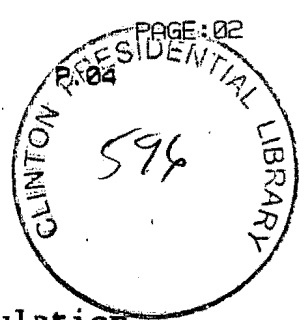
- register their existence with federal authorities;
- notify federal and state authorities when they engage in combat maneuvers and military training;
- ? — • disclose a list of members; and
- provide an inventory of weapons.

2. The Power to Regulate Private Military Organizations

It is well-settled that private military associations can be regulated by the state government. Both the Supreme Court in 1886, and, more recently, a United States District Court in 1982, have upheld the power of state governments to ban private military activities. These cases make clear that there is no constitutional right to associate as a private military organization.

In Presser v. Illinois, 116 U.S. 252 (1886), the defendant was indicted under an Illinois statute which prohibited "any body of men whatever, other than the regular organized volunteer militia of this State, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms ... without license of the Governor thereof, which license may at any time be revoked...." 116 U.S. at 253. In upholding the prosecution, the Court stated:

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without and independent of an Act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under



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our political system they are subject to the regulation and control of the State and Federal Governments....

116 U.S. at 267 (emphasis supplied).

More recently, in Vietnamese Fishermen's Association v. The Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Texas 1982), an association of Vietnamese fishermen sought to enjoin the military arm of the Ku Klux Klan (the self styled Texas Emergency Reserve) from associating in private military or paramilitary companies under a Texas statute which was virtually identical to the one at issue in Presser. The group sought the injunction on the ground that it was necessary to remedy violations of their civil rights, and to protect them from racial intimidation and violence.

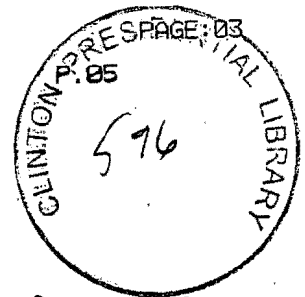
In reviewing the KKK's challenge, the district court stated that it could find "no authority for the proposition that military operations ... are protected by the First Amendment." Id. at 208. As an initial matter, the court concluded that military activities constitute "conduct," rather than "speech." The court further noted that even if such military activity could be characterized as speech, "the threat of violence ... is precisely such an irrefutable and dangerous 'communication' that it resembles the use of 'fighting words,' and, therefore, is not protected by the First Amendment." Id. (citing L. Tribe, American Constitutional Law, § 12-8, at 605). See Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Most importantly, the court held that private military activity could be regulated even if it assumed that such conduct were an exercise of free speech. The Court noted that, under United States v. O'Brien, 391 U.S. 367 (1968):

"A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. at 209 (quoting O'Brien, supra, 391 U.S. at 377).

The court pointed out that (a) under Presser, the state has the power to regulate private military activity; (b) the government interest in regulating such activity -- in view of its inherent danger -- is weighty; (c) the government interest is not intended to, nor does it, suppress free expression; and (d) any



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restriction on First Amendment rights would be minimal, as the defendants were free to express their views by means other than the threat of military force. Id. See also Person v. Miller, 854 F.2d 656 (4th Cir. 1986), cert. denied, 489 U.S. 1011 (1989), (upholding contempt finding based upon a North Carolina statute similar to those in Presser and Vietnamese Fishermen's Ass'n).¹

Finally, it is important to note that regulation of paramilitary groups does not violate the "right of the people to keep and bear arms" under the Second Amendment. The courts in both Presser and Vietnamese Fishermen's Ass'n rejected arguments based upon the Second Amendment. See Presser, supra, 116 U.S. at 266-67; Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 210. Indeed, we are unaware of any federal court decision striking down any gun control legislation on Second Amendment grounds.

Thus, in United States v. Miller, 307 U.S. 174 (1939), the defendant challenged, on Second Amendment grounds, his conviction for interstate transportation of a short-barrel shotgun under the National Firearms Act of 1934. In rejecting the defendant's argument, the Court explained that the Second Amendment's right to bear arms exists only within the context of a "well regulated militia." As the Court explained:

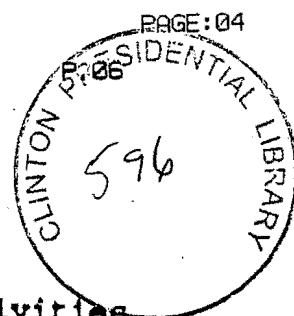
In the absence of any evidence tending to show that possession or use of a [short-barrel shotgun] at this time has some reasonable relation to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument ... With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

Id. at 178 (emphasis supplied). See also United States v. Lewis, 445 U.S. 55, 66 (1980) ("legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties"); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992), cert. denied, 113 S.Ct. 1614 (1993); United States v. Toner, 728 F.2d 115, 128 (2d Cir. 1984).

Hence, the district court in Vietnamese Fishermen's Ass'n, supra, rejected the defendants' Second Amendment challenge to the injunction on private military action, stating:

At least twenty-two other states have statutes barring private military associations. See, e.g., Cal. Penal Code § 11460; Conn. Gen. Stat. §§ 27-101, 27-102; N.Y. Mil. Law § 240. We are unaware of any state statute that has been successfully challenged.

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An injunction against defendants' military activities does no violence to the Second Amendment. By its express language, that Amendment prohibits only such infringement on the bearing of weapons as would interfere with "the preservation or efficiency of a well-regulated militia," organized by the State. United States v. Miller, 307 U.S. 174, 178, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939); United States v. Birmley, 529 F.2d 103, 107 (6th Cir. 1976).... In short, the Second Amendment does not imply any general constitutional right for individuals to bear arms and form private armies. See United States v. Miller, 307 U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939); United States v. Cruikshank, 92 U.S. 542, 553, 23 L.Ed. 588 (1876).

543 F.Supp. at 210 (footnote omitted).

3. Implying Federal Powers to Regulate Private Military Groups

The Supreme Court, in Presser, recognized that the federal government, as well as the states, could regulate private military associations:

Military organizations and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal Governments....

116 U.S. at 267 (emphasis supplied).

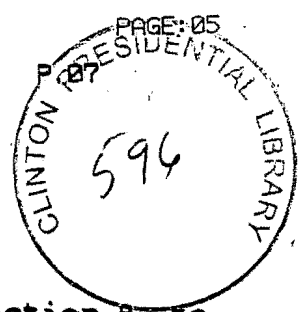
There are a number of additional sources from which to imply federal power to regulate private military activity. First, Article I, section 8 of the Constitution, gives to Congress broad powers to raise and regulate armies.² Implicit in these powers (or necessary and proper to their implementation) is the right to prevent others from taking military force into their own hands.

Second, federal sovereignty under Article I, section 8, includes the power to regulate state militias as well. The National Guard is the only authorized militia on the state level. Gilligan v. Morgan, 413 U.S. 1, 9 (1973). As the Court recognized,

² Article I, section 8 provides that Congress shall have the power: "[t]o raise and support armies ... [t]o make rules for the Government and Regulation of the land and naval forces ... [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o provide for organizing, arming and disciplining, the Militia ... reserving to the States ... the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress"

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the federal government is authorized under Article I, section 8, to provide for organizing, arming and disciplining the Guard. King v. St. Vincent's Hospital, 502 U.S. 215, 216 n.2 (1991); Perpich v. Department of Defense, 496 U.S. 334, 344-46 (1990). Plainly, the federal government's authority to regulate state militias should permit similar restrictions upon private military activity as well.

Third, federal power to regulate paramilitary activity can be derived from the government's right to prevent insurrections; implicit in that right is the prerogative to take reasonable steps to prevent an insurrection before its occurrence. Cf. Martin v. Mott, 25 U.S. 19 (1827); Raymond v. Thomas, 91 U.S. 712 (1875).

Fourth, the federal government undoubtedly has broad power to protect itself from destabilizing forces. As a New York State appellate court observed in another context:

There can be no justification for the organization of [a private military] force. Its existence would be incompatible with the fundamental concept of our form of government. The inherent potential danger of any organized private militia, even if never used or even if ultimately placed at the disposal of the government is obvious. Its existence would be sufficient, without more, to prevent a democratic form of government, such as ours, from functioning freely, without coercion, and in accordance with the constitutional mandates.

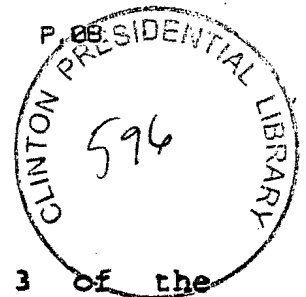
Application of Cassidy, 268 A.D. 282, 51 N.Y.S.2d 202, 205 (2d Dept. 1944), aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1947) (emphasis supplied). See also Vietnamese Fishermen's Ass'n, supra, 543 F.Supp. at 216 (finding regulation furthered a "vital government interest because the proliferation of private military organizations threatens to result in lawlessness and destructive chaos").

Fifth, and finally, notwithstanding the recent Supreme Court ruling in United States v. Lopez, 1995 W.L. 238424 (April 26, 1995), federal regulation of private militias can be based upon the authority of Congress "[t]o regulate Commerce ... among the several

In Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 95 (1961), the Supreme Court upheld the Subversive Activities Control Act based upon the unremarkable proposition that the federal government can take action to protect against threats to itself -- even without evidence of military training or military activity in the United States. While the cases upholding regulation of the Communist Party have not been explicitly overruled, they have been largely discredited.

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States...." under Article I, section 8, clause 3 of the Constitution (the Commerce Clause). While the Court's decision in Lopez may engender some uncertainty concerning the scope of Congressional authority under the Commerce Clause, it seems clear that legislation regulating private military organizations meets the criteria established by the Court's decision.'

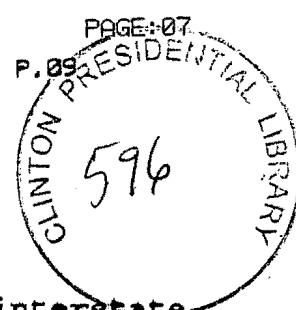
In Lopez, the Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe, is a school zone," 18 U.S.C. § 922(q)(1)(A). In reaching its decision, the Court distilled its prior decisions based upon the Commerce Clause, and identified three categories of activity that Congress may regulate under the Commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities that have a "substantial affect" on interstate commerce. Id. at * 6. After noting that the statute did not implicate the first two areas, the Court focused its analysis on the "substantial affect," concluding as follows:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

Id. at * 11.

There are several factors that distinguish regulation of private military activity from the legislation at issue in Lopez. Most importantly, the regulation concerns groups of people -- and weapons that have, presumably, been transported across state lines -- "in interstate commerce." Id. at * 6. Moreover, the activities of these organizations, which are comprised of large groups of

* In his majority opinion, Chief Justice Rehnquist noted that the Court's decision "may in some cases result in legal uncertainty," but pointed out that "Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty 'to say what the law is'" Lopez, 1995 WL 238424 at * 10 (quoting Marbury v. Madison, 1 Cranch. 137, 177 (1803)).



HERRICK, FEINSTEIN 117

individuals, have a far more "substantial affect" on interstate commerce than a "local student at a local school." Id.

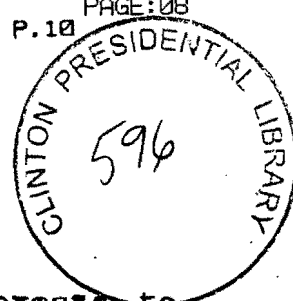
4. Disclosure of Membership Lists

In New York ex rel Bryant v. Zimmerman, 273 U.S. 63 (1928), the Supreme Court allowed disclosure of Ku Klux Klan membership lists under a New York state statute directing any association of more than twenty persons which requires an oath as a prerequisite or condition of membership to register and file with the secretary of state a copy of its constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and list of its officers.

The authority to compel such disclosure was limited, however, by the Supreme Court in NAACP v. State of Alabama, 357 U.S. 449 (1958) and its progeny. In that case, the Court recognized that an order of a state court requiring the NAACP to make its membership lists available to the state would have a deterrent effect upon the members' right to freedom of association guaranteed by the First and Fourteenth Amendments. Consequently, the Court held that the NAACP did not have to turn over its membership lists because the state had failed to show a substantial interest in obtaining them. Similarly, in Gibson v. Florida Legislative Investigation Co., 372 U.S. 539 (1963), the Court stated that the test to reconcile the government's interest in seeking disclosure of an organization's members and the members' right to freedom of association is whether the state can "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546. See also Bates v. Little Rock, 361 U.S. 516 (1960); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).⁶

⁶ This is even more likely if the definition of a paramilitary organization were to require the participation of a minimum number of persons. For example, Connecticut's statute defines a private military force as "any group of five or more persons organized or associated together in a camp, group, organization, company, association or society, or in any other manner, for the purpose of drilling or maneuvering with firearms or other dangerous weapons, or with imitations, copies or replicas thereof, or for the purpose of giving or acquiring military training or experience...." Conn.Gen.St. § 27-101.

⁶ In several of the "Communist Party" cases, the Court found a compelling interest justifying disclosure of the names of members. See, e.g., Uphaus v. Wyman, 360 U.S. 72 (1959) (state's compelling interest in self-preservation justified disclosure of the names of persons who attended summer camps allegedly operated by subversive organizations). See also Communist Party of United (continued...)



HERRICK, FEINSTEIN LLP

There are several compelling government interests to justify obtaining the membership lists of private military associations. For example, the identity of members would be important to the federal government for the purpose of locating weapons and understanding the nature of the military activities engaged in or contemplated by the groups.

In addition, the federal government's well-recognized power under the Commerce Clause to require licensing and registration in connection with firearms and ammunition would similarly provide the authority to require disclosure of membership lists and an inventory of weapons. See generally 18 U.S.C. § 921, et seq.; 26 U.S.C. § 5841, et seq.

5. Conclusion

Regulation of paramilitary groups by the federal government is both permissible under the Constitution and appropriate in view of the threat these organizations pose. Any regulation should be based upon clear legislative findings, and should define the groups to be regulated, focusing on their military activities. Statutes which are already on the books in close to two dozen states provide guidance for defining the groups and the prohibited activities.

Elizabeth Holtzman
Ronald J. Levine
Joshua F. Scheier

6 (...continued)

States v. Subversive Activities Control Board, supra, 367 U.S. 1; Barenblatt v. United States, 360 U.S. 109 (1959); Wilkinson v. United States, 365 U.S. 399 (1961). As noted above, however, the continuing viability of the "Communist Party" precedents is questionable.

7 A number of constitutional scholars at Harvard University, New York University, the University of Southern California and other institutions were consulted in the preparation of this memorandum. None seriously doubted the federal government's power to regulate paramilitary organizations under appropriately drafted statutes.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. memo	Reed, Bruce to the President re: Policy Recommendations on Counterterrorism (1 page)	04/26/1995	P5	597
001b. paper	Clinton Administration Counterterrorism Initiative (2 pages)	04/26/1995	P5	598
001c. paper	Attorney General's Guidelines on Domestic Terrorism Investigations (1 page)	04/26/1995	P5	599
001d. outline	Administratoin Terrorism Package (3 pages)	04/26/1995	P5	600
001e. paper	Clinton Administration Counterterrorism Initiative (5 pages)	04/26/1995	P5	601
002a. memo	Reed, Bruce/Cerda, Jose to the President re: Policy Options in Response to Oklahoma City (3 pages)	04/24/1995	P5	602
002b. list	Actions Sought in Light of Oklahoama City (3 pages)	n.d.	P5	603
003a. memo	Reed to the Chief of Staff re: Leadership Meeting on Counterterrorism (1 page)	04/25/1995	P5	604
003b. talking points	Draft Talking Points Bipartisan Leadership Meeting April 26, 1995 (1 page)	n.d.	P5	605
003c. briefing paper	Possible Questions (1 page)	n.d.	P5	606
003d. briefing paper	[Legal Procedures, Policy and FBI Investigations Relating to Counterterrorism] (1 page)	04/25/1995	P5	607

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9158

FOLDER TITLE:

Oklahoma City Bombing - Apr 19, '95 [4]

2006-0326-F

eh847

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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004. paper	Counter-Terrorism Initiatives Proposed by Criminal Division [draft] (2 pages)	04/23/1995	P5 608
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COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9158

FOLDER TITLE:

Oklahoma City Bombing - Apr 19, '95 [4]

2006-0326-F

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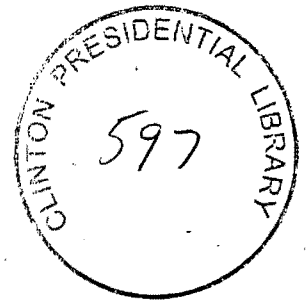
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April 26, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED

SUBJECT: Policy Recommendations on Counterterrorism

The attached document summarizes our consensus recommendations on additional executive actions the Administration should take and additional legislative measures we should call for to investigate, prosecute, and punish domestic terrorism. These recommendations are based on a comprehensive inventory of federal law enforcement agencies -- Justice, FBI, ATF, Secret Service, Customs, and Treasury.

In addition to the steps you have already announced, we recommend actions in three broad areas:

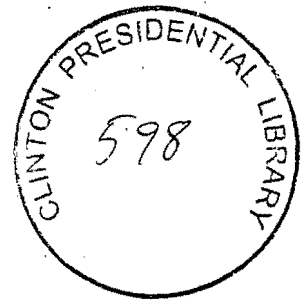
- 1) New investigative tools
- 2) Increased prosecution
- 3) Tougher penalties

These steps will require new legislation, and can be included as amendments to the anti-terrorism bill. Some measures will require new FY96 appropriations; we will recommend offsets to Congress next week. A few may need to be included in a small emergency FY95 supplemental.

On the domestic security guidelines, we recommend asking the leadership in both parties to take part in a joint process to review whatever changes should be made.

4/26/95

Clinton Administration Counterterrorism Initiative



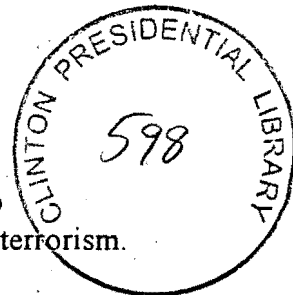
I. Actions Already Announced by the President

- 6515
- 1) Pass the Omnibus Counter-terrorism Act of 1995
 - 2) Provide more tools to federal law enforcement agencies fighting terrorism
 - o Amend the Fair Credit Reporting Act to ease access to financial and credit reports in anti-terrorism cases.
 - o Amend Federal law to adopt, in national security cases, the standard currently used in obtaining a "pen register" in a routine criminal case.
 - o Pass legislation to require hotel/motel and common carriers to provide records necessary for fighting terrorism.
 - o Fully fund the FBI's "digital telephony" initiative to assure court-authorized law enforcement access for electronic surveillance to digitized communications.
 - o Create and allocate funds for a special FBI counterterrorist and counterintelligence fund.
 - o Create an interagency Domestic Counterterrorism Center headed by the FBI.
 - 3) Conduct terrorism threat assessment of every federal facility in the country within the next 60 days.
 - 4) Direct GSA to replace the federal building in Oklahoma City.
 - 5) Direct the FBI Director, the Attorney General, and the National Security Adviser to prepare a Presidential Decision Directive authorizing any and all further steps necessary to combat foreign and domestic terrorism.

II. New Legislative Proposals

1) INVESTIGATIONS

- 460
253
- o Hire new agents, prosecutors, and other federal law enforcement personnel to investigate, deter, and prosecute terrorist activity.



- o Amend the Electronic Communications Privacy Act of 1986 to constitutionally enhance use of electronic surveillance to fight terrorism.
- o Amend the Posse Comitatus Act to permit military participation in crime-fighting involving weapons of mass destruction.
- o Require the BATF to study and report on: 1) the tagging of explosive materials for purposes of identification and detection; 2) whether common chemicals used to manufacture explosives can be rendered inert for use in explosives, and 3) whether controls can be imposed on certain precursor chemicals used to manufacture explosives.
- o Pass legislation to require, within 1 year, the inclusion of taggants in standard explosive device raw materials, which will permit tracing of the materials post-explosion.

2) PROSECUTION

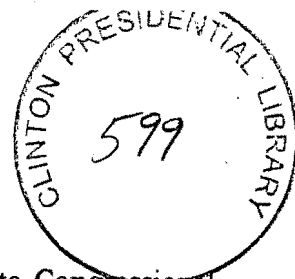
- o Amend Federal law to criminalize the use of all chemical weapons to include all forms of chemical weapons.
- o Make it illegal to possess explosives knowing that they are stolen.
- o Extend the statute of limitations on the National Firearms Act to five (5) years.
- o Provide the Secretary of Treasury authority to direct the use of Treasury Department aircraft to support emergency law enforcement situations.
- o Amend reward authority statutes to reduce restrictions on making rewards.

3) PENALTIES

- o Increase the penalty for anyone convicted of transferring a firearm or explosive knowing that it will be used to commit a crime of violence or drug trafficking crime.
- o Amend 18 U.S.C. §1111 to provide enhanced penalties for *all* current and former Federal Employees against terrorist attacks.

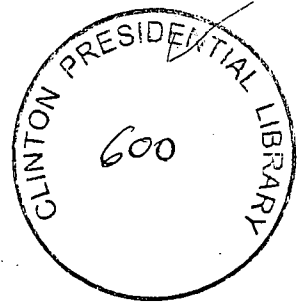
4/26/95

ATTORNEY GENERAL'S GUIDELINES ON DOMESTIC TERRORISM INVESTIGATIONS



- The Attorney General's Guidelines were originally developed in 1976 in response to Congressional inquiries concerning FBI investigations that resulted in the abuse of Constitutional rights.
- Attorney General Levi issued the Guidelines for Domestic Terrorism Investigations to end this pattern of abuse, while preserving the FBI's power to conduct internal security investigations where there is a threat of force or violence.
- Since being issued in 1976, the Attorney General Guidelines have been altered only slightly and only with substantial Congressional input prior to alterations.
- It is appropriate, given recent events, to consider whether the Guidelines need to be changed in any way.
- So that Congressional input can be guaranteed, I am asking the Senate Majority and Minority Leaders, the House Speaker and the House Minority Leader to each name a representative to a working group that, along with the Attorney General and the White House Counsel, will examine the question of what amendments to the guidelines might be appropriate
- It is my hope that this group, working in a bi-partisan manner, ^{to} can develop recommendations for any necessary changes to the Attorney General's guidelines that will maximize our ability to fight domestic terrorism while protecting our precious privacy rights

Administration Terrorism Package
(outline)



1) Take immediate steps that don't require new laws

- o Vigorously prosecute those involved in the Oklahoma City bombing
- o Maximize federal emergency assistance to Oklahoma City to recover from the disaster and restore facilities
- o Conduct terrorism threat assessment of every federal facility in the country within the next 60 days
- o Clarify the Attorney General's "Domestic Surveillance Guidelines" for the FBI in order to maximize counter-terrorism activity while protecting constitutional rights

2) Pass the Omnibus Counter-terrorism Act of 1995 (already announced).

3) Enact additional statutory reforms to provide more tools to federal law enforcement agencies investigating terrorism cases

already on
Hill

- o Amend the Fair Credit Reporting Act to ease access to financial and credit reports in anti-terrorism cases (already announced).

new
legislation

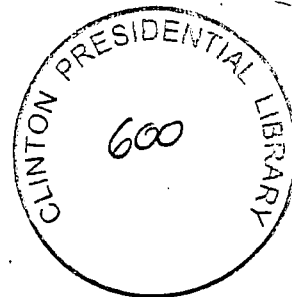
- o Amend the Foreign Intelligence Surveillance Act (FISA) of 1978 and the Electronic Communications Privacy Act of 1986 to adopt, in national security cases the standard currently used in obtaining a "pen register" in a routine criminal case(already announced).

new
legislation

- o Pass legislation to require hotel/motel and common carriers to provide records necessary for fighting terrorism(already announced).

already law
only new

- o Fully fund the FBI's "digital telephony" initiative to assure court-authorized law enforcement access for



electronic surveillance to digitized communications(already announced).

- o Create and allocate funds for a special FBI counterterrorist and counterintelligence fund(already announced).

- o Create an interagency Domestic Counterterrorism Center headed by the FBI(already announced).

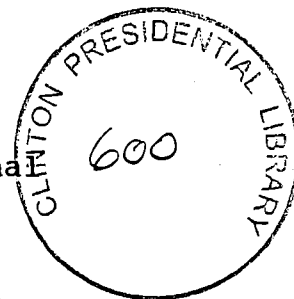
- o Amend the Electronic Communications Privacy Act of 1986 to constitutionally enhance use of electronic surveillance to fight terrorism.

- o Amend the Posse Comitatus Act to permit military participation in crime-fighting in limited, specialized circumstances. *hey have - now it is limited to "where"*

- o Pass legislation to require, within 1 year, the inclusion of taggants in standard explosive device raw materials which will permit tracing of the materials post-explosion.
- o Pass legislation to require individuals convicted of a federal felony to submit a blood sample to a federal DNA data bank.
- o Require the BATF to study and report on: 1) whether common chemicals used to manufacture explosives can be rendered inert for use in explosives, and 2) whether controls can be imposed on certain precursor chemicals used to manufacture explosives

- 4) Enact additional statutory reforms to provide more tools to federal law enforcement agencies prosecuting terrorism cases

- o Amend Chemical Weapons Act to include all forms of chemical weapons.
- o Make it illegal to possess explosives knowing that they are stolen.



- o Extend the statute of limitations on the National Firearms Act to five (5) years.
- new addition*
o Amend the Arms Export Control Act to include an "attempt" violation.
- o Amend the International Emergency Economic Powers Act to include an "attempt" violation.
- o Provide the Secretary of Treasury authority to direct the use of Treasury Department aircraft to support emergency law enforcement situations.
- 500,000 cap*
o Amend reward authority statutes to reduce restrictions on making rewards

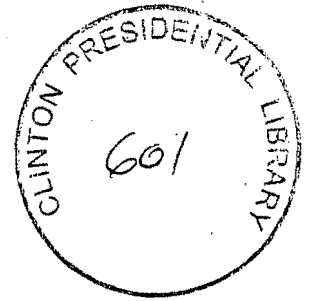
5) Enact additional statutory reforms to enhance penalties for certain terrorism crimes

- o Increase the penalty for anyone convicted of transferring a firearm or explosive knowing that it will be used to commit a crime of violence or drug trafficking crime
- o Amend 18 U.S.C. §111 to provide enhanced penalties for all current and former Federal Employees against terrorist attacks.

6) Provide additional funding for increased counter-terrorism activity

- o (Justice items to be added)
- o (Treasury items to be added)
- o (Other)

4/26/78



Clinton Administration Counterterrorism Initiative

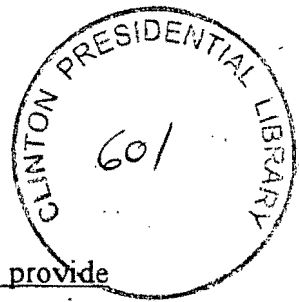
I. Actions Already Announced by the President

1) Pass the Omnibus Counter-terrorism Act of 1995

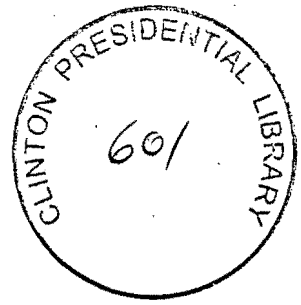
This bill would provide clear Federal criminal jurisdiction for any international terrorist attack that might occur in the United States; provide Federal criminal jurisdiction over terrorists who use the United States as the place from which to plan terrorist attacks overseas; provide a workable mechanism, utilizing United States District Judges appointed by the Chief Justice, to deport expeditiously alien terrorists without risking the disclosure of national security information or techniques; provide a new mechanism for preventing fund-raising in the United States that supports international terrorist activities overseas; and would implement an international treaty requiring the insertion of a chemical agent into plastic explosives when manufactured to make them detectable.

2) Provide more tools to federal law enforcement agencies fighting terrorism

- o Amend the Fair Credit Reporting Act to ease access to financial and credit reports in anti-terrorism cases. This legislation provides for disclosures by consumer reporting agencies to the FBI for counterintelligence and counterterrorism purposes. The FBI has no mechanism for obtaining credit reports for lead purposes in counterterrorism cases. These reports are available to used car dealers and other merchants. The FBI currently has authority under the Right to Financial Privacy Act of 1978 to obtain similar records pursuant to a "National Security Letter" signed by a high-ranking FBI official. The same procedures and safeguards would apply to credit records under this proposal.
- o Amend Federal law to adopt, in national security cases the standard currently used in obtaining a "pen register" in a routine criminal case. This proposal would extend the relaxed standard for obtaining "pen registers" and "trap and trace" device orders which already exists in routine criminal cases, to national security cases. A "pen register" is a device which records the number dialed on a telephone. A "trap and trace" device is similar to "Caller ID," providing law enforcement with the telephone number from which a call originates. Neither "pen registers" nor "trap and trace" devices permit law enforcement to monitor the actual conversations being conducted. The current, higher-than-regular standard impedes the ability of the FBI to obtain surveillance coverage of terrorists and spies.



- o Pass legislation to require hotel/motel and common carriers to provide records necessary for fighting terrorism. This proposal would require hotel/motel and common carriers such as airlines and bus companies to provide records to the FBI pursuant to authorized national security requests just as they must do now for virtually all state and local law enforcement. The FBI now must rely on the voluntary assistance of motel, hotel and other innkeepers or common carriers regarding records of terrorists who may have stayed at the establishment or used the common carrier. The FBI has found that, while some of these entities voluntarily provide such information, an increasing number refuse, absent a court order, a subpoena, or other legal protection. In a counterterrorism case being conducted pursuant to the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, there is no legal mechanism, e.g., subpoena, available to obtain these records.
 - o Fully fund the FBI's "digital telephony" initiative to assure court-authorized law enforcement access for electronic surveillance to digitized communications. This proposal would appropriate funds to implement recent amendments to statutes governing secure telephone data transmission (digital telephony). These amendments require telephone carriers to install and maintain sophisticated equipment which will permit law enforcement to continue to conduct legal electronic surveillance.
 - o Create and allocate funds for a special FBI counterterrorist and counterintelligence fund. This proposal will fund costs associated cases which arise in connection with terrorism crises, including logistics and other support.
 - o Create an interagency Domestic Counterterrorism Center headed by the FBI. This proposal will establish a partnership effort between the Justice Department, including the FBI, and other federal and state law enforcement authorities to coordinate counterterrorism efforts within the United States.
- 3) Conduct terrorism threat assessment of every federal facility in the country within the next 60 days. The President has directed the Attorney General to conduct this assessment and report her recommendations in 60 days. The assessment has already begun.
- 4) Direct GSA to replace the federal building in Oklahoma City.

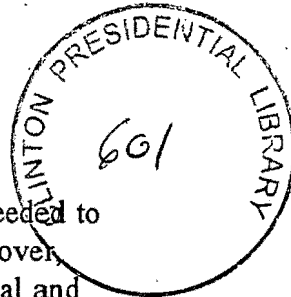


- 5) Direct the FBI Director, the Attorney General, and the National Security Adviser to prepare a Presidential Decision Directive authorizing any and all further steps necessary to combat foreign and domestic terrorism.

II. New Legislative Proposals

1) INVESTIGATIONS

- o Hire new agents, prosecutors, and other federal law enforcement personnel to investigate, deter, and prosecute terrorist activity.
- o Amend the Electronic Communications Privacy Act of 1986 to constitutionally enhance use of electronic surveillance to fight terrorism. This proposal would: permit any federal felony to be used as a basis for an electronic surveillance order; ease restrictions on the use, in American court proceedings, of information from electronic surveillance conducted by foreign governments; forbid suppression of electronic surveillance evidence unless law enforcement acted in bad faith in obtaining the evidence; authorize emergency electronic surveillance in situations involving threats by domestic terrorist organizations; authorize roving wiretaps where it is not practical to specify the number of the phone to be tapped, such as where a target uses multiple pay phones; allow the FBI to obtain records of local telephone calls, without the need for a court order, as they can now obtain records of long-distance calls; and require telephone companies and/or service providers to preserve evidence until a court order could be obtained. None of these changes would alter the requirement for probable cause prior to engaging in electronic surveillance.
- o Amend the Posse Comitatus Act to permit military participation in crime-fighting involving weapons of mass destruction. This proposal would amend Federal laws, which severely limit the role of the military in domestic law enforcement, to permit military participation in criminal cases involving chemical, biological and other weapons of mass destruction; areas in which the military has specialized expertise.
- o Require the BATF to study and report on: 1) the tagging of explosive materials for purposes of identification and detection; 2) whether common chemicals used to manufacture explosives can be rendered inert for use in explosives, and 3) whether controls can be imposed on certain precursor chemicals used to manufacture explosives. In light of recent bombing incidents, there is a need to develop technologies that will make it possible to detect concealed explosives. Additionally, if



bombings do take place, a means of providing some clues is needed to lead investigators to those responsible for the explosion. Moreover, since explosives can be manufactured using common agricultural and household materials, it is important to determine whether such materials can be manufactured in a manner so that their use in explosives is unlikely. Finally, the study would determine whether any reasonable controls can be placed on precursor chemicals, e.g., ammonium nitrate, which have many legitimate uses.

- o Pass legislation to require, within 1 year, the inclusion of taggants in standard explosive device raw materials which will permit tracing of the materials post-explosion. This proposal would require the inclusion of microscopic particles in certain raw materials, thereby permitting law enforcement to trace the source of explosives even after a device has been detonated.

2) PROSECUTION

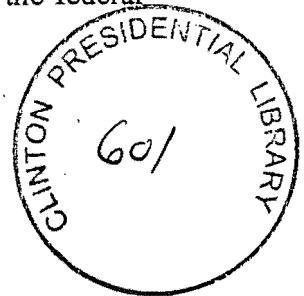
- o Amend Federal law to criminalize the use of all chemical weapons to include all forms of chemical weapons. This bill would amend federal law to include chemical weapons in non-gaseous form. Under existing law, chemical weapons in gaseous form are covered, but those which are in liquid or solid form are not. Thus, for example, an individual who introduces dioxin in solid form into the water supply of a city would not be chargeable under current law.
- o Make it illegal to possess explosives knowing that they are stolen. This proposal would conform explosives laws to existing firearms statutes, making it a crime for an individual to possess explosives which the individual knows are stolen.
- o Extend the statute of limitations on the National Firearms Act to five (5) years. This proposal would extend from three (3) to five (5) years the statute of limitations for prosecution for violations of the National Firearms Act, which deals with explosive and incendiary bombs. This change brings the statute of limitations for these offenses in line with similar criminal provisions.
- o Provide the Secretary of Treasury authority to direct the use of Treasury Department aircraft to support emergency law enforcement situations. This proposal would authorize the Secretary of Treasury to authorize the

use of Treasury Department aircraft in support of emergency law enforcement crises.

- o Amend reward authority statutes to reduce restrictions on making rewards. This proposal would provide the Attorney General authority to pay a reward which is not subject to the spending limitations contained in 18 U.S.C. §§ 3059 and 3072, provided that any reward of \$100,000 or more may not be made without the approval of the President or the Attorney General, and such approval may not be delegated.

3) PENALTIES

- o Increase the penalty for anyone convicted of transferring a firearm or explosive knowing that it will be used to commit a crime of violence or drug trafficking crime. This proposal will provide a mandatory penalty of not less than 10 years for any person who transfers a firearm knowing or having reasonable cause to believe that a firearm will be used to commit a crime of violence or drug-trafficking crime.
- o Amend 18 U.S.C. §111 to provide enhanced penalties for all current and former Federal Employees against terrorist attacks. The existing statute only protects enumerated categories of current Federal employees. The proposed statute would provide enhanced penalties for crimes against all current and former Federal employees, and their immediate families, when the crime is committed because of the official duties of the federal employee.

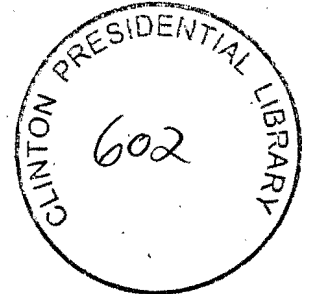


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April 24, 1995



MEMORANDUM FOR THE PRESIDENT

FROM: Bruce Reed
Jose Cerda

SUBJECT: Policy Options in Response to Oklahoma City

At Erskine's direction, the major law enforcement agencies -- Justice, FBI, ATF, DEA, Secret Service, U.S. Marshals Service -- are preparing an exhaustive inventory of legislative and enforcement actions the Administration can take to prevent, deter, and punish domestic and international terrorism. The Justice list is attached.

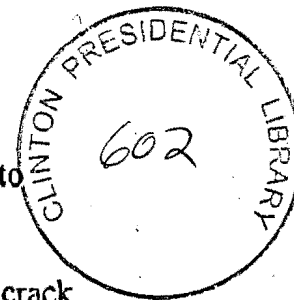
Most of these proposals appear to have merit, although some of them are rather obscure and not all of them have a direct terrorism connection. We recommend that you highlight a few major legislative and enforcement initiatives, described below, and leave many of the details to the law enforcement agencies and Congress. While the Administration should continue to take the lead in pursuing expanded authority through legislation, we should not get lost in the legislative bidding war. Our greatest emphasis should be on immediate enforcement actions that we can take on our own.

One major and controversial element of this strategy -- revising the Attorney General's domestic security guidelines -- is still under deliberation at the Justice Department. We expect a decision memorandum from them on Tuesday morning.

We recommend the following:

1. Nationwide Crackdown on Terrorism: Appoint Attorney General Reno to head a concerted, sweeping, high-profile crackdown on terrorism that seeks to identify, isolate, and root out domestic terrorism and related criminal activity. Its charge should be clear and simple: We will do whatever is necessary, and we will keep at it for as long as it takes. The historical precedent is Kennedy's crackdown on organized crime. This effort would include the interagency Domestic Counter-Terrorism Center, headed by FBI Director Freeh, which you have already called for.

2. **New Investigative Tools:** We need to give law enforcement new tools to investigate these crimes;



- * Give federal law enforcement the expanded authority they need to crack down on domestic terrorism by revising the Attorney General's outmoded guidelines regarding domestic security procedures. [Recommendation pending from Justice.]

- * Give law enforcement authorities access to information they need to investigate terrorist crimes. This includes measures you have already announced that would require information from credit reporting agencies and financial institutions; permit "trap and trace" and "pen register" devices to monitor phone traffic; and require hotels and common carriers to provide records. It also includes some non-controversial changes to privacy statutes to eliminate unnecessary technical burdens.

3. **New Enforcement and Prosecutorial Tools:** We need to press for immediate passage of the Omnibus Counter-Terrorism Act of 1995, along with the following new prosecutorial tools and penalties:

- * Amend the Posse Comitatus Act to permit the armed forces to assist in cases involving illegal use of chemical, biological, and other weapons of mass destruction.

- * Amend the Chemical Weapons Act to cover non-gaseous chemical weapons, such as dropping dioxin pellets in the water supply.

- * ATF is prepared to propose a permit system for the purchase of significant quantities of explosives. This might not have affected the Oklahoma City bombing, but ATF believes it would be instrumental in deterring other bombings. Justice has proposed a licensing system for those who do weapons and explosives training.

- * Make terrorism a predicate offense for money laundering, so that any money derived from terrorist activities triggers existing money laundering statutes.

- * Make it a federal crime to attack or kill all current and former federal employees.

- * Prevent convicted felons from regaining the ability to possess firearms after their release.

4. **Increased Resources to Combat Domestic Terrorism:** We are still working with OMB to reconcile what the agencies want with what we can afford. The most compelling requests include:

- * Request 270 new FBI agents and another 600 FBI personnel to engage in counter-terrorism activities.

- * Request additional funding for other FBI activities, such as the FBI command center, DNA identification procedures, and a new laboratory.

- * Expand ATF's investigative and laboratory capacities in the explosives and firearms unit with 500 special agents, 250 inspectors, and 100 support personnel.

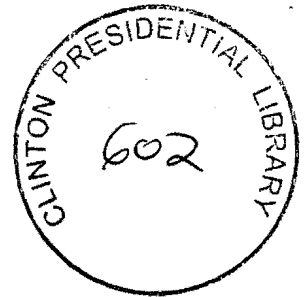
- * Additional resources for the Secret Service for expanded protection due to terrorist threats.

- * Additional resources for Customs to monitor arms trafficking.

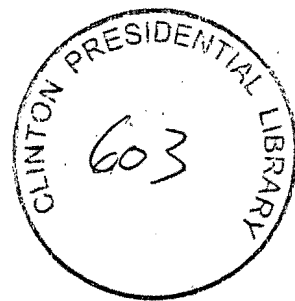
- * Full funding of the digital telephony legislation you signed last year (already announced).

- * Creation of a special FBI counter-terrorist and counter-intelligence fund (already announced).

5. Other Announced Actions: We should carry out other actions you have already announced, including a threat assessment of federal facilities; the Presidential Decision Directive from FBI, Attorney General, and NSC; and rebuilding the federal building in Oklahoma City.



ACTIONS SOUGHT IN LIGHT OF OKLAHOMA CITY

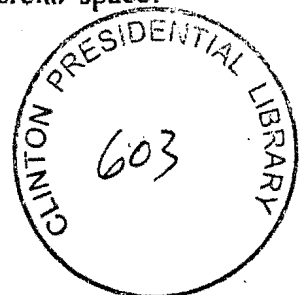


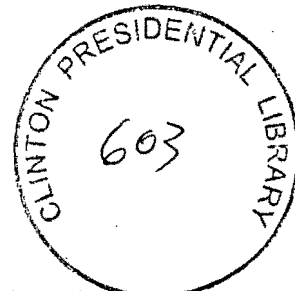
I. Substantive Legal Changes

- o Pass the Omnibus Counter-Terrorism Act of 1995.
- o Amend the Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510, to eliminate unnecessary technical burdens without sacrificing legitimate privacy concerns regarding wiretaps in national security cases.
- o Amend 18 U.S.C. §111 to include all current and former Federal employees under statutes that now make it a Federal offense to threaten, assault or kill only certain kinds of Federal employees on account of their official duties.
- o Amend Chemical Weapons Act to include chemical weapons in non-gaseous form.
- o Amend violent crime statutes to prevent convicted felons from regaining the ability to possess firearms.
- o Pass licensing system for those who provide weapons and explosives training.
- o Amend the Posse Comitatus Act to permit the armed forces to assist in cases involving illegal use of chemical, biological, or other weapons of mass destruction.
- o Amend Fair Credit Reporting Act and Right to Financial Privacy Act to require credit reporting agencies and financial institutions to provide information in defined national security investigations.
- o Amend statutes to permit "trap and trace" and "pen register" devices in national security cases.
- o Pass legislation to require hotel/motel and common carriers to provide records pursuant to formal national security request.
- o Pass legislation to establish a single data-encryption standard.
- o Amend award authority statutes to remove/reduce restrictions.
- o Amend FCC statutes to require reimbursement to law enforcement agencies for costs associated with the sale of radio frequencies

Additional Funding Requests

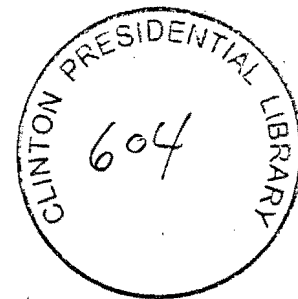
- o Appropriation for implementation of the Digital Telephony legislation (Pub. L. 103-414).
- o Appropriation for implementation of common radio frequencies which can be used by all law enforcement agencies under appropriate management.
- o Appropriation for FBI enhanced DNA identification procedures and laboratory.
- o Appropriation for FBI Project DRUGFIRE which will permit digital storage of bullet impressions so as to permit expedited and accurate firearms comparisons.
- o Appropriation for additional FBI and other personnel to engage in tactical operations, general counter-terrorism activities, investigations requiring proficiency in a foreign language, and security background checks.
- o Appropriation for additional computer technology and aviation needs.
- o Appropriation for DOJ Emergency Assistance Account for aid to state and local authorities in disaster situations
- o Appropriation to expand FBI legal attache program with increased sites and personnel to assist in terrorist prevention activities
- o Appropriation to expand and improve FBI command center
- o Appropriation for additional prosecutors, paralegal and support staff to handle terrorism and violent crime prosecutions.
- o Appropriation to permit replacement of the outmoded computer equipment and replace it with equipment which will increase the efficiency and productivity of operations to keep pace with the demands placed on prosecutors in the fight against violent crime and terrorism.
- o Appropriation to purchase X-ray devices and security officers to be devoted to each U.S. Attorney's office, the magnitude of risk in these offices has been increased tremendously. The number of offices secured by the Marshals Service has been reduced dramatically as a result of moves to leased commercial space.





III. Non-Statutory Procedures

- o Conduct terrorism threat assessment at all federal agencies.
- o Create interagency Domestic Counter-Terrorism Center, headed by the FBI, to coordinate a program directed at preventing, deterring, and, as necessary, investigating domestic terrorist incidents.
- o Revise the Attorney General's guidelines regarding domestic security procedures
- o Designation of the Attorney General as the administration-wide coordinator of law enforcement policy



April 25, 1995

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: BRUCE REED

SUBJECT: Leadership Meeting on Counterterrorism

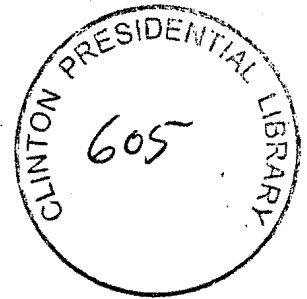
Pat Griffin and I drafted the attached talking points for tomorrow's leadership meeting. We strongly recommend that the President use the meeting to announce the remaining measures he wants Congress to include when it takes up terrorism legislation.

Senate Republicans have told us they are planning to announce their anti-terrorism bill as soon as Thursday, so tomorrow is our best chance to put a tough, reasonable package on the table. We do not have to resolve every issue by then. If the President needs more time to think about revising the domestic security guidelines -- which does not require legislation -- he should take it. But we should announce as much of our package as he is comfortable with: new investigative tools, new agents, new penalties, etc.

We met with the agencies today and resolved all the non-funding issues (new enforcement authority, new penalties). We are working with OMB to resolve the funding issues (new agents, new lab) by early tomorrow afternoon. The major sticking point will be agreeing upon FY96 offsets. We may have to decide how much we want to spend tomorrow and figure out how to offset it next week.

By midday tomorrow, we will have a fully scrubbed summary of the legislative package for the President's review (and for release after the meeting, if we decide to go forward). Nothing in the legislative package is particularly controversial, and none of it should take long for him to decide upon. Most of the controversy and debate will focus instead on the domestic security guidelines. Justice promised to send its recommendation on the guidelines to George sometime tonight.

**DRAFT TALKING POINTS
BIPARTISAN LEADERSHIP MEETING
April 26, 1995**



I. Opening Remarks

1. Report on your visit to Oklahoma City: For those who have not been there, you should tell them what it's like -- what you've seen, heard, and felt over the last several days.

2. Update on investigation: Let agencies in attendance report on any recent developments.

3. Recap what you've already called for:

- * Swift passage of the Omnibus Counter-Terrorism bill
- * Additional legislative measures on funding digital telephony, creating a special FBI counterintelligence fund, establishing a domestic counterterrorism center, and giving the FBI expanded authority to seek credit, hotel, and common carrier records and make use of pen registers
- * Threat assessment of all federal facilities
- * Rebuilding Oklahoma City
- * Presidential Decision Directive on additional steps

4. Announce additional measures you hope they will consider for their anti-terrorism legislation. Subject to your review, here is a partial list of what this package might include:

A. New investigative tools: Allowing the military to assist on cases involving chemical, biological, and weapons of mass destruction; building a new FBI lab; and whatever revisions you're prepared to recommend in the domestic security guidelines.

B. New enforcement measures: More agents (FBI, ATF, Secret Service, Treasury, Customs); a new federal crime for possessing stolen explosives; requiring ATF to work with explosives industry to develop ways of tagging explosive materials; an ATF study on how to render inert common chemicals used to manufacture explosives.

C. New and tougher penalties: Doubling the penalty for transferring a firearm or explosive knowing that it will be used to commit a crime of violence; making it a federal crime to attack or kill current and former federal employees.

5. Let's do this without partisanship, and do it quickly: This is no time for politics. The country needs us to put aside our partisan differences, and come together quickly on a swift, certain, non-political response to deal with this tragedy and prevent terrorist actions in the future. We should work on this together, without blame or rancor, and we should move as quickly as we can while still respecting the important and weighty issues involved.

6. Ask them for their ideas, and pledge to work together in the coming weeks.

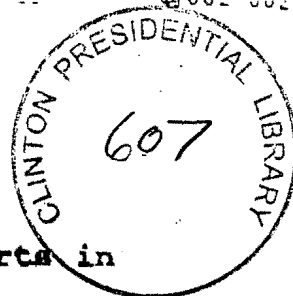


II. Possible Questions

Two issues may divide the room: habeas, and revisions to the Attorney General's domestic security guidelines. Gingrich and other Republicans might challenge you to break habeas out of the crime bill and tack it onto the terrorism bill. You might respond by saying that you support habeas reform and would support breaking it out and passing it as a stand-alone bill, but that it would be a mistake to attach what it is bound to be a divisive, partisan, drawn-out issue to a bipartisan anti-terrorism bill that for the good of the country needs to pass quickly and without a big partisan struggle.

On the guidelines, we will have to watch out for congressional efforts either to go further than we want or to codify changes into law. If they press you about your plans, you might remind them that this, too, is a matter of enormous import that should be considered carefully and not be driven by politics or legislated in haste.

You may also be asked about whether we will be asking for an FY95 emergency supplemental. A small supplemental may be necessary, but we are doing everything we can to minimize the need for FY95 money, because it will get entangled in the rescission conference.



4/25/95

1. Consumer Credit Records

The FBI needs to obtain consumer credit reports in certain international counterterrorism and foreign counterintelligence investigations. The Fair Credit Reporting Act currently does not enable the FBI to obtain consumer credit reports in such intelligence investigations. The FBI does have authority under the Right to Financial Privacy Act of 1978 to obtain financial records pursuant to a National Security Letter signed by a high-ranking FBI official. However, without comparable access to consumer credit reports under the Fair Credit Reporting Act, the FBI may well not be aware of financial institutions with whom the subject does business. The consumer credit report would give the FBI a quick knowledge of the "universe" of financial institutions with whom the subject deals.

2. Pen Registers/Trap and Trace in International Counterterrorism and Foreign Counterintelligence Investigations

The Foreign Intelligence Surveillance Act of 1978 requires the same level of probable cause and legal findings to obtain a pen register and/or trap and trace device as to obtain authorization for a wiretap or microphone surveillance.

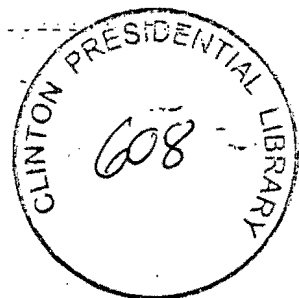
Because pen register and trap and trace records (i.e. a real time record of telephone numbers called by the subject, and the phone numbers from which the subject was called) are frequently relevant to such cases at a point when the legal standard for a FISA wiretap could not be met.

The Foreign Intelligence Surveillance Act should be amended to authorize the FBI to obtain pen registers and trap and trace techniques on a standard comparable to that in the criminal Title III wiretap statute.

3. Occupancy Records of Inn Keepers, Motels, Hotels, etc.

The FBI cannot require innkeepers to produce information regarding whether and when subjects of international counterterrorism and foreign counterintelligence investigations may have stayed at the hotel, motel, etc. Because these are intelligence investigations, the FBI cannot generally obtain criminal process to compel the production of such information.

The FBI therefore requests that it be able to obtain such occupancy information based upon a National Security Letter request signed by a senior FBI official.

DRAFT**COUNTER-TERRORISM INITIATIVES
PROPOSED BY CRIMINAL DIVISION****New Authorities**

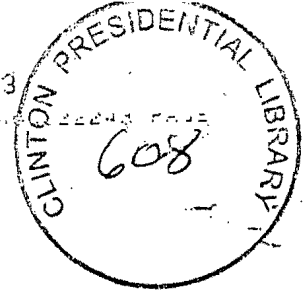
- Counter-Terrorism Legislation. We will push for early enactment of the Omnibus Counter-Terrorism Act of 1995.
- Improved Electronic Surveillance Capabilities. We will seek to amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. § 2510 et seq.), to improve our ability to conduct electronic surveillance, particularly with respect to terrorist crimes. These amendments will relax unnecessary technical burdens without sacrificing legitimate privacy concerns. They will make acquisition of evidence faster and more efficient, helping us prevent acts of domestic terrorism and quickly identify and locate individuals who commit such acts.
- Domestic Intelligence Surveillance Authority. We will also seek authority -- under strict judicial supervision and fully consistent with the protections of the Constitution -- to conduct limited electronic surveillance to collect intelligence on individuals or groups suspected of advocating or planning terrorist attacks.
- Authorities to Prevent Future Attacks:
 - Include all current and former Federal employees under statutes that now make it a Federal offense to threaten, assault or kill only certain kinds of Federal employees on account of their official duties
 - Enact legislation to ensure that:
 - Chemical weapons, beyond poisonous gas, are covered by the Chemical Weapons Act;
 - Federal statutes prohibiting possession of firearms by felons apply even to felons whose convictions have been expunged by lapse of time;
 - Persons training others in use of certain kinds of weapons or explosive devices be subject to a strict licensing system.

DRAFT

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**DRAFT**Authorities to Facilitate Investigations:

- Amend the Posse Comitatus Act to permit U.S. armed forces to assist in cases involving illegal use of chemical, biological, or other weapons of mass destruction
- Require certain critical commercial establishments, e.g., car rental agencies and explosives dealers, to employ recordkeeping and other techniques, such as CCTV/ videotaping of transactions, to facilitate investigations

Structural Improvements to Prevent and Respond to Terrorist Incidents

- Group*
Domestic Counter
- Require all Federal agencies to review their organization and structure to determine vulnerabilities and to assess and improve methods to prevent terrorist attacks directed at the Federal Government
 - ○ Create an interagency Domestic Counter-terrorism Center, headed by the FBI, to coordinate a program directed at preventing, deterring, and, as necessary, investigating domestic terrorist incidents
 - Create, within the DOJ Criminal Division, a Crisis Management Unit to coordinate with the FBI-managed center and to maintain and rapidly deploy a well-trained prosecutorial response team

① AG's guidelines - are they required by law or are not

② 1970s

③ updated 1980s

- in place for decades
- contained in guidelines

DRAFT

see re
- prohibit using speeches as a
pretext for monitoring
- except terrorist investigations
can be protected as
speech speech due
- must purge ~~for~~ DOJ files
of speech as se
- could cut back on some of
the guidelines

7 min res -
- Oct 94 letter
- interagency group
- AG leads it
- recently

on going reinterrogation
- White House to receive
some recent comments
forward to Dallas
every news

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	To Ickes, Harold re: [CNM Calls] (1 page)	06/12/1996	P5 <i>609</i>
002. briefing paper	"Families" - Background information on survivors, families and victims of the Oklahoma City bombing (partial). (1 page)	n.d.	~~b(7)(C), b(7)(F)~~

COLLECTION:

Clinton Presidential Records
Chief of Staff
Harold Ickes
OA/Box Number: 9158

FOLDER TITLE:

Oklahoma City Bombing - Apr 19 '95 [1]

Eric Holzer
2006-0326-F
eh42

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

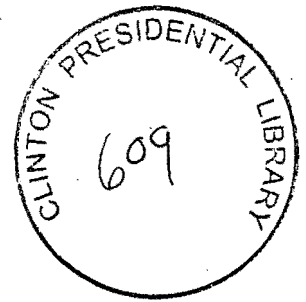
Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

WJC LIBRARY PHOTOCOPY

6/12/96

Harold,



Laura Quinn called because she said Senator Daschle is "beating her up" about the POTUS making the CNM calls and that he is very ticked off that it has not happened yet. She knows that you called the 4 individuals which she is very thankful for. At least point, she thinks all the POTUS needs to do is to call both Eli and Erskine and encourage them to call the 4 individuals to set up the meeting. She does not feel that a call from you to Erskine and Eli will get them to "jump". She thinks that if the President does not call Eli and Erskine, it will send the wrong signal and that the Senators will think that the President does not care about the project. They will think that you made the calls not because the President asked you to do it, but because Quinn, Daschle and others "beat you up" to do it.

She thinks that the senators will greatly appreciate all your efforts, but unless the POTUS calls Eli and Erskine (or the 4 individuals), the senators + Eli and Erskine will NOT think the President is behind this project despite your reassurances.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Bruce N. Reed to Steve Ricchetti at 15:52:12:94. Subject: Talking Points. (2 pages)	04/25/1995	P5 3075
002. email	Bruce Reed to Robert E. Litan at 08:47:43.91. Subject: Draft Terrorism Options Memo. (3 pages)	04/25/1995	P5 3076

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Oklahoma Bombing])
OA/Box Number: 250000

FOLDER TITLE:

[04/19/1995 - 04/27/1995]

Adam Bergfeld
2006-0326-F
ab989

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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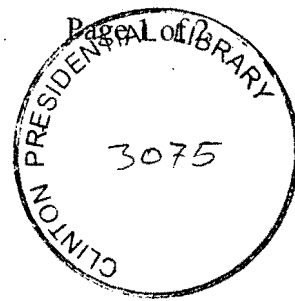
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CLINTON LIBRARY PHOTOCOPY

ARMS Email System



RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Bruce N. Reed (REED_B) (OPD)

CREATION DATE/TIME: 25-APR-1995 15:52:12.94

SUBJECT: Talking Points

TO: Steve Ricchetti

(RICCHETTI_S) Autoforward to: Gordon Li

READ: 25-APR-1995 17:06:21.78

TEXT:

PRINTER FONT 12_POINT_ROMAN

TALKING POINTS

BIPARTISAN LEADERSHIP MEETING

April 26, 1995

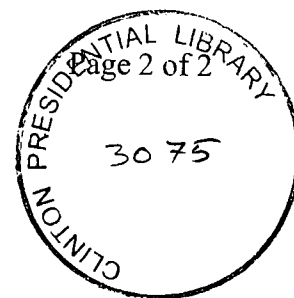
I. Opening Remarks

1. Update on investigation: any recent developments.
2. Report on your visit to Oklahoma City: For those who have not been there, you should tell them what it's like -- what you've seen, heard, and felt over the last several days.
3. Let's do this without partisanship, and do it quickly: This is no time for politics. The country needs us to put aside our partisan differences, and come together quickly on a swift, certain, non-political response to deal with this tragedy and prevent terrorist actions in the future. We should work on this together, without blame or rancor, and we should move as quickly as we can while still respecting the important and weighty issues involved.
4. Recap what you've already called for:
 - * Swift passage of the Omnibus Counter-Terrorism bill
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 - * Threat assessment of all federal facilities
 - * Rebuilding Oklahoma City
 - * Presidential Decision Directive on additional steps
5. Let them know other measures you hope they will consider for their anti-terrorism legislation [see attached list], ask them for their ideas, and pledge to work together in the coming weeks.

II. Possible Questions

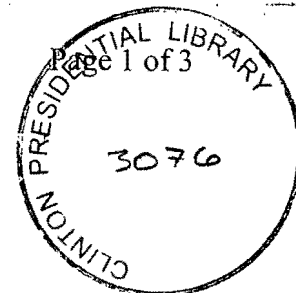
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You will need to decide whether this meeting is the right time to go into detail about revising the guidelines, which is an area where we would rather not have legislative action if we can avoid it. When they press about your plans, you might remind them that



this, too, is a matter of enormous import, that should not be driven by politics or legislated in haste.

ARMS Email System



RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Bruce N. Reed (REED_B) (OPD)

CREATION DATE/TIME: 25-APR-1995 08:47:43.91

SUBJECT: Draft Terrorism Options Memo

TO: Robert E. Litan (LITAN_R) (OMB)

READ: 25-APR-1995 10:09:47.65

TEXT:

PRINTER FONT 12_POINT_ROMAN

DRAFT

April 24, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: Bruce Reed

Jose Cerda

SUBJECT: Policy Options in Response to Oklahoma City

At Erskine's direction, the major law enforcement agencies -- Justice, FBI, ATF, DEA, Secret Service, U.S. Marshals Service -- are preparing an exhaustive inventory of legislative and enforcement actions the Administration can take to prevent, deter, and punish domestic and international terrorism. The Justice list is attached.

Most of these proposals appear to have merit, although some of them are rather obscure and not all of them have a direct terrorism connection. We recommend that you highlight a few major legislative and enforcement initiatives, described below, and leave many of the details to the law enforcement agencies and Congress. While the Administration should continue to take the lead in pursuing expanded authority through legislation, we should not get lost in the legislative bidding war. Our greatest emphasis should be on immediate enforcement actions that we can take on our own.

One major and controversial element of this strategy -- revising the Attorney General's domestic security guidelines -- is still under deliberation at the Justice Department. We expect a decision memorandum from them on Tuesday morning.

We recommend the following:

1. Nationwide Crackdown on Terrorism: Appoint Attorney General Reno to head a concerted, sweeping, high-

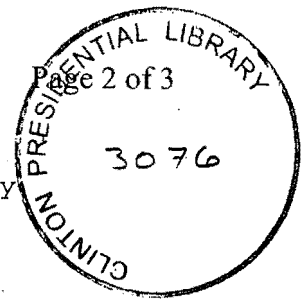
□
profile crackdown

on terrorism that seeks to identify, isolate, and root out domestic terrorism and related criminal activity. Its charge should be clear and simple: We will do whatever is necessary, and we will keep at it for as long as it takes. The historical precedent is Kennedy's crackdown on organized crime. This effort would include the interagency Domestic Counter-

□
Terrorism Center, headed by FBI Director Freeh, which you have already called for.

2. New Investigative Tools: We need to give law enforcement new tools to investigate these crimes:

CLINTON LIBRARY PHOTOCOPY



* Give federal law enforcement the expanded authority they need to crack down on domestic terrorism by revising the Attorney General's outmoded guidelines regarding domestic security procedures. [Recommendation pending from Justice.]

* Give law enforcement authorities access to information they need to investigate terrorist crimes. This includes measures you have already announced that would require information from credit reporting agencies and financial institutions; permit "trap and trace" and "pen register" devices to monitor phone traffic; and require hotels and common carriers to provide records. It also includes some non-controversial changes to privacy statutes to eliminate unnecessary technical burdens.

3. New Enforcement and Prosecutorial Tools: We need to press for immediate passage of the Omnibus Counter-Terrorism Act of 1995, along with the following new prosecutorial tools and penalties:

* Amend the Posse Comitatus Act to permit the armed forces to assist in cases involving illegal use of chemical, biological, and other weapons of mass destruction.

* Amend the Chemical Weapons Act to cover non-gaseous chemical weapons, such as dropping dioxin pellets in the water supply.

* ATF is prepared to propose a permit system for the purchase of significant quantities of explosives. This might not have affected the Oklahoma City bombing, but ATF believes it would be instrumental in deterring other bombings. Justice has proposed a licensing system for those who do weapons and explosives training.

* Make terrorism a predicate offense for money laundering, so that any money derived from terrorist activities triggers existing money laundering statutes.

* Make it a federal crime to attack or kill all current and former federal employees.

* Prevent convicted felons from regaining the ability to possess firearms after their release.

4. Increased Resources to Combat Domestic Terrorism: We are still working with OMB to reconcile what the agencies want with what we can afford. The most compelling requests include:

* Request 270 new FBI agents and another 600 FBI personnel to engage in counter-terrorism activities.

* Request additional funding for other FBI activities, such as the FBI command center, DNA identification procedures, and a new laboratory.

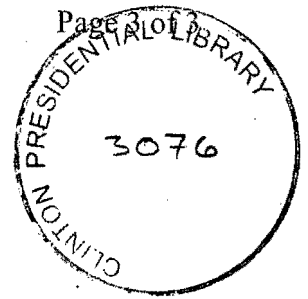
* Expand ATF's investigative and laboratory capacities in the explosives and firearms unit with 500 special agents, 250 inspectors, and 100 support personnel.

* Additional resources for the Secret Service for expanded protection due to terrorist threats.

* Additional resources for Customs to monitor arms trafficking.

* Full funding of the digital telephony legislation you signed last year (already announced).

* Creation of a special FBI counter-terrorist and counter-



☐
☐
☐
intelligence fund (already announced).

5. Other Announced Actions: We should carry out other actions you have already announced, including a threat assessment of federal facilities; the Presidential Decision Directive from FBI, Attorney General, and NSC; and rebuilding the federal building in Oklahoma City.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	William C. Hornish to Jonathan M. Prince at 10:38:19.19. Subject: Poem from the internet. [partial] (1 page)	04/25/1995	P6/b(6)
002. email	mullin@ncri.com to Ann M. Cattalini at 12:17:54.72. Subject: Re: Dave's New Job. [partial] (1 page)	04/25/1995	P6/b(6)
003. email	Bruce N. Reed to Steve Ricchetti at 15:52:12.94. Subject: Talking Points. (2 pages)	04/25/1995	P5 Dup. of ab989 001
004. email	Bruce N. Reed to Jonathan M. Prince at 12:10:01.30. Subject: stuff (3 pages)	04/26/1995	P5 3077
005. email	nobody@razorback.arc.nasa to horn_s at 17:14:39.01. Subject: The President's Speech (www coments). [partial] (1 page)	04/26/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Oklahoma Bombing])
OA/Box Number: 500000

FOLDER TITLE:

[04/25/1995 - 04/26/1995]

Adam Bergfeld
2006-0326-F
ab684

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

[004]

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Bruce N. Reed (REED_B) (OPD)

CREATION DATE/TIME: 26-APR-1995 12:10:01.30

SUBJECT: stuff

TO: Jonathan M. Prince

(PRINCE_J) (WHO)

READ: 26-APR-1995 12:10:12.22

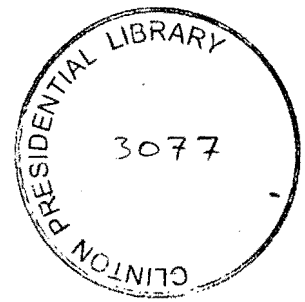
TEXT:

PRINTER FONT 12_POINT_ROMAN

DRAFT TALKING POINTS

BIPARTISAN LEADERSHIP MEETING

April 26, 1995



I. Pool Spray: [See Attached Cards]

II. Report on Oklahoma City Visit:

For those of you who have not been there, let me tell you a little about what it's like, and some of what I've seen, heard, and felt over the last several days.

III. Update on Investigation:

I want to call on representatives of the agencies who are here to provide an update on the investigation and the situation in Oklahoma City:

1. Attorney General Reno
 2. FBI Director Freeh
 3. FEMA
 4. GSA
- [FILL IN]

IV. Recap Actions We Have Already Called For:

On Sunday, I outlined several immediate steps to prevent and fight terrorism:

1. Swift passage of the Omnibus Counter-

□
Terrorism bill

2. New legislative measures to address:
 - ? Full funding for digital telephony legislation
 - ? Creating a special FBI counterterrorism fund
 - ? Creating a domestic counterterrorism center headed

by the FBI

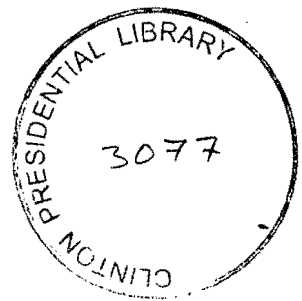
? Giving the FBI authority to investigate international terrorism through increased use of pen registers; access to consumer reporting agencies; and access to hotel, motel, and common carrier records

3. Threat assessment of all federal facilities

4. Directing GSA to replace the federal building in Oklahoma City

5. Directing the FBI Director, the Attorney General, and the National Security Adviser to prepare a Presidential Decision Directive authorizing any and all further steps necessary to combat foreign and domestic terrorism.

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V. Announce New Steps We're Calling for Today:

In the wake of the Oklahoma City bombing, I asked federal law enforcement agencies to conduct a complete inventory of additional measures we can take through legislative and executive action to combat domestic terrorism. Today, I am announcing a series of measures that will strengthen law enforcement authorities' ability to investigate, pursue, and punish domestic terrorism and criminal activity:

1. New Investigative Tools
2. Increased Enforcement
3. Tougher Penalties

VI. Announce Joint Process on Domestic Security Guidelines

[Insert DOJ graph]

4. Announce additional measures you hope they will consider for their anti-terrorism legislation. Subject to your review, here is a partial list of what this package might include:

A. New investigative tools: Allowing the military to assist on cases involving chemical, biological, and weapons of mass destruction; building a new FBI lab; and whatever revisions you're prepared to recommend in the domestic security guidelines.

B. New enforcement measures: More agents (FBI, ATF, Secret Service, Treasury, Customs); a new federal crime for possessing stolen explosives; requiring ATF to work with explosives industry to develop ways of tagging explosive materials; an ATF study on how to render inert common chemicals used to manufacture explosives.

C. New and tougher penalties: Doubling the penalty for transferring a firearm or explosive knowing that it will be used to commit a crime of violence; making it a federal crime to attack or kill current and former federal employees.

5. Let's do this without partisanship, and do it quickly: This is no time for politics. The country needs us to put aside our partisan differences, and come together quickly on a swift, certain, non-political response to deal with this tragedy and prevent terrorist actions in the future. We should work on this together, without blame or rancor, and we should move as quickly as we can while still respecting the important and weighty issues involved.

6. Ask them for their ideas, and pledge to work together in the coming weeks.

II. Possible Questions

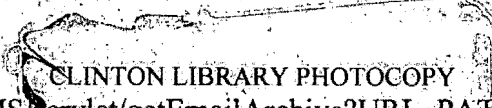
Two issues may divide the room: habeas, and revisions to the Attorney General's

domestic security guidelines. Gingrich and other Republicans might challenge you to break

habeas out of the crime bill and tack it onto the terrorism bill. You might respond by saying

that you support habeas reform and would support breaking it out and passing it as a stand-

alone bill, but that it would be a mistake to attach what it is



bound to be a divisive, partisan,

drawn-out issue to a focused, bipartisan anti-terrorism bill that for the good of the country

needs to pass quickly and without a big partisan struggle.

On the guidelines, we will have to watch out for congressional efforts either to go

further than we want or to codify changes into law. If they press you about your plans, you

might remind them that this, too, is a matter of enormous import that should be considered

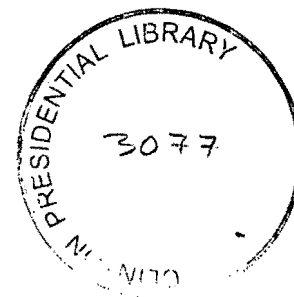
carefully and not be driven by politics or legislated in haste.

You may also be asked about whether we will be asking for an FY95 emergency

supplemental. A small supplemental may be necessary, but we are doing everything we can

to minimize the need for FY95 money, because it will get entangled in the rescission

conference.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	James A. dorskind to Jennifer McCarthy, etc. at 14:27:43.80. Subject: Good work is appreciated. Thanks. [partial] (1 page)	05/16/1995	P6/b(6), b(7)(C), b(7)(E), b(7)(F)
002. email	Adam R. Kreisel to James A. Dorskind at 14:18:47.62. Subject: Thank you call. [partial] (1 page)	05/16/1995	P6/b(6), b(7)(C), b(7)(E), b(7)(F)
003. email	asitkoff@usia.gov to strauss_r at 09:56:00.00. subject: <None>. (1 page)	05/18/1995	P6/b(6)
004. email	kgill to Pam Cicetti at 12:14:00.00. Subject: GovAccess.119: Paranoia?, crypto/privacy contacts, censors,action!, (if ... [partial] (1 page)	05/23/1995	P5
005. email	Rob Higby to gabrielle M. Bushman at 12:09:49.31. Subject: Oklahoma Speech Info. [partial] (1 page)	06/01/1995	P6/b(6)
006. email	Bruce N. Reed to Jonathan M. Prince at 18:33:06.68. Subject: Re: Draft. Yay. (1 page)	06/07/1995	P5 3078
007. email	Brian J. Johnson to Barry J. Toiv at 18:10:42.54. Subject: this replaces the last one. [partial] (1 page)	06/29/1995	P5
008. email	Brian J. Johnson to Barry J. Toiv at 17:47:49.39. Subject: Comments [partial] (1 page)	06/29/1995	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Oklahoma Bombing])
OA/Box Number: 5000000

FOLDER TITLE:

[05/14/1995 - 07/11/1995]

Adam Bergfeld
2006-0326-F
ab689

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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CLINTON LIBRARY PHOTOCOPY

[006]

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Bruce N. Reed (REED_B) (OPD)

CREATION DATE/TIME: 7-JUN-1995 18:33:06.68

SUBJECT: RE: Draft. Yay.

TO: Jonathan M. Prince

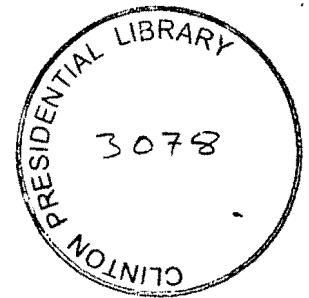
(PRINCE_J) (WHO)

READ: 7-JUN-1995 18:51:51.29

TEXT:

Very good -- a painful chore well done. My only advice would be to say a little more on terrorism -- a good, bipartisan bill that I called for in the wake of Oklahoma City, will give law enforcement the tools it needs to prevent future tragedies and punish those responsible -- but the House must pass it and put it on my desk without delay.

P.S. The Senate is passing it right now. So now we have to beat up on the House to get off its duff.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. email	Bruce N. Reed to Carol Rasco at 17:28:25.68. Subject: Habeas memo. (2 pages)	05/03/1995	P5 3080
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COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([McVeigh Bombing])
OA/Box Number: 250000

FOLDER TITLE:

[05/03/1995]

Adam Bergfeld
2006-0326-F
ab994

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Bruce N. Reed (REED_B) (OPD)

CREATION DATE/TIME: 3-MAY-1995 17:28:25.68

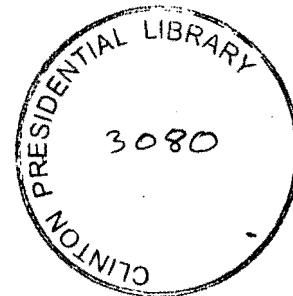
SUBJECT: Habeas memo

TO: Carol H. Rasco

(RASCO_C) (OPD)

READ: 3-MAY-1995 18:35:41.72

TEXT:



PRINTER FONT 12_POINT_ROMAN

May 3, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED

SUBJECT: Habeas Reform

I. Background

Attached is a Justice Department analysis of the habeas reform proposal that Senate Republicans have introduced as part of their anti-terrorism bill. It is largely similar to habeas provisions the House passed as part of its crime bill in March.

The Administration and the Justice Department have been strong and vocal supporters of habeas reform. The average delay from sentence to execution in capital cases now stands at nine years.

In August 1993, the Attorney General and Senator Biden won the district attorneys' support for a one-year, one-appeal reform proposal. Biden and Hatch eventually decided to drop habeas from the crime bill, because Hatch was afraid a Democratic crime bill would undermine recent Supreme Court decisions that have strengthened prosecutors' hands, and Biden was convinced that Republicans had enough support from Southern Democrats to adopt their tougher version of habeas on the floor.

Republicans clearly have the votes in the new Congress, and their bill will attract enthusiastic bipartisan support from state and local prosecutors. Biden would prefer to see habeas taken up as a stand-alone measure, rather than as part of the anti-terrorism bill. Although he is aware that the Administration may accept what the Republicans pass, he will not be happy about it.

For the moment, Republicans see habeas as an opportunity to turn the anti-terrorism debate to their advantage, although it is not clear whether they will insist that it be included. Biden and Daschle have let the Republicans know that if habeas remains part of the anti-terrorism bill, Democrats will start adding anti-gun amendments, such as a moratorium on repealing the assault ban and a stiffer ban on cop-killer bullets.

II. Major Issues

The Administration and congressional Republicans are in agreement on the one aspect of habeas reform that most people can understand, which is limiting death-penalty appeals to one year and one bite at the apple. Although there is deep disagreement among Democrats and within the Administration about other important details, there is no disagreement among prosecutors, who strongly

supported the House Republican bill and will strongly support the Senate Republican version.

In broad terms, the major issues involve: 1) counsel standards; 2) how much deference to give state courts; and 3) habeas for federal prisoners.

1. Counsel Standards: The Biden bill would require states to impose higher counsel standards than the current federal ones in exchange for curbing habeas appeals; the Republican bills leave standards up to the states. The Justice Department believes we may be able to persuade the Republicans to accept some kind of standards that ensure the quality of lawyering, on the grounds that it is in everybody's interest to have sound counsel standards that help ensure finality. A related issue is federal funding for prosecutors and defense counsel to handle habeas litigation.

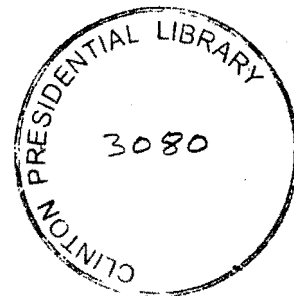
2. Deference to State Courts: The Republican bills would essentially codify several recent Supreme Court decisions which require deference to state courts on questions of fact, law, and applications of law to fact. The Biden bill would allow for independent review of those questions. Many prosecutors argue that the Biden bill would weaken current law; the prosecutors' groups supported it last year because they were afraid a Democratic Congress might go even further, as it had done in 1992. In the current atmosphere, we will have a hard time getting any changes in this area.

3. Habeas for Federal Prisoners: The Republican bills limit collateral appeals by federal prisoners under 28 U.S.C. 2255. The Biden bill only addresses appeals by state prisoners. This means that the Biden bill would not affect the case of Timothy McVeigh. We should go along with some form of limits on appeals by federal prisoners.

III. How to Proceed

The Attorney General would be willing to accept a tougher bill than she and Biden put forward. The White House counsel's office would rather see the issue go away.

For now, we can continue to argue that we would be happy to take up habeas as a stand-alone measure after the terrorism bill passes, but this is no time to bring up divisive issues for partisan advantage. Dole and Hatch may put off habeas to avoid confrontations over guns. If not, we can try to extract some improvements in return for going along with it in the bill. In the meantime, we will keep meeting with them on a bipartisan basis to reach agreement on other elements of the anti-terrorism legislation.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. schedule	Schedule of the President for Friday, April 5, 1996 [partial] (1 page)	4/4/96	P6/b(6)
002a. schedule	Schedule of the President for Friday, April 5, 1996 [partial] (1 page)	4/4/96	P6/b(6)
002b. memo	Hilley to President Clinton re: House-Senate Conference on Antiterrorism Legislation (3 pages)	04/04/96	P5 41221

COLLECTION:

Clinton Presidential Records
Executive Office of the President

OA/Box Number: CF 350

FOLDER TITLE:

[POTUS Briefing Papers - April 5, 1996] [1]

Eric Holzer
2006-0326-F
eh47

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

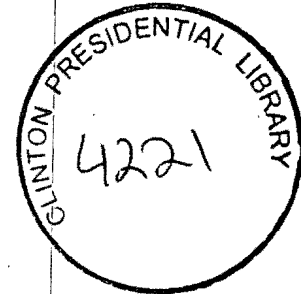
Freedom of Information Act - [5 U.S.C. 552(b)]

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COPY

THE WHITE HOUSE
WASHINGTON

April 4, 1996



MEMORANDUM FOR THE PRESIDENT

FROM: John Hilley *JH*

SUBJECT: House-Senate Conference on Antiterrorism Legislation

SUMMARY

On March 27th the House and Senate conferees met to begin negotiating the differences between the House and Senate versions of antiterrorism legislation. Final House and Senate floor consideration of the conference agreement is tentatively scheduled for April 19, the one year anniversary of the Oklahoma City bombing.

Very generally the Senate-passed bill is reflective of the Administration's original counterterrorism proposals while many of the House bill's Administration-backed antiterrorism provisions were "eviscerated" during House floor consideration of the measure. While it is anticipated that the conference agreement will largely track the House measure, conferees are likely to adopt key Administration proposals from the Senate measure.

Given that the conference report is still being developed, your position should be:

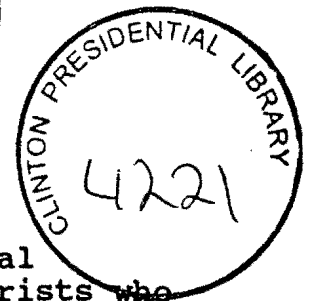
- You are in favor of the strongest bill possible emerging from conference and you are working with Congress to see that occur (refer to the Radio Address for 4/6).
- You should not promise to either sign or veto the bill at this time because it is very much a work in progress.

Additionally, Oklahoma State Attorney General Drew Edmondson has recruited many of the family members of the Oklahoma City bombing victims to support the habeas corpus provisions currently in the legislation. Moreover, since both the House and the Senate bill contain the same exact habeas provisions, there is almost no chance for change in conference.

- For these reasons, public opposition to the current habeas provisions should be avoided.

Please find attached a list of the key issues in the House and Senate counterterrorism bills and their likely disposition (based on initial conversations with both staff and conferees) in the House-Senate conference.

COPY



Key Counterterrorism Legislation Provisions

- Federal criminal jurisdiction for any international terrorist attack in the U.S. as well as for terrorists who use the U.S. as a base from which to plan activities overseas. Proposed by the Administration and contained in both the House and Senate bill. Likely to be adopted by conferees.
- An effective means of preventing fund raising in the U.S. that supports international terrorism overseas. Proposed by the Administration and contained in the Senate bill only. Likely to be adopted by conferees. (Final provision is likely to be weaker than Administration or Senate provision)
- A mechanism for expeditiously and fairly deporting alien terrorists without disclosing national security information. Proposed by the Administration and contained in the Senate bill only. Conference position is unclear.
- Authorization for "roving" wiretaps; adding terrorism cases to the list of cases under which temporary emergency wiretaps may be used; expanding the list of felonies that could be predicate offenses for wiretaps. Proposed by the Administration and contained in the Senate bill only. Not likely to be adopted by conferees.
- Authority to use the national security letter process to obtain records in terrorism investigations from hotels, motels, common carriers and storage and rental facilities. Proposed by the Administration and contained in the Senate bill only. Not likely to be adopted by conferees.
- Implementation of the Plastic Explosives Convention which requires chemicals be added in plastic explosives to permit detection. Proposed by the Administration and contained in both the House and the Senate bill. Likely to be adopted by conferees.
- Requirement of inclusion of microscopic taggants in explosives for tracing purposes. Proposed by the Administration and contained in the Senate bill only. Not likely to be adopted by conferees. (House bill contains a taggants study which is likely to be adopted by conferees.)
- A source of funding for the Administration's digital telephony initiative. Proposed by the Administration and contained in the Senate bill only. Conference position unclear.
- A new Federal offense for knowing possession of stolen explosives. Proposed by the Administration and contained in both the House and Senate bills. Likely to be adopted by conferees.

Enhanced penalties for transfer of firearms or explosives knowing they will be used in a crime of violence and for terrorist attacks against federal employees and their families. Proposed by the Administration and contained in the House bill with certain provisions also contained in the Senate bill. A weakened, compromise version likely to be adopted by conferees.

Extension of the statute of limitations for certain firearm offenses. Proposed by the Administration and contained in the Senate bill only. Unlikely to be adopted by conferees.

- Provisions to reform habeas corpus by setting a one year limitation on an application for a habeas writ and revising the procedures for consideration of a writ in Federal court (the measure would require Federal courts to give state court rulings broad deference). Generally opposed by the Administration because of the deference provisions. Identical provisions contained in both the House and Senate bills. Likely to be adopted by the conferees.
- Amendments to the Foreign Sovereign Immunity Act that would allow U.S. citizens to sue foreign perpetrators of terrorism in U.S. courts. Opposed by the Administration. Contained in both the House and Senate bills (although the Senate language is much more limited in scope). Likely to be adopted by the conferees.

