

March 1996

# USE OF FORCE

## ATF Policy, Training and Review Process Are Comparable to DEA's and FBI's







United States  
General Accounting Office  
Washington, D.C. 20548

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**General Government Division**

B-262134

March 29, 1996

The Honorable Jim Lightfoot  
Chairman, Subcommittee on Treasury,  
Postal Service, and General Government  
Committee on Appropriations  
House of Representatives

Dear Mr. Chairman:

Your August 2, 1995, letter requested that we review various aspects of the Bureau of Alcohol, Tobacco and Firearms (ATF). This report responds to your questions concerning ATF's use of deadly force and dynamic entry. Specifically, the report discusses (1) ATF's policies for the use of deadly force; (2) how ATF conveys its policies to its agents; (3) the reasons for and the extent to which ATF uses dynamic entry and the equipment it uses to accomplish these entries; and (4) ATF's compliance with its procedures for investigating shooting and alleged excessive use-of-force incidents. The report also discusses how ATF addresses these issues in comparison to the Drug Enforcement Administration and the Federal Bureau of Investigation.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Secretary of the Treasury, the Attorney General, the Director of ATF, the Director of the Federal Law Enforcement Training Center, the Administrator of the Drug Enforcement Administration, the Director of the Federal Bureau of Investigation, and other interested parties. Copies will be made available to others upon request.

Major contributors to this report are listed in appendix VII. Please call me on (202) 512-8777 if you or your staff have any questions.

Sincerely yours,

A handwritten signature in cursive script that reads "Norman Rabkin".

Norman J. Rabkin  
Director, Administration of  
Justice Issues

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# Executive Summary

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## Purpose

According to the International Association of Chiefs of Police, managing officers' use of force is one of the most difficult challenges facing law enforcement agencies. The ability of officers to enforce the law, protect the public, and guard their own safety is very difficult in an environment where violent crime is commonplace and firearms are frequently used for illegal purposes. Because the Bureau of Alcohol, Tobacco and Firearms (ATF) is the federal agency primarily responsible for enforcing firearms laws, its agents often face this difficulty.

Over the past several years, ATF has come under public criticism and congressional scrutiny, in part, due to citizen accusations that ATF agents used excessive force in carrying out their enforcement responsibilities. In August 1995, the Chairman of the Subcommittee on Treasury, Postal Service, and General Government, House Committee on Appropriations, asked GAO to (1) identify and describe ATF's policies for the use of deadly force; (2) determine how ATF conveys its policies to its agents; (3) determine the reasons for and the extent to which ATF uses dynamic entry—a tactic used to gain rapid entry to premises when serving high-risk search and arrest warrants and which may include forced entry—and the equipment ATF uses to accomplish these entries; and (4) determine whether ATF has complied with its procedures for investigating shooting and alleged excessive use-of-force incidents. The Chairman also asked GAO to compare how ATF addresses these issues with the way the Department of Justice's Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) address them. While GAO determined whether ATF complied with its procedures for investigating shooting and alleged excessive use-of-force incidents on the basis of a review of investigative file documents, it did not evaluate the quality and adequacy of ATF's investigations. Neither did GAO verify whether all incidents had been reported nor whether all incidents that had been reported were investigated.

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## Background

ATF, an agency of the Department of the Treasury, is responsible for, among other things, investigating criminal violations of federal firearms, explosives, arson, alcohol, and tobacco laws. As of September 1995, ATF had 1,944 special agents; 1,777 of these agents were assigned to 24 field divisions nationwide.

Treasury's use-of-force policy, revised in October 1995 and applicable to ATF, is based on the premise of timely and effective application of the appropriate level of force required to establish and maintain lawful

control. Both Treasury and Justice define “deadly force” as use of any force that is likely to cause death or serious physical injury. For example, any firearm discharge directed at a suspect is considered to be deadly force.

As shown in table 1, ATF, on average, conducted over 12,000 investigations and arrested about 8,000 suspects during fiscal years 1990 through 1995. In the course of these activities, ATF was involved in fewer than 10 reported shooting or alleged excessive force incidents each year.

**Table 1: Summary Table of ATF Investigations, Arrests, Shootings, and Alleged Excessive Force Incidents, FYs 1990-1995**

|  | FY 1990 | FY 1991 | FY 1992 | FY 1993 | FY 1994 | FY 1995 |
|--|---------|---------|---------|---------|---------|---------|
| Total investigations                           | 11,741  | 13,735  | 15,117  | 13,479  | 11,965  | 10,505  |
| Suspects arrested                              | 7,104   | 8,301   | 8,631   | 6,607   | 9,595   | 6,692   |
| ATF shooting incidents <sup>a</sup>            | 4       | 9       | 9       | 2       | 8       | 7       |
| Alleged excessive force incidents <sup>b</sup> | 3       | 2       | 5       | 3       | 8       | 4       |

<sup>a</sup>Reported intentional shootings at suspects by ATF agents.

<sup>b</sup>Reported alleged excessive force incidents involving ATF agents.

Source: ATF.

## Results in Brief

In October 1995, Treasury and Justice issued uniform policies governing the use of deadly force for each of their bureaus and agencies. The revised policies permit law enforcement officers to use deadly force only when an officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or another person. GAO determined that the 1988 ATF use of deadly force policy, which was in effect before the issuance of the October 1995 Treasury policy, was, with the two distinctions discussed in the principal findings, consistent with the 1995 Treasury policy. In addition, ATF’s 1988 policy was, with the three distinctions discussed in the principal findings, consistent with FBI and DEA policies that were in effect immediately before the issuance of the 1995 uniform policies.

ATF conveys its deadly force policies to new agents through training. GAO’s discussions with training officials, reviews of course materials, and observations showed that the types of deadly force training provided new ATF agents were consistent with the types of training provided new DEA and FBI agents. Moreover, ATF policy requires that all ATF agents be

instructed on the deadly force policy at least quarterly throughout their careers. In the fall of 1995, GAO observed three ATF divisions' quarterly firearms qualifications. At each qualification, firearms instructors reminded agents of the policy.

According to ATF officials and GAO analysis of selected ATF data for fiscal year 1995, dynamic entry was a principal tactical procedure employed by ATF when access to premises was required to execute search and arrest warrants in high-risk operations—those posing a threat of violence—or in operations where evidence could be easily destroyed. According to ATF officials, ATF used dynamic entry when, given the specific situation, it reduced the potential for injury to those involved. According to FBI and DEA officials, dynamic entry also was a principal tactic used to execute their high-risk warrants where entry to premises was required. The equipment used by ATF, DEA, and FBI during dynamic entries is generally comparable on the basis of GAO's observations at division offices, discussions with agency officials, review of ATF inventory listings, and analysis of selected operations reports for fiscal year 1995.

ATF's procedures for reporting, investigating, and reviewing shooting incidents and alleged use of excessive force incidents are consistent with standards recommended by organizations such as the President's Council on Integrity and Efficiency. Overall, ATF's shooting incident procedures are comparable with DEA's and FBI's with two distinctions. GAO identified distinctions between ATF and these agencies in the delegation of investigative responsibilities and representation on review boards. Also, ATF's excessive force procedures are comparable to DEA's with one distinction relating to delegation. However, ATF's procedures are not comparable to FBI's mainly because of distinctions regarding the referral of excessive force allegations to Justice for possible civil rights violations.

GAO's review of ATF's investigative files for its reported intentional shooting incidents and alleged use of excessive force incidents for fiscal years 1990 through 1995 showed that ATF (1) complied with its investigative procedures with an exception discussed below; (2) found that all intentional shootings were justified; (3) found most allegations of excessive use of force were unsubstantiated; and (4) sanctioned agents it determined had engaged in misconduct.

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## Principal Findings

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### ATF's Deadly Force Policies Have Remained Generally Consistent in Recent Years and Are Generally Consistent With FBI and DEA Policies

State rules and U.S. Supreme Court guidance on the use of deadly force have been evolving for a number of years. Approaches among the states on the use of deadly force have ranged from those that place a predominant emphasis on the apprehension of a fleeing felon to those that permit such force only with respect to dangerous suspects and impose several qualifications on the use of such force. Within this context, federal law enforcement agencies have adopted policies to govern their employees' use of deadly force. (See p. 28.)

In October 1995, Treasury and Justice adopted use of deadly force policies for their component agencies that are uniform with the exception of certain agency mission-specific provisions covering, for example, Justice's prisoner-related responsibilities. Both policies provide that their respective officers may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or another person. (See p. 33.)

The 1988 ATF use of deadly force policy, in effect before the issuance of the October 1995 Treasury policy, was, with two distinctions, consistent with the new policy. The two distinctions were that (1) the 1995 Treasury policy referred to the use of "deadly force" while the 1988 ATF policy referred more specifically only to the use of a "firearm" and (2) the 1995 Treasury policy allows for the use of deadly force only when the law enforcement officer has a "reasonable belief" that there is an imminent danger of death or serious physical injury while the 1988 ATF policy allowed for the use of such force when the agent "perceives" an imminent threat of death or serious physical injury. (See p. 34.)

In addition, the prior ATF policy was, with three distinctions, consistent with prior DEA and FBI policies. The three distinctions were that (1) ATF's policy alone provided the additional qualifying restriction that the threat of death or serious bodily harm be "imminent," (2) the ATF and DEA policies referred to the shooting of "firearms" while the FBI policy used the term "deadly force," and (3) the ATF policy used the term "perceives" while the DEA and FBI used the term "reasonably believe" and "reason to believe," respectively. (See p. 35.)

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**ATF, DEA, and FBI Convey  
Deadly Force Policies to  
Their Agents in Similar  
Ways**

ATF conveys its deadly force policies to new agents through training. GAO's discussions with training officials, reviews of training materials and policies, and observations showed that the training provided new ATF agents to introduce them to the deadly force policies was consistent with the Treasury/ATF deadly force policies and the types of training provided were consistent with the training provided to new DEA and FBI agents. (See p. 37.)

GAO's discussions and review of course materials also showed that within the first week of training, each agency provides new agent trainees with a classroom lecture and discussion describing, with examples, the agency's use-of-force and deadly force policies. Thereafter, each agency integrates use-of-force issues into other segments of the training where force could be a relevant issue, such as training in physical control techniques. Each agency employs training techniques, such as practical exercises, that use role-playing and firearms judgment exercises that require shoot or not-to-shoot decisions. Furthermore, each agency trains new agents in how to recognize the perceived level of threat they face and in how to respond to it with an appropriate level of force. (See p. 42.)

Once new agent training is completed, ATF requires that the use-of-force policies are to be reiterated to agents throughout their careers at quarterly firearms qualifications and during tactical operations briefings. In the fall of 1995, GAO observed three divisions' quarterly qualifications, interviewed the divisions' Firearms Instructor Coordinators, and reviewed documentation of prior qualifications and used these observations, interviews, and documentation to confirm that the deadly force policy was reiterated during qualifications at these three divisions. Also, agents at the qualifications with whom GAO spoke confirmed that the policy was reviewed before every tactical operation. DEA and FBI officials said that deadly force policies are also to be reiterated at their quarterly firearms qualifications. (See p. 43.)

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**ATF's Use of Dynamic  
Entries and Related  
Equipment Is Generally  
Comparable to FBI's and  
DEA's**

Dynamic entry is one of several tactical procedures used by ATF to execute search and arrest warrants. Dynamic entry, which relies on speed and surprise and may involve forced entry, is a preferred tactic during high-risk operations—those where ATF believes that suspects pose a threat of violence—or in operations where evidence can be easily destroyed. ATF statistics on suspects arrested from firearms investigations during fiscal years 1990 to 1995 showed that 46 percent of the suspects had previous

felony convictions, 24 percent had a history of violence, and 18 percent were armed at the time of their arrests.<sup>1</sup> (See pp. 47 and 56.)

All ATF case agents, including those assigned to special weapons and tactics units, known as Special Response Teams (SRT), are to be trained in the dynamic entry technique. GAO observed new agent and SRT training sessions where ATF agents made dynamic entries into buildings during practical exercises. Moreover, according to ATF officials, ATF agents primarily used the dynamic entry technique to gain entry to buildings during high-risk search and arrest warrants. (See p. 53.)

From fiscal year 1993 through 1995, ATF conducted 35,949 investigations and arrested 22,894 suspects. During this same period, SRTs were deployed 523 times, and SRT members were involved in 3 intentional shooting incidents, 1 of which resulted in fatalities. GAO reviewed the available documentation for all 157 SRT deployments for fiscal year 1995 and found that the dynamic entry technique was used almost half the time and was the predominant technique used when an entry to a building was required. However, in none of the 1995 SRT dynamic entries did ATF agents fire their weapons at suspects. (See p. 54.)

According to ATF, DEA, and FBI officials, the primary purpose of dynamic entry is to ensure the safety of agents, as well as suspects and other individuals, by reducing the potential for suspects to react to the notification of warrant service. However, in October 1995, ATF decided that a dynamic entry could be planned only after all other tactical options had been considered. According to officials, DEA and FBI agents and specialized teams also often use dynamic entries during high-risk search and arrest warrant operations to ensure the safety of agents and suspects. (See p. 49.)

The equipment available for use by ATF agents during dynamic entries generally includes weaponry; breaching equipment, such as battering rams; and/or other tactical equipment designed for safety, such as ballistic vests, helmets, and body bunkers. Body bunkers are ballistic shields that can provide additional protection to agents as they enter and search premises. In addition to the equipment available to all ATF agents, SRTs have access to additional firearms, such as bolt-action rifles, and specialized tactical equipment, such as diversionary devices. GAO's review of SRT deployment reports for fiscal year 1995 showed that diversionary devices represented the specialized equipment most often used by SRTs. (See p. 57.)

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<sup>1</sup>ATF did not compile data for suspects armed at arrest for fiscal years 1990 and 1991.

Vehicles used by SRTs generally included vans and trucks that were used for deployments and storing equipment. GAO's review of fiscal year 1995 SRT deployment reports, found that SRTs most often used aircraft to obtain aerial photography of suspects' locations. In only one fiscal year 1995 operation did an SRT use aircraft to transport agents. ATF equipment, vehicles, aircraft, and clothing used by SRT's are generally comparable to those used by DEA and FBI agents during similar operations on the basis of GAO's observations at divisions, discussions with agencies' officials, review of ATF equipment lists, and analysis of SRT deployment reports. (See pp. 60 and 63.)

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### ATF Complied With Its Procedures for Investigating Shooting and Alleged Excessive Force Incidents

ATF's procedures for reporting, investigating, and reviewing shooting and excessive force incidents were revised in October 1994. The revisions included changes to shooting incident reporting requirements and procedures, including which types of shooting incidents are and are not to be reported. ATF procedures are consistent with guidelines and/or standards recommended by the International Association of Chiefs of Police, the President's Council on Integrity and Efficiency, and the Commission on Accreditation for Law Enforcement Agencies. For example, agents are required to immediately report shooting incidents to their supervisors, incidents are to be investigated by an independent unit, and certain reports are to be reviewed by a review board on the basis of the nature and seriousness of the incident. (See p. 65.)

Overall, DEA and FBI procedures for reporting, investigating, and reviewing shooting incidents are comparable to ATF's. For example, each agency requires that investigations address similar issues and that reports contain similar types of information. Distinctions in the procedures include (1) DEA and FBI delegate some investigative responsibilities to their field divisions—ATF does not delegate such responsibility and (2) DEA's and FBI's review boards include representatives from Justice—ATF's review board does not include representatives from Treasury. While ATF's excessive force procedures are comparable to DEA's with one distinction relating again to delegation, they are distinct from those employed by FBI. ATF is to investigate allegations of excessive force first and—if warranted—is to refer them to Justice for possible criminal investigation. In contrast, FBI refers all allegations of excessive force to Justice's Civil Rights Division for possible criminal investigation before investigating the allegations itself. (See p. 73.)

GAO's review of documents in ATF's investigative files for reported shooting and excessive use-of-force incidents, for fiscal years 1990 through 1995, showed that ATF complied with its investigative procedures except that two investigative files did not include a required record of review<sup>2</sup> by the designated unit at ATF headquarters. GAO's review also showed that ATF's investigations of 38 reported shootings involving ATF agents' discharging their weapons at suspects found each to be justified and within the scope of its use-of-force policy. In addition, ATF's investigations found that 18 of 25 reported allegations of excessive force were unsubstantiated. Four investigations found evidence of some agent misconduct, such as an agent who confiscated drugs from an informant but failed to turn in or report the drugs. Two of the investigations were ongoing at the time of GAO's review, and one was closed without action because ATF determined that there was no need for adjudication. ATF agents found to have engaged in misconduct received written reprimands and suspensions. (See p. 83.)

Due to time and/or methodological constraints, GAO did not evaluate the events that resulted in the incidents or the quality and adequacy of ATF's investigations. In addition, GAO did not verify whether all shooting or excessive force incidents were reported or whether all reported excessive force incidents were investigated. Accordingly, GAO's conclusions about ATF's compliance with its investigative procedures are based on GAO's review of ATF investigative file documentation required by these procedures and apply only to these files. (See pp. 83 and 90.)

GAO did not review the shootings arising from ATF's operation at the Branch Davidians' compound in Waco, TX. This incident was independently investigated by Treasury, which identified shortcomings in ATF's operations and reported its findings in September 1993. In October 1995, ATF reported the actions it had taken in response to Treasury's findings. (See p. 25.)

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## Recommendations

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GAO is making no recommendations in this report.

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## Agency Comments

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GAO requested comments on a draft of this report from the Secretary of the Treasury and the Attorney General. In separate meetings on March 1, 1996, the Senior Advisor to the Under Secretary of the Treasury for Enforcement and ATF officials provided Treasury's comments, and the Director of the Audit Liaison Office under the Assistant Attorney General for

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<sup>2</sup>A document maintained in the investigative file that indicates who reviewed the file and, where applicable, any annotated comments resulting from the review.

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Administration provided Justice's comments. Also present at the Justice meeting were officials from the Office of the Attorney General, the Office of the Deputy Attorney General, the Criminal Division, DEA, and FBI. Overall, the Treasury and Justice officials either characterized the report as balanced, accurate, and thorough or had no comments. They provided some technical comments that GAO has incorporated in this report, where appropriate. (See p. 27.)

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**Abbreviations**

|       |   |
|-------|---|
| ACC   | ATF's Associate Chief Counsel                   |
| ATF   | Bureau of Alcohol, Tobacco and Firearms         |
| CITP  | Criminal Investigator Training Program          |
| DEA   | Drug Enforcement Administration                 |
| ELRB  | ATF's Employee Labor Relations Board            |
| FBI   | Federal Bureau of Investigation                 |
| FLETC | Federal Law Enforcement Training Center         |
| FTCA  | Federal Tort Claims Act                         |
| HEAT  | High Risk Entry and Arrest Team                 |
| IACP  | International Association of Chiefs of Police   |
| MSPB  | Merit System Protection Board                   |
| OCC   | ATF's Office of Chief Counsel                   |
| OE    | ATF's Office of Enforcement                     |
| OI    | ATF's Office of Inspection                      |
| OJT   | On-the-Job Training                             |
| OPR   | Office of Professional Responsibility           |
| PCIE  | President's Council on Integrity and Efficiency |
| PRB   | ATF's Professional Review Board                 |
| RAC   | Resident Agent-in-Charge                        |
| SAC   | Special Agent-in-Charge                         |
| SAR   | Significant Activity Report                     |
| SIR   | Shooting Incident Report                        |
| SIRB  | Shooting Incident Review Board                  |
| SIRT  | Shooting Incident Review Team                   |
| SRT   | Special Response Team                           |
| SWAT  | Special Weapons and Tactics                     |

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# Introduction

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According to the International Association of Chiefs of Police (IACP), managing officers' use of force is one of the most difficult challenges facing law enforcement agencies. The ability of officers to enforce the law, protect the public, and guard their own safety is very difficult in an environment in which violent crime is commonplace and firearms are frequently used for illegal purposes. For the agents of the Bureau of Alcohol, Tobacco and Firearms (ATF), suspected illegal firearms activities are the leading cause for their initiating enforcement actions.

Over the past several years, ATF has come under public criticism and congressional scrutiny primarily as a result of its operation at the Branch Davidians' compound in Waco, TX, and citizen accusations that ATF agents used excessive force in carrying out their enforcement responsibilities. The February 1993 operation at the Branch Davidians' compound was initiated to serve an arrest warrant on David Koresh, the Davidians' leader, and to execute a search warrant on the compound. When Koresh refused to accept the warrants, ATF tried to forcibly enter the compound using a tactic known as dynamic entry but simultaneously was met with gunfire from the Branch Davidians. In the ensuing gun battle, four ATF agents and six Branch Davidians were killed.

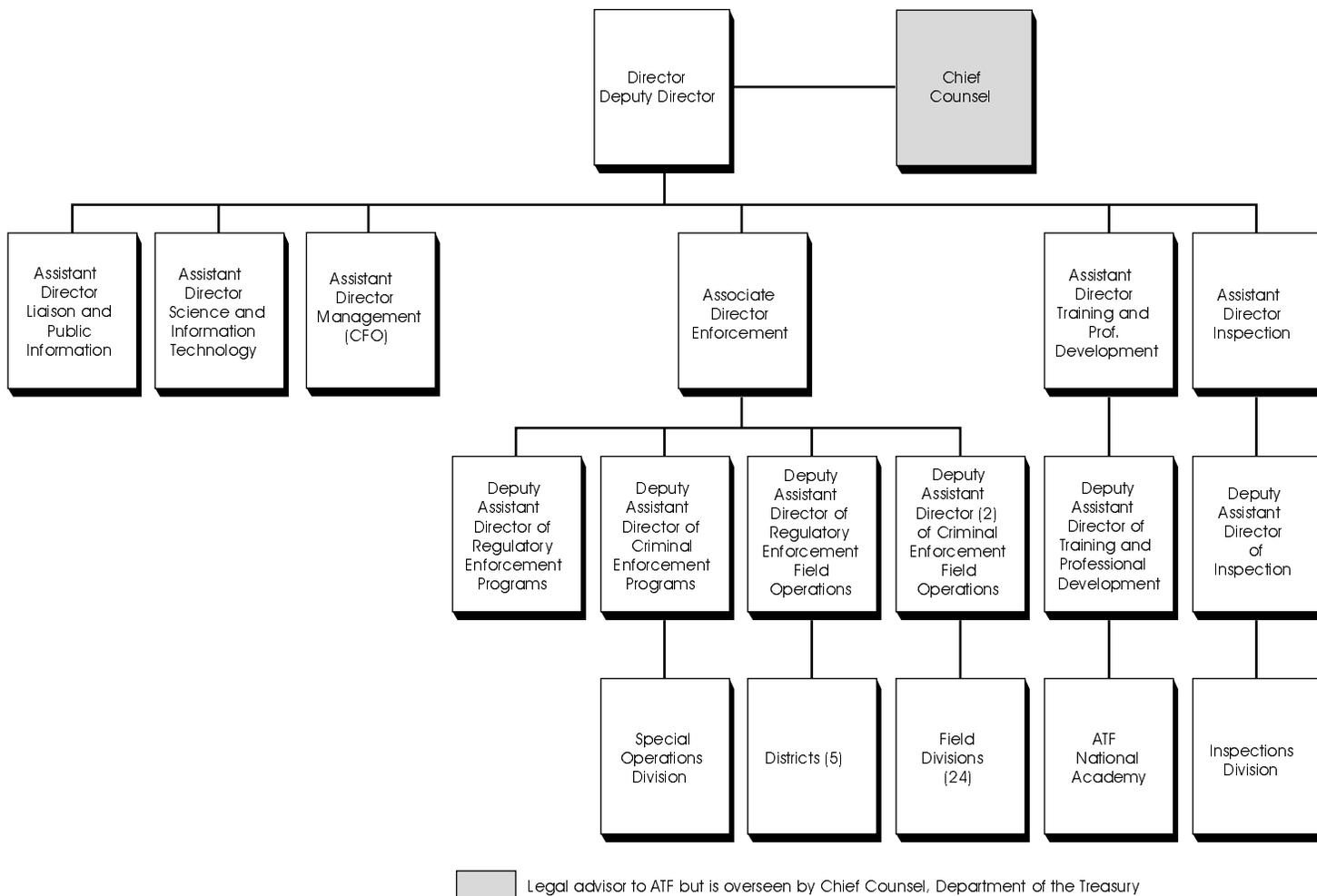
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## Overview of ATF Enforcement Activities

ATF is a law enforcement agency within the Department of the Treasury with responsibilities directed toward reducing violent crime, collecting revenue, and protecting the public. ATF enforces the federal laws and regulations relating to alcohol, tobacco, firearms, explosives, and arson. Among its missions, ATF is to work directly and in cooperation with others to (1) suppress and prevent crime and violence through enforcement, regulation, and community outreach and (2) support and assist federal, state, local, and international law enforcement.

To accomplish its criminal enforcement responsibilities, ATF has 24 field divisions, headed by special agents-in-charge (SAC), located throughout the United States. As of September 1995, ATF had a total of 1,944 special agents of which 1,777 were assigned to its field divisions. ATF's special agents are to initiate criminal investigations when notified of suspected illegal activities by such sources as informants; undercover operatives; and referrals from ATF inspectors and other federal, state, and local law enforcement agencies. Figure 1.1 is an ATF organization chart, as of January 1996, that depicts the principal units discussed in this report.

Figure 1.1: ATF Organization Chart, as of January 1996



Source: ATF.

As table 1.1 shows, the vast majority of ATF's enforcement activities have been directed at suspects who are believed to be engaged in illegal firearms activities. Suspicion of illegal firearms activities is the principal reason that initiates ATF firearms investigations.

**Table 1.1: Investigations Initiated by ATF, FYs 1990-1995**

| Investigation type | FY 1990       | FY 1991       | FY 1992       | FY 1993       | FY 1994       | FY 1995       |
|--------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| Firearms           | 9,753         | 11,745        | 12,598        | 10,489        | 9,227         | 7,606         |
| Arson              | 668           | 808           | 1,462         | 1,955         | 1,629         | 1,739         |
| Explosives         | 1,192         | 1,079         | 952           | 873           | 888           | 890           |
| Tobacco            | 8             | 15            | 13            | 14            | 19            | 33            |
| Alcohol            | 12            | 9             | 10            | 17            | 9             | 29            |
| Other              | 108           | 79            | 82            | 131           | 193           | 208           |
| <b>Total</b>       | <b>11,741</b> | <b>13,735</b> | <b>15,117</b> | <b>13,479</b> | <b>11,965</b> | <b>10,505</b> |

Source: ATF.

On the basis of its investigations, ATF apprehends individuals that it suspects of criminal violations. As can be seen from table 1.2, most of the individuals ATF arrested were suspected of violating firearms laws.

**Table 1.2: Suspects Arrested by ATF, FYs 1990-1995**

| Investigation type | FY 1990      | FY 1991      | FY 1992      | FY 1993      | FY 1994      | FY 1995      |
|--------------------|--------------|--------------|--------------|--------------|--------------|--------------|
| Firearms           | 6,355        | 7,599        | 7,971        | 6,092        | 8,687        | 6,034        |
| Arson              | 276          | 293          | 286          | 275          | 477          | 304          |
| Explosives         | 422          | 365          | 342          | 218          | 374          | 284          |
| Tobacco            | 8            | 3            | 3            | 3            | 10           | 21           |
| Alcohol            | 1            | 10           | 9            | 4            | 0            | 12           |
| Other              | 42           | 31           | 20           | 15           | 47           | 37           |
| <b>Total</b>       | <b>7,104</b> | <b>8,301</b> | <b>8,631</b> | <b>6,607</b> | <b>9,595</b> | <b>6,692</b> |

Source: ATF.

## What Are Use of Force and Deadly Force?

According to IACP, use of force has been construed to include a wide range of techniques used to compel compliance. Such techniques range from verbal persuasion—the lowest force level—to deadly force—the most severe force level—and everything in between, including physical force, stun guns, tear gas, batons, and other nonlethal equipment. The variety of coercive options available to agents in a confrontational setting is often referred to as the “force continuum.”

According to Treasury policy on the use of force, the primary consideration in its use is the timely and effective application of the appropriate level of force required to establish and maintain lawful control. ATF training materials note that the use of force by law

enforcement officers in the performance of their duties has been traditionally limited to four categories. Under these categories, use of force is allowed if necessary to

- overcome resistance to the officer's lawful commands,
- effect an arrest or detain a suspect,
- maintain custody and prevent escape, or
- protect the officer or other persons.

Furthermore, the training materials note that in determining how much force may be or should be used, the officer should consider such factors as the

- nature of the offense for which the suspect is being arrested, e.g., felony or misdemeanor arrest;
- number of participants on each side;
- size, age, and condition of participants;
- record and/or reputation of the suspect for violence;
- use of alcohol or drugs by the suspect;
- suspect's mental or psychiatric history;
- presence of innocent bystanders; and
- availability of less violent or nonlethal weapons.

In October 1995, Treasury and the Department of Justice adopted use of deadly force guidelines that are uniform with the exception of certain agency mission-specific provisions. For example, while warning shots generally are not permitted under the Treasury and Justice policies, the U.S. Secret Service may use warning shots in exercising its protective responsibilities, the U.S. Customs Service may use warning shots on the open waters, and Justice agencies may use warning shots under certain circumstances within the prison context.

In addressing the subject of nondeadly force, the Treasury and Justice uniform policies recognize that if force other than deadly force reasonably appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary. In commenting on the policy, both Departments committed to take all reasonable steps to prevent the need to use deadly force.

Both Departments define deadly force as the use of any force that is likely to cause death or serious physical injury. Therefore, any firearms discharge that is intended to disable a suspect is considered to be deadly

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force. However, the use of other weapons, including those considered nonlethal, could be construed as a law enforcement officer's having used deadly force, depending on the manner in which the weapon was used. For example, hitting a suspect in the head with a baton is considered to be the use of deadly force.

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## Objectives, Scope, and Methodology

In August 1995, the Chairman of the Subcommittee on Treasury, Postal Service, and General Government, House Committee on Appropriations, asked us to (1) identify and describe ATF's policies for the use of deadly force; (2) determine how ATF conveys its policies to its agents; (3) determine the reasons for and the extent to which ATF uses dynamic entry and the equipment ATF uses to accomplish these entries; and (4) determine whether ATF has complied with its procedures for investigating shooting and alleged excessive use-of-force incidents. While we determined whether ATF complied with procedures for investigating shooting and alleged excessive use-of-force incidents on the basis of a review of case file documents, we did not evaluate the quality and adequacy of ATF's investigations. In addition, except for a limited check discussed later, we did not verify whether all shooting and alleged excessive force incidents were reported or whether all reported allegations of excessive force were investigated.

The Chairman also asked us to compare how ATF addresses the above issues with the way that Justice's Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) address them. In addition, we were asked to determine (1) whether ATF applies lessons learned from its reviews of shootings and allegations of excessive use of force and (2) what authority ATF has to take adverse personnel actions against agents, particularly in connection with excessive use-of-force incidents.

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### Objective 1

To identify and describe ATF's policies on the use of deadly force and compare them to DEA's and FBI's, we reviewed pertinent Treasury, Justice, ATF, DEA, and FBI policies and accompanying commentaries on the use of deadly force that were available. Also, we reviewed certain relevant U.S. Supreme Court and lower court decisions involving the use of deadly force. We also interviewed appropriate ATF, DEA, and FBI officials concerning their policies on the use of deadly force.

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Objective 2

To determine how ATF conveys its deadly force policies to its agents, we (1) visited the Federal Law Enforcement Training Center (FLETC) and ATF's National Academy in Glynco, GA; (2) observed training facilities, equipment, and ongoing classes—including Basic Marksmanship, Judgment Pistol Shooting, Situational Response, Non-Lethal Control Techniques, and Tactical Operations Planning; and (3) spoke with officials about the overall training courses provided new agents, in general, and the use-of-force and firearms training provided, in particular. We also reviewed teaching guides and student training materials for FLETC's Criminal Investigator Training Course and ATF's New Agent Course. At the time of our visit to FLETC, ATF did not have any students enrolled in criminal investigator training for new agents, although there were new agent classes in progress. However, we observed a class of new ATF agents attending the National Academy.

We also met with FBI and DEA training officials to discuss their new agent training courses and use of deadly force training; toured the training academy at Quantico, VA, and observed the training facilities and equipment; participated in a demonstration of the Firearms Training System<sup>1</sup> and reviewed summaries of course materials and instructor teaching guides for training that discussed use of force. We compared use-of-force course descriptions and the types of training provided new ATF agents to course materials and DEA and FBI training officials' descriptions of the types of training provided new DEA and FBI agents.

We also reviewed (1) ATF's manual for its new agent On-the-Job Training Course and identified training objectives dealing with use-of-force issues and (2) course training materials provided to Special Response Teams (SRT)—ATF's version of special weapons and tactics units—on use of force and deadly force.

We identified and reviewed ATF's policies requiring use-of-force discussions during quarterly firearms training and during tactical operational planning and operation briefings. On September 28, 1995, October 13, 1995, and December 11, 1995, respectively, we observed quarterly firearms training at three ATF field divisions—Baltimore;

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<sup>1</sup>Reacting to realistic video scenarios and using laser pistols, new agents employ the Firearms Training System in learning to make split-second decisions about whether to shoot a suspect during a confrontation.

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Washington, D.C.; and Los Angeles<sup>2</sup>—to assure ourselves that the required use-of-force discussion took place. We also interviewed the divisions' Firearms Instructor Coordinators concerning firearms training and use-of-force training and reviewed their records documenting use-of-force discussions at prior quarters' training sessions. At the firearms qualification sessions, we also judgmentally selected and spoke with some attending ATF agents to determine whether use-of-force discussions were a regular part of tactical operation planning and operation briefings. Also, in these divisions, we interviewed Assistant Special Agents-in-Charge responsible for the SRT, SRT leaders, and group supervisors to determine whether use-of-force discussions were a part of tactical operation planning and operation briefings.

Finally, we compared FLETC and ATF training materials with relevant Treasury/ATF use-of-force and deadly force policies to determine if training materials complied with the policies.

While our review analyzed whether the agencies' training reflected applicable use-of-force policies, we did not assess the effectiveness of the agencies' training. In addition, we did not review new agent attendance records while at FLETC or the ATF National Academy, nor did we review agent personnel training records while we were at the field divisions.

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### Objective 3

To determine the reasons for and the extent to which ATF uses dynamic entry and the equipment used in such entries, we reviewed ATF policies, procedures, and documents regarding operational planning, dynamic entries, equipment, and SRT units. Due to time constraints, we did not review a sample of all ATF enforcement actions conducted by all ATF agents to determine how often dynamic entry was used. Because (1) SRTs are to be deployed to conduct ATF's higher risk search and arrest warrants and SRTs have access to all of the equipment available to ATF agents as well as additional specialized equipment and (2) ATF maintains more thorough and readily available data on SRT operations, including tactics and equipment used, than it does on its other enforcement groups, we focused our review and analysis of ATF's use of dynamic entry and related equipment to operations involving SRT deployments. However, whenever possible, we discussed the use of dynamic entries and related equipment by non-SRT agents with headquarters and division officials.

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<sup>2</sup>The Los Angeles division was chosen because of its relatively large number of SRT activations and its more extensive inventory of equipment available during high-risk operations. The remaining two divisions were chosen because of their proximity to Washington, D.C., in our effort to complete our work in a timely and cost-effective manner.

We analyzed all SRT deployment activation reports for fiscal year 1995 to identify the reason for the deployment, the extent to which the deployment used the dynamic entry tactic to enter a building, whether the deployment resulted in force being used (e.g., shootings or physical force), and whether the SRT used specialized equipment. We also obtained an ATF statistical compilation of fiscal years 1993 and 1994 SRT activation data, which showed the number of activations, the reason for deployments, deployments that resulted in force being used (e.g., shootings), and whether special equipment was used. Furthermore, we reviewed all shooting incident reports for fiscal years 1990 through 1995 and determined the number of SRT incidents in which ATF agents fired their weapons at suspects.

We also interviewed ATF officials in the Special Operations Division to determine ATF's practices regarding the use of dynamic entries and other tactics as well as the type of equipment used for these operations. In addition, we discussed the use of dynamic entries with ATF division officials, SRT team leaders, Tactical Operations Officers, and agents at three ATF field divisions—Washington, D.C.; Baltimore; and Los Angeles.

We reviewed training materials and observed some of the training provided new agents at FLETC regarding dynamic entries and other tactics and related equipment. We also reviewed training materials used to train new SRT members during their initial 2-week training session at Fort McClellan, AL. We analyzed all SRT training reports for fiscal year 1995 to determine the type of in-service training received, equipment used during training, and sources that provided instruction. In addition, we observed the Washington Division SRT's fourth quarter 1995 training to determine what tactical training was received.

We spoke with officials from ATF's Property and Fleet Management Section and Enforcement Support Branch regarding ATF policies and controls on the equipment available for high-risk operations. We also observed the equipment maintained and issued by the Enforcement Support Branch in Rockville, MD, and the SRT equipment at the three field divisions we visited. In addition, at the Washington, D.C., and Los Angeles divisions, we obtained listings of the SRT equipment and vehicles as well as certain firearms, breaching tools, and other tactical equipment available for dynamic entries. Although we observed the SRT equipment maintained in Baltimore, we did not obtain an equipment listing because at the time of our visit the SRT had been recently merged into the Washington Division's SRT. We discussed the use and sources of this equipment with the Tactical

Operations Officers, the SRT team leaders, and several agents in each of the three division offices we visited. We also obtained and reviewed comprehensive listings of rifles and tactical carbines, SRT and armored vehicles, and aircraft in inventory throughout ATF from ATF's Inventory Tracking and Equipment Management System.

In addition, we visited the FBI and DEA Washington field divisions to compare ATF's use of dynamic entries and equipment to other federal law enforcement agencies. At each division, we interviewed division officials, including entry team leaders, to determine their use of dynamic entries and other tactics and observed the equipment used by the FBI Special Weapons and Tactics (SWAT) and DEA entry teams during high-risk operations. On the basis of the standardization of training provided for high-risk warrant service, both FBI and DEA officials opined that their division's use of dynamic entry and related equipment generally was representative of other field divisions in their respective agencies. We also reviewed the literature available from IACP and other law enforcement experts regarding the use of equipment, dynamic entries, and other tactics by law enforcement agencies.

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#### Objective 4

To determine whether ATF complied with its procedures for investigating shooting and use-of-force incidents, we obtained and reviewed the following information: (1) procedures for reporting, investigating, and reviewing shooting and misconduct incidents; (2) policies on administering adverse personnel actions against agents found to have violated use-of-force policies; (3) policies on protecting complainants from retaliation; (4) policies on ensuring that lessons learned from investigations are transmitted to agents; and (5) investigative guidelines and/or standards recommended by IACP, the President's Council on Integrity and Efficiency (PCIE), and the Commission on Accreditation for Law Enforcement Agencies. We obtained similar information, where applicable, from DEA and FBI. We also identified and reviewed legislation, regulations, and court cases related to the use of force by law enforcement agencies.

We identified and reviewed files related to the investigation of reported shooting and use of excessive force incidents during fiscal years 1990 through 1995. For shooting incidents, we identified and reviewed 38 of 39 incidents where ATF agents intentionally discharged their weapons at suspects.<sup>3</sup> For use of excessive force incidents, we identified and reviewed

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<sup>3</sup>We did not review the Waco incident. No ATF file existed because Treasury investigated the incident.

92 investigations in three categories of alleged agent misconduct: (1) misconduct during the execution of a search warrant, (2) violation of a person's civil rights, and (3) assault by an agent on a person. Because ATF does not maintain a separate category for use of excessive force, we judgmentally selected these categories following consultations with ATF officials and a review of misconduct incident categories. The selection was based on the likelihood that these categories would include most, if not all, incidents of alleged use of excessive force. Of the 92 investigations, we found that 25 involved allegations of the physical abuse of persons and/or property.

To place the shooting and use of excessive force incidents in perspective, we obtained statistics related to ATF enforcement actions, such as arrests and SRT deployments. At the request of the Subcommittee, we also obtained shooting incident and enforcement action data from DEA and FBI. However, it should be emphasized that these data were not comparable to ATF's, given the agencies' differences in missions, personnel levels, and some data definitions. These data are presented in appendix V. As agreed with the Subcommittee, we did not verify the accuracy of ATF's, DEA's, or FBI's statistical data because of time limitations.

To determine ATF's compliance with its investigative procedures, we reviewed ATF's investigative files for all 38 intentional shooting incidents that were reported to and investigated by ATF from fiscal years 1990 through 1995 as well as for the 25 alleged excessive force incidents we selected. We based our compliance determination on whether the information in the files indicated that the investigative procedures had been followed. We looked for the required information on (1) the incident, such as whether it resulted in injuries or the type of law enforcement activity that resulted in the incident, and (2) the investigation, such as who conducted the investigation, who reviewed it, the types of information the investigation obtained and analyzed, and the outcome of the investigation. Where documentation was not initially found, we obtained documents and/or explanations from ATF officials and considered them in our determination.

Due to time and methodological constraints, we did not evaluate the quality and adequacy of the shooting and use of excessive force investigations or the validity of their conclusions. We also did not evaluate the circumstances, such as law enforcement actions, that resulted in the shooting or use of excessive force incidents. In addition, we did not verify the accuracy of the information in ATF's files. Finally, we did not verify

whether all shooting and alleged excessive force incidents were reported or whether all reported allegations of excessive force were investigated. We did, however, do a limited check related to this matter by searching a computerized news database and contacting two organizations with possible knowledge of some incidents. The results of this limited check are discussed in chapter 5.

We discussed issues related to our review, including the use of excessive force, with officials from (1) ATF's Office of Inspection, Office of Chief Counsel, and Office of Enforcement; (2) DEA's Office of Inspections; (3) the FBI's Office of Inspection; and (4) organizations that monitor law enforcement practices.

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## Additional Issues

To determine whether, and how, ATF applies lessons learned from its investigations, we (1) identified and reviewed the relevant sections in ATF's investigative procedures; (2) obtained from ATF and reviewed examples of lessons learned being implemented; (3) reviewed ATF's October 1995 report on the actions taken in response to the lessons learned from the Waco operation; and (4) discussed related issues with cognizant ATF officials, including the Associate Director for Enforcement.

To determine ATF's authority for administering adverse actions against its personnel—including managers who perform poorly—we (1) obtained and reviewed the relevant ATF adverse action orders, (2) identified examples of personnel actions from our review of ATF's investigative files, and (3) discussed adverse action issues with staff from ATF's Employee Labor Relations Branch (ELRB) and the chairman of the unit charged with reviewing incidents that may result in adverse action being taken against ATF personnel. We also obtained relevant documentation from DEA and FBI and compared it with ATF's to identify any similarities and differences.

Our review was made between August 1995 and January 1996 in accordance with generally accepted government auditing standards. We provided drafts of this report to the Secretary of Treasury and the Attorney General for comment. Responsible Treasury and Justice officials provided oral comments at separate meetings on March 1, 1996.

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## Agency Comments

At the March 1, 1996, meetings, the Senior Advisor to the Under Secretary of the Treasury for Enforcement and ATF officials provided Treasury's comments, and the Director of the Audit Liaison Office under the Assistant

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Attorney General for Administration provided Justice's comments. Also present at the Justice meeting were officials from the Office of the Attorney General, the Office of the Deputy Attorney General, the Criminal Division, DEA, and FBI. The Treasury and Justice officials either characterized the report as balanced, accurate, and thorough or had no comments. They provided some technical comments that we have incorporated in this report, where appropriate.

# Treasury and Justice Use of Deadly Force Policies Have Been Adopted to Reflect Supreme Court Guidance and Are Generally Consistent

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State rules and Supreme Court guidance on the use of deadly force have been evolving for a number of years. Approaches among the states on the use of deadly force have ranged from those that place an emphasis on the apprehension of a fleeing felon to those that permit such force regarding dangerous suspects but with certain qualifications. Within this context, federal law enforcement agencies have, over the years, adopted policies to govern their employees' use of deadly force. In October 1995, Treasury and Justice adopted uniform policies on the use of deadly force. These uniform policies, like those they replaced, were adopted to reflect applicable Supreme Court guidance. Treasury's and Justice's commentaries,<sup>1</sup> in general, explain that their policies were formulated to be more restrictive on the law enforcement officer than constitutional or other legal limits. ATF's 1988 use of deadly force policy, which was in effect before the issuance of the 1995 Treasury policy, was, with two distinctions as discussed in this chapter, consistent with the new Treasury policy. In addition, the 1988 ATF policy, was, with three distinctions as discussed in this chapter, consistent with prior DEA and FBI policies.

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## State Rules and Supreme Court Guidance on the Use of Deadly Force

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### State Rules Have Varied

By 1985, the rules in the states governing the use of deadly force by law enforcement officers varied.<sup>2</sup> These rules can generally be grouped into three categories: (1) the common-law rule, (2) a modified common-law approach, and (3) the Model Penal Code approach.

Many states followed something similar to the English common-law rule on the use of deadly force, which existed at the time of this country's founding. Generally, deadly force could be used by a law enforcement officer if necessary to arrest a felony suspect. Because the type of felony involved is not taken into account, this rule is generally referred to as the "fleeing felon" rule. An officer could use deadly force when he reasonably

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<sup>1</sup>Treasury and Justice issued written comments discussing and elaborating upon their 1995 use of deadly force policies.

<sup>2</sup>The issue of the use of deadly force was described by a 1975 decision of the U.S. Court of Appeals for the Second Circuit as an area characterized by "shifting sands" and "obscured pathways." Jones v. Marshall, 528 F. 2d 132, 141 (2d Cir. 1975).

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believed that he was justified in arresting an individual for a felony as long as the officer also reasonably believed that such force was necessary to protect himself or prevent escape. To a great extent, the rationale behind the fleeing felon rule was based on the fact that common-law felonies<sup>3</sup> were punishable by death, and the use of deadly force was seen as merely accelerating the penal process, albeit without providing a trial. For example, the 1982 Tennessee statute, which was found unconstitutional in a landmark Supreme Court decision discussed later, was based on the fleeing felon rule. The decision provided, in part, that “[i]f, after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest.”<sup>4</sup>

Some states used a modified common-law rule by specifying the felonies for which deadly force may be used to arrest or by stating that only “forcible felonies”—also called dangerous felonies—justify the use of deadly force. An Illinois statute, for example, listed the felonies that may trigger the use of deadly force:

“‘Forcible felony’ means treason, murder, voluntary manslaughter, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, arson, kidnapping, aggravated battery and any other felony which involves the use or threat of physical force or violence against any individual.”<sup>5</sup>

Legislatures in other states abandoned the common-law rule for some form of the Model Penal Code approach, which imposes several qualifications on the use of deadly force. The Model Penal Code, as formulated by the American Law Institute<sup>6</sup> in 1962, generally permits the use of deadly force only when the crime for which the arrest is made involves conduct including use or threatened use of deadly force or when there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed. More specifically, under the Model Penal Code approach, the use of deadly force is not justified unless (1) the arrest is for a felony, (2) the actor effecting the arrest is a peace officer or is assisting a peace officer, (3) the actor

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<sup>3</sup>Common-law felonies were murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, and larceny.

<sup>4</sup>Tenn. Code. Ann. section 40-7-108 (1982).

<sup>5</sup>Criminal Code of 1961 section 2-8, Ill. Ann. Stat. ch. 38, section 2-8.

<sup>6</sup>The American Law Institute was founded in 1923 and is composed of judges, law professors, and practitioners. Its objective is to encourage the fair administration of justice throughout the nation by advancing the uniformity of law, whenever practicable. This goal is accomplished by the work of the Institute in proposing Model Acts—statutory provisions that legislatures may enact in whole, in part, or not at all.

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believes such force creates no substantial risk of injury to innocent persons, and (4) the actor believes that the felony included the use or threatened use of deadly force or there is a substantial risk that the suspect will cause death or serious bodily harm if apprehension is delayed.<sup>7</sup>

The Supreme Court noted, in 1985, that while there was not a constant or overwhelming trend away from the common-law rule, a long-term movement has been away from the emphasis that deadly force may be used against any fleeing felon.<sup>8</sup>

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**Two Supreme Court Cases  
Have Provided Some  
Guidance on the Use of  
Deadly Force**

In the 1985 Tennessee v. Garner decision<sup>9</sup> and the 1989 Graham v. Connor decision,<sup>10</sup> the Supreme Court addressed the issue of when police may reasonably use deadly force and provided some clarification as to how courts should examine allegations that law enforcement officers have used excessive force.

In Garner, a police officer shot and killed Edward Garner to prevent his escape from the scene of a burglary, even though Garner did not appear to be armed. Garner, after being told to halt, tried to climb over a fence at night in the backyard of a house he was suspected of burglarizing. With the aid of a flashlight, the officer was able to see Garner's face and hands. Even though the officer saw no sign of a weapon, he shot Garner in order to prevent his escape. The officer argued that his actions were reasonable under a Tennessee statute that provided that a law enforcement officer could use any means necessary to make an arrest.

The Supreme Court, basing its determination on a Fourth Amendment<sup>11</sup> balancing test, struck down Tennessee's statute to the extent that it authorized the use of deadly force against all fleeing suspected felons, including nondangerous suspects. The Court noted that a seizure occurs

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<sup>7</sup>American Law Institute, Model Penal Code, section 3.07(2)(b).

<sup>8</sup>Tennessee v. Garner, 471 U.S. 1, 18 (1985).

<sup>9</sup>Garner, 471 U.S. 1 (1985).

<sup>10</sup>Graham v. Connor, 490 U.S. 386 (1989).

<sup>11</sup>The Fourth Amendment contains a prohibition against unreasonable seizures of the person. The Supreme Court has stated that the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions that are not justified in the circumstances, or that are made in an improper manner. Schmerber v. California, 384 U.S. 757, 768 (1966).

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whenever an officer restrains the freedom of a person to walk away.<sup>12</sup> The constitutionality of a seizure is determined by balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. The Court then reasoned that an apprehension using deadly force is also a seizure subject to the reasonableness requirement of the Fourth Amendment. In using this balancing test, the Court was not persuaded that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life. Thus, the Court found that the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. Hence, the Court found Tennessee's statute unconstitutional to the extent that it authorized the use of deadly force against nondangerous fleeing suspects. However, the Court also found that it is not constitutionally unreasonable to prevent escape by using deadly force in certain limited circumstances:

"Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."

In the 1989 Graham decision,<sup>13</sup> the Supreme Court provided some clarification as to how courts should examine allegations that law enforcement officers have used excessive force. In Graham, a diabetic felt the onset of an insulin reaction and drove with a friend to a convenience store to purchase orange juice. Upon entering the store and seeing the number of people ahead of him at the checkout line, Graham hurried out of the store to go to a friend's house instead. A police officer became suspicious, followed Graham's car, and made an investigative stop. Backup police officers arrived, handcuffed Graham, and ignored Graham's attempts to explain and treat his diabetic condition. Graham sustained various physical injuries during the incident, was thrown headfirst into the police car, and the officers refused to let him have some orange juice as a remedy for his condition. Graham was later released when the officers learned that nothing had happened at the store.

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<sup>12</sup>Garner, 471 U.S. at 7 (1985). It is well settled that police officers may use some degree of force in effectuating a lawful arrest. Graham, 490 U.S. at 396 (1989).

<sup>13</sup>Graham, 490 U.S. 386 (1989).

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Graham brought an action against the officers involved in the incident alleging that the officers had used excessive force in making the investigatory stop. The District Court applied a four-factor test<sup>14</sup> and ruled in the officers' favor. The Court of Appeals for the Fourth Circuit, without attempting to identify the specific constitutional provision under which Graham's claim arose, endorsed the four-factor test applied by the District Court and affirmed the District Court decision.

However, the Supreme Court ruled that the lower courts had applied the incorrect legal standard and remanded the case in order for the Court of Appeals to consider the claim under the Fourth Amendment's reasonableness standard. In doing so, the Court declared that it was making

“explicit what was implicit in the *Garner* analysis—that all claims alleging that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other seizure of a free citizen should be analyzed under the Fourth Amendment's 'reasonableness' standard . . . .”

The Court explained that determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of “the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.” While recognizing that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, the Court explained that its proper application requires careful attention to the facts and circumstances of each particular case, such as the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting or attempting to evade arrest by flight. Among other things, the Court noted that the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20-20 vision of hindsight. The Court further noted that the calculus of reasonableness must allow for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that may be necessary in a particular situation.

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<sup>14</sup>The District Court considered the following four factors: (1) the need for the application of force, (2) the relationship between that need and the amount of force that was used, (3) the extent of the injury inflicted, and (4) whether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm.

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## Treasury and Justice Have Adopted Uniform Policies on the Use of Deadly Force

In October 1995, Treasury and Justice adopted use of deadly force policies to standardize the various policies their component agencies had adopted over the years. The policies are uniform with the exception of certain agency mission-specific provisions covering, for example, Justice's prisoner-related responsibilities. Justice's Resolution 14, which created the Justice uniform policy, notes that in view of Supreme Court decisions addressing constitutional restrictions on the use of deadly force,<sup>15</sup> Justice's investigative agencies have, over the years, adopted policies to govern their employees' use of deadly force, albeit in a manner that was not standardized. Both Justice and Treasury note in their commentaries that the policies are intended to maintain uniformity among their various respective departmental components and to achieve uniform standards and training with respect to the use of deadly force. While components may develop and conduct their own training on the use of deadly force, the commentaries state that the new uniform policies govern the use of deadly force under all circumstances.

The Justice and Treasury uniform policies provide that their respective officers may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or another person. The Treasury and Justice commentaries, in general, explain that their policies were formulated to be more restrictive on the law enforcement officer than constitutional or other legal limits. Following are Treasury's and Justice's 1995 policies:

- Treasury: "Treasury Law Enforcement Officers may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person."<sup>16</sup>
- Justice: "Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person."<sup>17</sup>

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<sup>15</sup>The Treasury and Justice commentaries explain that in developing the policies, it became apparent that decisional law provides only limited guidance regarding the use of deadly force.

<sup>16</sup>The Department of the Treasury, Uniform Policy on the Use of Force, Treasury Order No. 105-12, section (4)(a) (1995).

<sup>17</sup>U.S. Department of Justice, Uniform Policy on the Use of Deadly Force, section I (1995).

Accompanying Treasury and Justice commentary provide that “probable cause,” “reason to believe,” or a “reasonable belief,” for purposes of their policies, mean facts and circumstances, including reasonable inferences, known to the officer at the time of the use of deadly force, that would cause a reasonable officer to conclude that the point at issue is probably true. The commentaries also recognize that the reasonableness of a belief or decision must be viewed from the perspective of the officer on the scene, who may often be forced to make split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving.

Justice and Treasury commentaries also state that as used in their respective policies, “imminent” has a broader meaning than “immediate” or “instantaneous.” The commentaries further state that the concept of “imminent” should be understood to be elastic, that is, involving a period of time dependent on the circumstances, rather than the fixed point of time implicit in the concept of “immediate” or “instantaneous.” Thus, a subject may pose an imminent danger even if he or she is not at that very moment pointing a weapon at the officer if, for example, he or she has a weapon within reach or is running for cover carrying a weapon or running to a place where the officer has reason to believe a weapon is available.

In addition, the policies provide that if force other than deadly force appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary. The commentaries further provide that if force less than deadly force could reasonably be expected to accomplish the same end, such as the arrest of a dangerous fleeing subject, without unreasonably increasing the danger to the officer or others, then it must be used.

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## **ATF’s 1988 Policy on the Use of Deadly Force Was Generally Consistent With the 1995 Treasury Policy**

The 1988 ATF use of deadly force policy, which was in effect before the issuance of the October 1995 Treasury uniform policy, was, with two distinctions, consistent with the October 1995 Treasury policy. ATF’s 1988 use of deadly force policy stated that

“A firearm may be discharged when the special agent believes that there is no other means of control and perceives an imminent threat of death or serious bodily injury to himself/herself or other innocent persons.”<sup>18</sup>

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<sup>18</sup>ATF Order No. 3000.8, ch. A, section (3)(a) (1988).

The 1988 ATF and 1995 Treasury policies are consistent in that both policies generally authorize the use of such force only when the law enforcement officer reasonably believes or perceives that there is an imminent threat or danger of death or serious physical injury to the officer or another person. Moreover, both the 1988 ATF and 1995 Treasury policies limit the degree of force authorized to that which is needed to accomplish the law enforcement purpose. More specifically, the 1988 ATF policy provided that the degree of force authorized was limited to that which was necessary to establish lawful order and control in a timely manner, and the 1995 Treasury policy provides that if force other than deadly force appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary.

One distinction between the policies is that the 1995 Treasury policy refers to the use of “deadly force” while the 1988 ATF policy referred more specifically only to the use of a “firearm.” With respect to the 1988 ATF policy, an ATF official noted that until 1995, firearms were the only equipment issued to ATF agents that could inflict deadly force. A second distinction is that while the 1995 Treasury policy allows for the use of deadly force only when the law enforcement officer has a “reasonable belief” that there is an imminent threat of death or serious physical injury, the 1988 ATF policy allowed for the use of such force when the special agent “perceives” an imminent threat of death or serious physical injury. An ATF official noted that, under the 1988 policy, the special agent’s perception of an imminent threat would have been within the context of additional policy language which provided that “the authority to bear firearms carries with it an obligation to exercise discipline, restraint, and good judgement.”

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## **ATF’s 1988 Policy on the Use of Deadly Force Was Generally Consistent With Prior DEA and FBI Policies**

The 1988 ATF use of deadly force policy was, with three distinctions, consistent with DEA and FBI policies in effect prior to the issuance of the 1995 uniform policies. Following are DEA’s and FBI’s prior policies:

- DEA: “Agents are not to shoot any person except in self-defense, when they reasonably believe they or another person are in danger of death or grievous bodily harm.”<sup>19</sup>
- FBI: “Agents are not to use deadly force against any person except as necessary in self-defense or the defense of another, when they have reason

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<sup>19</sup>Drug Enforcement Administration, Policy on the Use of Deadly Force, section 6122.13 (A).

to believe they or another are in danger of death or grievous bodily harm.”<sup>20</sup>

The prior ATF policy was consistent with prior DEA and FBI policies in that they generally authorized the use of deadly force only when the agents reasonably believed or perceived that there was a threat or danger of death or serious bodily harm to the agent or another person. One distinction among the three policies was that the ATF policy alone provided the additional qualifying restriction that such threat be “imminent.” In addition, the aforementioned “firearm/deadly force” and “reasonably believes/perceives” distinctions also existed among the prior policies. More specifically, (1) the ATF and DEA policies referred to the shooting of a “firearm” while the FBI policy used the term “deadly force” and (2) the ATF policy used the term “perceives” while the DEA and FBI used the terms “reasonably believe” and “reason to believe,” respectively.

The policies described in this chapter contain additional guidance regarding specific situations, such as fleeing persons, escaping prisoners, verbal warnings, warning shots, and shooting at or from vehicles. This additional information can be found in appendix I.

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## Conclusions

As Supreme Court guidance and state rules on the use of deadly force have evolved over the years, so have the policies of federal agencies. In addition, the ability of officers to enforce the law, protect the public, and guard their own safety is a very difficult task. Officers are often forced to make split-second judgments in circumstances that have been described as tense, uncertain, and rapidly evolving. Recently, Treasury and Justice adopted uniform policies to standardize the policies of their component agencies. Since 1988, ATF has maintained a policy that was, with three distinctions as discussed in this chapter, consistent with prior FBI and DEA policies. ATF’s 1988 policy was also, with two distinctions as discussed in this chapter, consistent with Treasury’s current uniform policy.

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<sup>20</sup>Manual of Investigative Operations and Guidelines, Part II - Section 12. FBI materials assert that this policy is more restrictive than the constitutional standard announced in Garner.

# ATF, DEA, and FBI Convey Deadly Force Policies to Their Agents in Similar Ways

Use of deadly force training provided new ATF agents at FLETC<sup>1</sup> and the ATF National Academy reflected the ATF/Treasury deadly force policy. This policy is also to be reiterated to new agents during their probationary period when they receive on-the-job training (OJT). Furthermore, the types of deadly force training new ATF agents received at FLETC and the ATF National Academy were consistent with the types of training provided new FBI and DEA agents. Moreover, ATF policy requires that ATF agents be reminded of the deadly force policy at least quarterly throughout their careers.

## Initial Training Is Designed to Establish the Foundation for New ATF Agents' Understanding of Use-of-Force Policies

The first year with ATF, new agents are to receive about 17 weeks of formal training—about 8 weeks in general criminal investigator skills and techniques at FLETC and 9 weeks in ATF-specific training at the National Academy. In addition, agents also participate in ATF's OJT for new agents.

## Training at FLETC

FLETC requires that all students who attend the basic criminal investigator course be trained in Treasury's/FLETC's Use-of-Force Policy and Firearms Policy, including deadly force. Because Treasury's use-of-force and deadly force policies are applicable to all of its bureaus, the use-of-force policies taught at FLETC are generally consistent with ATF's policies. Once trained on the policies and tested on their knowledge of them, students are required to demonstrate their knowledge and apply the policies where applicable throughout their training.

All new ATF agents are required to attend the FLETC's Criminal Investigator Training Program (CITP).<sup>2</sup> This program, which in fiscal year 1996 is to be expanded to approximately 9 weeks from slightly over 8 weeks in fiscal year 1995, provides basic training in a broad range of skills that criminal investigators require. Among the more than 70 course topics presented are interviewing, case management, surveillance, undercover operations, crime scene investigation, fingerprints, constitutional law, court testimony, and search and seizure. All Treasury bureaus' and many

<sup>1</sup>FLETC, which was established in 1970, is a Treasury bureau but has an interagency Board of Directors. FLETC serves as a law enforcement training organization for more than 70 federal agencies, as well as offering training programs for state and local enforcement personnel.

<sup>2</sup>Exceptions are made for new agents who have transferred from other law enforcement agencies and have completed equivalent training.

non-Treasury agencies are to send their new agents to FLETC for basic criminal investigator training.

CITP training consists of three methods of presentation—classroom/lecture; laboratory, where students practice skills under an instructor’s guidance; and practical exercises, where students participate in a related law enforcement scenario and demonstrate law enforcement skills. Students are to receive over 175 hours of training in the classroom/lecture, 117 hours of laboratory work, and 39 hours of practical exercises. They are to be graded in both lecture material and practical exercises. During CITP, students are to be given 5 written examinations on which they must score at least 70 percent and satisfactorily complete all required tasks during the practical exercises.

### Use-of-Force Training

According to FLETC officials, in about 1990, the FLETC Use-of-Force Oversight Committee developed a use-of-force continuum model, consistent with Treasury policies, which has been used to train all students. Furthermore, the Committee recommended and FLETC agreed to integrate use-of-force issues, where applicable, into all FLETC courses. As a result, FLETC provides a 2-hour course on Firearms Policy during the first week of training that presents, among other things, the basic concepts in the use of force, including deadly force, and introduces students to FLETC’s Use-of-Force Model (discussed below). Among the performance objectives of this course are that the student is to be able to (1) identify basic principles governing the use of force, (2) identify and apply the appropriate force, and (3) identify and apply the firearms policy and guidelines to hypothetical situations and practical exercises that are given throughout the training program.

### The FLETC Use-of-Force Model

The FLETC Use-of-Force Model is composed of five color-coded levels of force designed to correspond to officers’ perceptions of the level of threat with which they are confronted and describes the progression or de-escalation of force on the basis of the demonstrated level of compliance or resistance from a subject. Students are shown a video illustrating a situation that poses various levels of threat and emphasizes how threats in real-life situations can escalate and de-escalate from one level to another. Table 3.1 shows the levels of threat and the corresponding force represented in the Use-of-Force Model.

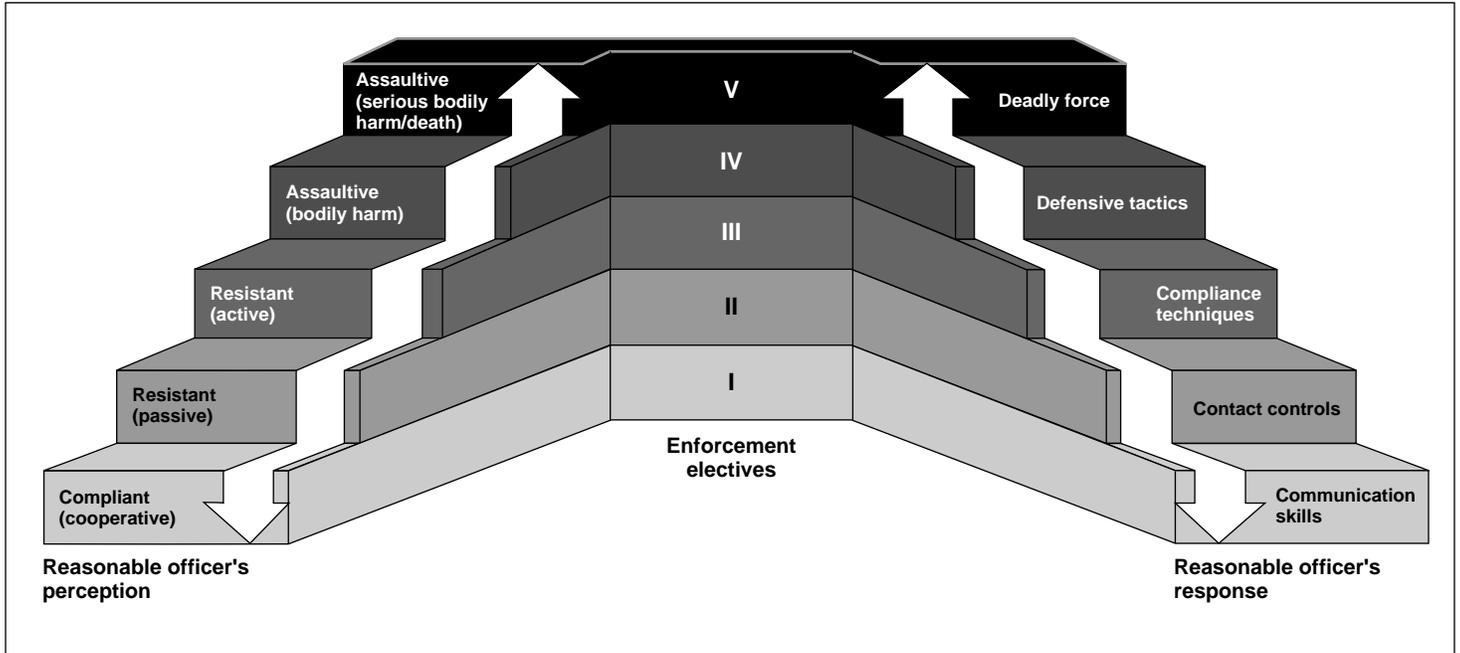
**Table 3.1: Levels of Threat and Corresponding Force**

| Level of threat  | Corresponding force   |
|--|---|
| (1) Compliant (blue level)   | Communication, such as verbal commands                                  |
| (2) Passive resistance (green level)   | Low-level physical tactics, such as grabbing a suspect's arm            |
| (3) Active resistance (yellow level)   | Use of come-along holds, pressure points, and chemical sprays           |
| (4) Assaultive with the potential for bodily harm (orange level)               | Defensive tactics, such as striking maneuvers with the hands or a baton |
| (5) Assaultive with the potential for serious bodily harm or death (red level) | Deadly force  |

Source: FLETC.

In addition to its presentation in training courses, FLETC officials said that the Use-of-Force Model is prominently displayed in all classrooms and throughout FLETC hallways. We observed that the Use-of-Force Model was displayed in the FLETC classrooms we visited as well as in hallways, firing ranges, and the cafeteria (see fig. 3.1).

**Figure 3.1: The FLETC Use-of-Force Model**



Source: FLETC.

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Other CITP Courses That  
Address Use of Force and  
Deadly Force

Our review of FLETC CITP course materials identified seven other courses (besides the Firearms Policy course) in which use-of-force topics were presented in varying amounts. These courses were (1) Detention and Arrest, (2) Execution of a Search Warrant, (3) Judgment Pistol Shooting, (4) Situational Response, (5) Introduction to Physical Techniques, (6) Non-lethal Control Techniques, and (7) The Removal and Positioning for Transportation of Reluctant Suspects. These courses contain components whose objectives are to train students in identifying threats and use-of-force concepts, applying the proper use of force to the threat, and honing judgmental skills in applying the various levels of force, including deadly force.

For example, in the Detention and Arrest course (10 hours), terms used in the use-of-force policy are to be defined, Supreme Court rulings on deadly force are to be discussed, and the FLETC Use-of-Force Model is to be presented. One of the objectives of the course is to train students to recognize the degree of force, which may include deadly force, that may be used to effect an arrest, according to Treasury/FLETC Firearms Policy.

In Judgment Pistol Shooting (3 hours), students are to use a weapon that has been altered to shoot a laser beam. They are confronted by realistic video scenarios on a giant screen that require them to use proper judgment in making shoot or not-to-shoot decisions. Students are required to identify the elements of jeopardy with which they are confronted and to provide a rational explanation in each instance of questionable judgment. Failure to properly respond to the video could result in the video perpetrator's "killing" the agent or another person. To successfully pass the course, students must score 100 percent in judgment and 70 percent in shooting accuracy.

In Situational Response (2 hours), students are to be given a scripted scenario in which they are placed into a situation and have to react to the threat posed by an instructor/role-player. Both students and role-players are to wear protective clothing and have weapons that fire paint bullets (commonly referred to as simunitions), which mark the target they hit. Students have to react to shoot and not-to-shoot situations and demonstrate the application of the deadly force policy.

In Non-Lethal Control Techniques (30 hours), students are to be provided the basic skills required to control and arrest a compliant and a noncompliant suspect without using deadly force. As part of the training, students are required to assess the threat and resistance level of the

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suspect and respond with the correct level of force and control as required by the FLETC Use-of-Force Model.

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## Training at ATF's National Academy

ATF students who successfully complete CTP are also required to attend New Agent Training at ATF's National Academy, which is located on the FLETC campus. New Agent Training is 9 weeks and focuses on the laws, policies, procedures, and specialized investigative techniques that are specific to ATF and designed to orientate new agents to their roles as special agents. Our review of course materials identified three courses that address ATF's use of deadly force policy:<sup>3</sup> (1) Firearms Usage Policy, (2) Situational Response for ATF New Agent Training, and (3) Tactical Operations Planning. A portion of the Firearms Usage Policy course is to be devoted to reiterating ATF's use-of-force and deadly force policies and the authority and limitations that agents bear in exercising the use of force.

In Situational Response for ATF New Agent Training (4 hours), students are to work in two- or more person teams with simunitions and participate in 7 realistic scenarios. These scenarios are designed from real-life experiences of ATF agents to challenge the students' ability to make proper decisions regarding the use of force, tactics, the use of cover, and, if appropriate, marksmanship. In this course, emphasis is placed on resolving the exercises with the use of surprise, speed, and, if necessary, violence without the use of deadly force. Among the objectives of the course are to allow the students to (1) demonstrate the ability to make proper deadly force decisions, (2) utilize the principles of tactics to gain control of situations and to avoid shootouts, and (3) demonstrate the ability to articulate a rational explanation of shooting decisions.

In Tactical Operations Planning (2 hours), students are to compile the necessary intelligence to develop and execute tactical plans relating to search warrants, high-risk search warrants, arrests, and undercover operations. As part of the training in operational briefings, students are to be taught that the Treasury/ATF Firearms Policy is required to be presented before the execution of tactical plans.

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## ATF On-the-Job Training

During the first year with ATF, new agents are supposed to complete phase 1 of the training program. For phase 1, new agents, in addition to attending

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<sup>3</sup>Use-of-force policies, including deadly force, are contained in ATF's Firearms Policy, ATF Order 3000.8.

CITP and New Agent Training, are to continue their training at their post of duty under the guidance of an experienced agent who has been designated as an OJT instructor. The purpose of OJT is to acquaint the new agent with applicable policies and procedures and to expose the trainee to various investigative activities. During this period, the trainee is expected to display the appropriate skill, knowledge, and judgment that is needed during their involvement in situations related to the training objective, such as during an arrest situation. For example, during OJT on arrest procedures, students are expected to understand the limitations on the use of force and the restrictions and limitations on using firearms when making an arrest. The student is also to understand and demonstrate proper custody and control of subjects.

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## Training Provided New ATF Agents Is Consistent With the Types of Training DEA and FBI Provided to Their New Agents

The types of training provided to new ATF agents in fiscal year 1995 to introduce them to and train them in the use-of-force and deadly force policies was consistent with the types of training provided to DEA and FBI new agents.

Each agency provided new agent trainees with an initial 2-hour classroom lecture<sup>4</sup> and discussion describing with examples the agency's use-of-force/deadly force policy within the first week of the training. (App. II provides FLETC and FBI excerpts from nine training scenarios in which the use of force was used and the rationale for whether the force used was appropriate.) Thereafter, each agency employed a building-block approach that integrates the use-of-force/deadly force issues into other segments of the training in which the use of force could be a relevant issue, such as physical control techniques, arrests, and on search and seizure training. Each of the agencies employed training techniques, such as practical exercises using role-playing, simunitions exercises, and firearms judgment exercises that use realistic video scenarios requiring shoot or not-to-shoot decisions. Furthermore, each agency trained its new agents in recognizing the perceived level of threat they face and in responding to it with an appropriate level of force.

FBI training officials stated that DEA and FBI have similar use-of-force training programs for new agents. One official noted that although the exact language of their policies might be somewhat different (the Treasury and Justice policies applicable to DEA and FBI were revised in October 1995 and are now generally uniform for DEA and FBI), DEA and FBI interpret and

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<sup>4</sup>According to FBI officials, for fiscal year 1996, legal instruction on the deadly force policy was being expanded to 4 hours during the first week of new agent training.

apply their use-of-force policies almost identically in training programs. This official said that he instructs on legal issues for the use-of-force policy course for FBI's new agents and has taught DEA's new agents as well and that he had also provided training assistance at FLETC.

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## Agents Are to Be Kept Aware of Use-of-Force Policies at Tactical Operations Briefings and at Quarterly Firearms Qualifications

Even after the training of new agents is completed and agents are provided full special agent responsibilities, they are to be frequently exposed to the use-of-force and deadly force policies. ATF policy requires that these policies be reiterated during the planning process for tactical operations and quarterly during firearms requalification training.

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## Tactical Operations Plans and Briefings

For over a decade, ATF policy has required that for every search warrant obtained, a plan is to be developed to execute the warrant and that all persons participating in the warrant are to be briefed on the plan. Moreover, the policy requires that every person participating in the plan, especially those who are not Treasury enforcement officers, are to be advised of Treasury's policy on the use of firearms.

A January 27, 1995, ATF policy brief stated that due to the increase in violence encountered by agents during the execution of search warrants, arrest warrants, and undercover operations, special agents planning to execute such operations are required to prepare an operational plan. The ATF guidance for operational plans stated that "the use of a well written operational plan, in concert with a thorough briefing, substantially enhances the safety of the special agents, public, and suspects." ATF policy requires that all enforcement officers involved in the operation be provided a copy of the operational plan. Among the issues to be discussed at the operational plan briefing is ATF's firearms policy on the use of deadly force. The plan, which is to be prepared on a standardized form, contains a block that is to be checked when the policy is discussed.

ATF agents with whom we spoke at the Washington, Los Angeles, and Baltimore divisions stated that the firearms policy on use of deadly force was reiterated before all operations.

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## Quarterly Firearms Training

ATF's firearms policy requires all special agents to qualify in marksmanship with their primary duty firearm each quarter. Agents who fail to meet minimum qualification requirements are not to be certified to use that weapon until they requalify. Because the requirement applies to the primary duty weapon, each agent,<sup>5</sup> even those in supervisory positions at headquarters, must attend and qualify each quarter. Furthermore, the ATF policy requires that as part of each firearms training session, no less than 1 hour of instruction is to be provided on ATF firearms/ammunition standards and procedures and the use-of-force policy. Each Firearms Instructor Coordinator is required to document the training provided and certify that the firearms policy instruction was provided.

We observed one quarterly firearms training session at each of the Washington, Los Angeles, and Baltimore divisions. At each session, the divisions' Firearms Instructor Coordinator read the use-of-force and deadly force policies to the agents. At the fourth quarter of the Washington Division's fiscal year 1995 qualification, the coordinator elaborated on various points in the policies, such as the prohibitions against firing at moving vehicles and firing warning shots. At the Los Angeles Division's first quarter of fiscal year 1996 qualification, the coordinator reviewed the revised October 1995 Treasury use of deadly force policy and confirmed that all agents had received copies of the new policy. He also gave the agents a quiz that included questions on the policy, among other topics.

At the Washington, Los Angeles, and Baltimore divisions, we discussed with the Firearms Instructor Coordinators the training they provided and also reviewed their records, including quarterly firearms training documentation, to determine if the use-of-force policies were discussed at all quarterly firearms training in fiscal year 1995. Our review of ATF agent firearms qualification records for the Washington Division showed that at each quarterly session the division's coordinator had certified on the records to reviewing ATF's firearms policy.

In Los Angeles, the division's former Firearms Instructor Coordinator said that he reviewed the policy at each quarterly qualification session during fiscal year 1995 and had every agent sign their qualification records to attest that they understood the policy. However, Los Angeles' new coordinator for 1996, said that instead of having agents' attest that they understood the policy, he would meet the policy requirement by certifying

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<sup>5</sup>Exceptions to the qualification requirement can be permitted by the SAC due to medical or leave reasons or where operational duties do not permit (e.g., agents who are working in certain undercover capacities or agents who are required to be in court when the qualifications take place).

on the agents' qualification record that the use-of-force policy had been reviewed.

At the Baltimore Division, the Firearms Instructor Coordinator had instituted, on his own initiative, a new computerized firearms qualification record form for each division agent. The computerized document did not show whether the firearms policy had been discussed. When asked about whether the policy had been discussed at each session, the coordinator said that he had discussed it and that, henceforth, he intended to certify to doing so in his written records. Furthermore, documentation at each of these offices showed that the firearms policy had been discussed at qualification sessions going back to at least the early 1990s.

DEA and FBI officials confirmed that deadly force policies are to be reiterated at their quarterly firearms qualifications.

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## Disseminating the Revised Treasury Use-of-Force Policy

In October 1995, shortly after Treasury revised its use-of-force policy to make it uniform among its components and with the Justice policy, ATF sent the revised policy to all of its field divisions. In his cover letter transmitting the revised policy, ATF's Associate Director for Enforcement pointed out that the policy sets forth uniform standards for the use of deadly force and provides broad guidelines for all Treasury enforcement agencies. Moreover, he emphasized that the uniform policy was effective immediately and that it was the responsibility of each supervisor to ensure that all special agents under their supervision receive a copy of the policy. The letter also stipulated that the policy should be addressed at the next quarterly firearms qualification.

Agents we spoke with in the Washington, Los Angeles, and Baltimore divisions all confirmed that supervising agents discussed the revised Treasury use-of-force policy with agents under their supervision. And, as noted above, we observed the Los Angeles Division's quarterly firearms qualification in which the Firearms Instructor Coordinator discussed the new policy.

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## Conclusions

ATF conveys its deadly force policies to new agents through training. Use-of-force and deadly force training provided new ATF agents reflected Treasury/ATF policies. The types of training new ATF agents receive were consistent with the training provided DEA and FBI new agents. Furthermore, ATF policy requires that the use-of-force and deadly force

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**Chapter 3**  
**ATF, DEA, and FBI Convey Deadly Force**  
**Policies to Their Agents in Similar Ways**

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policies be reiterated to agents throughout their careers during quarterly firearms qualifications and tactical operations briefings. According to DEA and FBI officials, their use-of-force policies are also to be reiterated during firearms qualification.

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# ATF, DEA, and FBI Often Use Dynamic Entries and Comparable Equipment to Execute High-Risk Warrants

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Dynamic entry has been a principal tactical procedure ATF has used to gain entry to premises when executing search and arrest warrants in high-risk operations. ATF believes dynamic entry is a useful tactic that can reduce the potential for injury to both agents and suspects in particular situations. However, on the basis of Treasury's report on the Waco operation<sup>1</sup> and views of tactical operations experts and ATF's own personnel, ATF decided in October 1995 that dynamic entry would only be planned after all other options have been considered and began to adjust its training accordingly. Similarly, according to DEA and FBI Washington Division officials, their agencies use dynamic entry when necessary to execute high-risk warrants and believe the tactic promotes safety.

ATF, DEA, and FBI use generally comparable weaponry and equipment to effect dynamic entries. The exceptions are noted in this chapter. In addition, all three agencies have aircraft that can be used for intelligence and surveillance operations, such as obtaining aerial photography, and their specialized teams generally have similar vehicles, such as sports utility vehicles, from which they can deploy and in which they store equipment. The clothing and additional gear worn by agents of all three agencies when executing warrants are designed to promote agent safety.

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## Dynamic Entry Is a Principal Tactic Used by ATF During High-Risk Search and Arrest Warrant Operations

Dynamic entry is one of several tactical procedures used by ATF to gain entry to premises to execute search and arrest warrants. Dynamic entry, which may involve a forced entry, relies on speed and surprise and often is used during high-risk operations, such as ones where suspects pose a threat of violence, or where evidence can be easily destroyed. Both ATF's case agents and SRTs are to be trained in the dynamic entry technique. However, ATF did not compile any statistics regarding the number of times various tactics, such as a dynamic entry, were used during enforcement operations, according to ATF officials. Due to time constraints, we did not review a sample of all ATF enforcement operations to determine how often various tactics were used. However, we discussed the use of dynamic entries with ATF headquarters and division officials who all agreed that dynamic entry was the principal tactic used by ATF agents during high-risk search and arrest warrant operations.

Furthermore, as agreed with the Subcommittee, since SRTs are to be deployed to conduct ATF's higher risk search and arrest warrants and have access to all of the equipment available to ATF agents as well as additional

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<sup>1</sup>Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco, and Firearms Investigation of Vernon Wayne Howell also known as David Koresh, September 1993.

specialized equipment, we primarily focused our review of ATF's use of dynamic entry and related equipment on operations involving SRT deployments. Our review of SRT deployments for fiscal year 1995 found that the dynamic entry technique was used almost half of the time and was the predominant technique used when an entry to a premise was required. Moreover, during the period we reviewed, when the dynamic entry technique was used, no SRT member fired a weapon at a suspect.

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**Executing High-Risk  
Search and Arrest  
Warrants Was the Primary  
Purpose of SRT  
Deployments**

ATF has established an SRT in each of its 24 criminal enforcement field divisions<sup>2</sup> to conduct high-risk operations. These situations include high-risk arrest, search, and undercover operations. SRT membership is voluntary and a part-time duty and ranges from 11 to 20 ATF agents depending on the location of the team.

ATF defines high-risk situations, in which activation of the SRT should be considered, as those in which an increased propensity for violence exists based on the nature of the subject, the monetary value of the transaction, or the underlying circumstances of the situation. Some of the factors to be used to determine whether the SRT should be deployed include the suspect's criminal history and propensity for armed violence, the weapons expected at the location, and the fortification of the buildings involved. SRTs are to be deployed at the discretion of the SAC of the division to ensure the safety of ATF agents, other law enforcement officers, and the public during high-risk operations. As seen in table 4.1, SRTs were most often deployed to execute search and/or arrest warrants.

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<sup>2</sup>In fiscal year 1996, ATF plans to restructure the SRTs to more effectively use its resources from 24 divisional teams to 5 regional teams consisting of about 40 agents each. Each regional team is expected to consist of several squads of about seven agents located geographically throughout its region. The teams are expected to obtain more multifunctional training, in areas such as surveillance, as well as continue to receive tactical training (e.g., entry techniques).

**Chapter 4  
ATF, DEA, and FBI Often Use Dynamic  
Entries and Comparable Equipment to  
Execute High-Risk Warrants**

**Table 4.1: SRT Deployments, FYs  
1993-1995**

| Reason for deployment                          | FY 1993    |                        | FY 1994    |                        | FY 1995    |                        |
|--|------------|------------------------|------------|------------------------|------------|------------------------|
|  | Number     | Percent                | Number     | Percent                | Number     | Percent                |
| Search warrant                                 | 150        | 69                     | 97         | 66                     | 68         | 43                     |
| Arrest warrant                                 | 21         | 10                     | 13         | 9                      | 23         | 15                     |
| Both search and arrest warrants (at same time) | 25         | 12                     | 22         | 15                     | 38         | 24                     |
| Other (undercover operations, etc.)            | 22         | 10                     | 16         | 11                     | 28         | 18                     |
| <b>Total</b>                                   | <b>218</b> | <b>100<sup>a</sup></b> | <b>148</b> | <b>100<sup>a</sup></b> | <b>157</b> | <b>100<sup>a</sup></b> |

<sup>a</sup>Does not add to 100 percent due to rounding.

Source: ATF for fiscal years 1993-1994. GAO analysis of SRT After Action Reports for fiscal year 1995.

**Dynamic Entries and Other  
Tactics Used to Promote  
Safety**

According to ATF, DEA, and FBI officials as well as training literature prepared by IACP and local law enforcement agencies, dynamic entry is a principal tactic available to law enforcement agencies for use during high-risk enforcement operations. According to these officials, the primary purpose for using dynamic entry is to ensure the safety of law enforcement personnel as well as suspects and other individuals during a high-risk operation. In addition, dynamic entries may be a preferred tactic when the possibility exists that evidence may be destroyed.

Furthermore, these officials as well as other law enforcement officials agree that two characteristics of dynamic entry are speed and surprise. Various law enforcement articles as well as ATF, DEA, and FBI officials assert that law enforcement studies show reaction time to be slower than action time—it takes longer for individuals to respond to a threat than to make a threat. Thus, through the use of dynamic entries in certain high-risk situations, law enforcement agents hope to act so quickly that the suspects do not have time to respond or, at a minimum, give agents the advantage by forcing suspects to react to agent actions rather than the reverse. While dynamic entries may require a forcible entry, such as breaking down a door, dynamic entries can also be accomplished through open or unlocked doors.

Dynamic entry is only one of several tactical techniques ATF agents can use to execute search and arrest warrants or conduct other enforcement operations. Additional techniques include

- “stealth” or “static” entries, which involve slow, methodical entry and movement in a premise during which each area or room is cleared of danger before proceeding (e.g., when a suspect opens the door in response to the knock and announcement, agents may arrest or detain the suspect and then slowly clear the remainder of the premise of danger before proceeding with a search);
- containment call-outs, which are situations where agents surround a location and, from covered positions, contact the suspect and order the person to exit the premise;
- ruses, such as when agents create a ploy to draw the person out of their premise before making an entry or arresting them; and
- arresting or detaining the suspect away from the location (e.g., vehicle stops) before making an entry or, in the case of an arrest, to avoid having to make an entry.

Whether an entry is required after using certain tactics, such as containment call-outs or ruses, would depend on the purpose of the operation. If a search warrant needs to be executed, even after arresting or detaining the suspect outside of the premise, an entry may still need to be made. According to ATF agents and our review of SRT deployment reports for fiscal year 1995, agents often conducted a stealth or static entry, rather than a dynamic entry, after detaining or arresting the primary suspect. According to ATF, DEA, and FBI officials, flexibility in tactical operations is important. Thus, agents may use a combination of these tactics or change tactics during an operation, as necessary. For example, ATF training materials and officials stressed that even after a decision is made to use a dynamic entry, a situation can emerge in the middle of an operation that dictates a change in tactics. Accordingly, during one SRT deployment in fiscal year 1995, agents planned to conduct a dynamic entry to execute arrest and search warrants. However, after the SRT’s arrival at the primary suspect’s home, the suspect was located in the backyard and detained before the SRT entered the premise. The agents then used a stealth entry to execute the search warrant. (App. III provides detailed examples of actual SRT operations in which these various tactics were used.)

According to ATF, DEA, and FBI officials, the decision regarding whether to use dynamic entry or another technique is dictated by the unique circumstances presented in each operation, with safety as the primary objective. ATF, DEA, and FBI officials agreed that factors, such as the suspect’s criminal history and violent tendencies, the location of the premise, and the amount of fortification expected, are to be considered

when determining whether dynamic entry or another tactic should be used.

In 1994, ATF developed and began requiring an Operational Risk Assessment form to be completed by agents when planning an operation.<sup>3</sup> This document is designed to identify critical elements that can affect high-risk tactical operations. The assessment is divided into four categories, including the type of enforcement activity, the suspect's criminal history, the weapons possessed by the suspect, and the suspect's location. According to ATF agents, factors, such as the suspect's violent tendencies, the location of the premise, and the amount of fortification expected, also are considered. The factors developed in the assessment are assigned point values and are totaled to determine the amount of risk believed to be present in the operation. Depending on the amount of risk present, a decision is made whether to use the SRT to accomplish the operation. Above a certain point total, deployment of the SRT is highly recommended. Below that point total, deployment is to be considered but is optional.

The information gathered for the risk assessment represents critical intelligence information needed by ATF agents to develop an operational plan (discussed below). According to one SRT leader, one specific factor, if present, would not dictate the use of a particular tactic. Instead, he said agents consider the totality of the factors in a situation when developing the operational plan. For example, because a person is expected to be armed and has a history of violence, does not result in the SRT employing the same tactic in each case. Other factors also present are considered in conjunction with what is known about the suspect—possibly leading agents to chose different tactics in each case. Thus, according to the SRT leader, agents must consider all factors and determine the most appropriate tactic for each operation. For example, agents have to consider whether a prolonged containment call-out could result in needed evidence being destroyed; whether the surrounding neighborhood would have to be evacuated; or, if the location is in certain high-crime neighborhoods, whether a call-out would create a more dangerous situation (e.g., sniping or a riot).

In January 1995, ATF began requiring agents to complete a standard written planning document for enforcement operations called an operational plan. According to ATF documents, ATF instituted this change due to the increase

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<sup>3</sup>Some divisions were using similar risk assessment forms before being directed to do so by the Tactical Response Branch.

in violence ATF agents encountered during the execution of search and arrest warrants and undercover operations. An operational plan is required before executing any search or arrest warrants or conducting certain undercover operations.<sup>4</sup> The plan is to specify the tactics and personnel to be used during the operation. According to ATF policy, the agent(s) responsible for the planning portion of the operation prepares the plan, and the group supervisor or Resident Agent-in-Charge (RAC) reviews and approves it. According to division officials, in operations involving the SRT, the SRT team leader and/or other SRT members are to develop the plan, which is then to be reviewed and approved by the assistant SAC responsible for supervising the SRT.<sup>5</sup> Copies of the approved plans are to be sent to the SAC of the division.

Since the decision to use a dynamic entry or other technique requires consideration of the unique factors present in each situation, ATF has not had any specific policies regarding the use of dynamic entry. However, as a result of Treasury's review of the Waco operation and the views of tactical operations experts and ATF's own personnel, ATF decided in October 1995 to implement lessons learned from Waco. One change ATF decided to make was that dynamic entry would only be planned after all other options had been considered. Given the choice, it was decided that the first tactical option to be considered during operational planning would be a ruse—luring the suspect out. It was believed that luring the suspect out would reduce the risks to the public and agents and ensure a safe, peaceful resolution to the situation.

Regardless of whether dynamic entry or another technique is used, ATF agents are required to follow Treasury's use-of-force policy as discussed in chapter 2. Also, ATF agents generally are required by law to knock and announce their identity and purpose before executing search and arrest warrants. Courts, nevertheless, have permitted unannounced entries in certain exigent circumstances. Several agents stated that knocking and announcing also helps to protect their safety—through identifying themselves and their purpose they sometimes can prevent a situation in which the suspect might react without knowing that they are law enforcement officers.

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<sup>4</sup>Previously, ATF agents were required to complete a written plan for search warrant operations. However, there was no standard planning requirement throughout ATF for all enforcement operations, such as arrest warrants and undercover operations. Also, previous ATF guidance permitted plans to be in outline form.

<sup>5</sup>The only exception to mandatory completion of the operational plan is on SRT activations in which the SRT leader chooses to complete a five-paragraph order. According to ATF officials, a five-paragraph order is a type of operational planning document that is commonly used by special weapons and tactics teams and contains all of the information required in ATF's operational plan.

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## **ATF Agents and SRTs Are to Be Trained in Dynamic Entry and Other Tactics**

ATF training is to emphasize that no one tactic is an absolute and that a number of factors, beyond the agents' control, will influence whether a dynamic entry or other technique is best. During New Agent Training, ATF agents are to be taught to differentiate between situations that require a dynamic or stealth/static entry. Agents are to be taught to consider various factors—such as the characteristics of the suspect, location, and weapons expected—when determining the best tactics to employ during an operation. Agents are to participate in simulation exercises during which they are required to determine and use the appropriate tactics to gain control of situations. ATF course materials emphasize resolving these exercises by using tactics involving speed, surprise, and, if necessary, violence without employing deadly force. During our visit to the ATF National Academy, we were able to confirm through observation that a class of new agents were trained on dynamic entries through practical exercises.

Agents assigned to SRTs are to receive additional training in tactics, including dynamic entries, during their 2 weeks of SRT basic training at Fort McClellan. Among the more than 20 course topics to be presented are tactical shooting, hostage situations, vehicle assaults, felony vehicle stops, and tactics. Over half of the instruction time allotted during this training is to cover tactics that include team entry and movement techniques during high-risk operations. However, according to an October 1995 ATF report, the basic SRT course curriculum has been revised to include instruction on some of the techniques needed to conduct containment call-out operations. This change was initiated by ATF, on the basis of lessons learned from Waco, to address situations in which there was no evidence in the suspect's premise that could be easily destroyed. The new basic SRT training also is to emphasize that dynamic entries are to be planned only after all other tactical options have been considered.

SRTs also are to continue to train on these skills at regularly scheduled in-service sessions. SRTs are required to receive a minimum of 8 hours training each month, or 24 hours each quarter, in addition to the quarterly firearms training to be received by all ATF agents. This continuing training must be provided by qualified sources, which includes other law enforcement agencies.

We reviewed SRT quarterly in-service training records for fiscal year 1995 and determined that all 24 SRTs conducted training on entry techniques, such as dynamic and/or stealth/static entries, including practical exercises frequently using simunitions or live fire rounds. However, we did not

confirm whether all SRT members attended all training sessions. Our review also showed that most of the training was conducted by ATF instructors. The most common non-ATF source of training was state and local law enforcement agencies. For example, we observed the Washington Division's SRT training for the fourth quarter of 1995. Two days of this training was conducted by representatives of the Los Angeles County Sheriff's Department's Special Enforcement Branch—the SWAT team—and primarily consisted of instruction and practical exercises on stealth entry techniques. In 10 instances, Department of Defense or National Guard units provided some training to SRTs but generally not regarding entry tactics. ATF forward observers<sup>6</sup> received most of the training provided by Department of Defense or National Guard units, covering subjects such as winter survival and surveillance techniques. Furthermore, our review showed that some SRTs' quarterly training exceeded the minimum hourly requirements, such as training conducted by the Los Angeles and Washington divisions' SRTs.

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**ATF Most Often Used**  
**Dynamic Entry Tactic in**  
**High-Risk Search and**  
**Arrest Warrant Services**

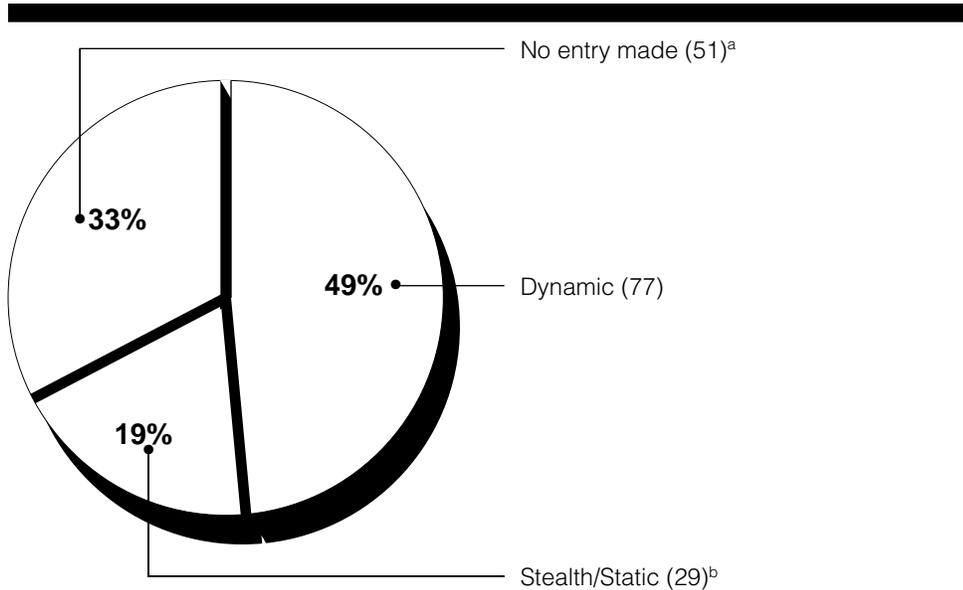
According to ATF division and headquarters officials, dynamic entry has been the primary technique used by both SRTs and non-SRT agents to gain entry to premises when executing high-risk search and arrest warrants. We reviewed reports of each of the total 157 SRT deployments during fiscal year 1995. During these deployments, about 185 suspects were arrested. As seen in figure 4.1, SRTs used the dynamic entry technique almost half the time during these deployments, and it was the predominant tactic used when an entry to a premise was made. However, none of the 77 deployments in 1995 in which SRTs used dynamic entries resulted in ATF agents' firing their weapons at suspects, according to the deployment reports. During only one SRT deployment, involving a "buy/bust" undercover operation in an open area where no entry was required, did ATF agents fire their weapons at suspects. During this incident, three suspects were wounded.

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<sup>6</sup>ATF forward observers support SRT operations by providing up-to-date intelligence and by ensuring the safety of participating enforcement personnel. Their initial training at Fort McClellan emphasizes weapons selection, marksmanship, and observation techniques.

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**Figure 4.1: Primary Entry Tactic Used During SRT Deployments in FY 1995**



Note: Does not add to 100 percent due to rounding.

<sup>a</sup>Includes situations such as undercover operations in open areas, vehicle stops, and arrests following containment call-outs or ruses in which search warrants were not executed.

<sup>b</sup>Includes situations such as entering a premise to execute a search warrant after detaining or arresting a suspect via a vehicle stop, containment call-out, or ruse.

Source: GAO analysis of fiscal year 1995 SRT After Action Reports.

Furthermore, from fiscal years 1993 through 1995, ATF conducted 35,949 investigations, arrested 22,894 suspects, and deployed SRTs 523 times. During this same period, as seen in table 4.2, SRT members were involved in 3 intentional<sup>7</sup> shooting incidents, one of which resulted in fatalities.

**Table 4.2: SRT Intentional Shooting Incidents, FYs 1993-1995**

|                                    | FY 1993        | FY 1994 | FY 1995 |
|------------------------------------|----------------|---------|---------|
| SRT intentional shooting incidents | 1 <sup>a</sup> | 1       | 1       |

<sup>a</sup>The Waco operation.

Source: GAO analysis of ATF Shooting Incident Reports, fiscal years 1993 through 1995.

<sup>7</sup>ATF defines intentional as the discharge of a firearm by a law enforcement officer directed at a suspect in response to a perceived threat of death or serious bodily injury to the officer or an innocent person.

According to several ATF agents, one reason they used dynamic entries so frequently was the type of suspects they generally encountered. According to these agents, with most of their enforcement investigations involving firearms, ATF suspects frequently had previous convictions, were known to have committed or are suspected of past violent acts, and were believed to be armed. According to ATF reports of its firearms enforcement investigations from fiscal years 1990 to 1995, 46 percent of the suspects ATF arrested had previous felony convictions, 24 percent had a history of violence, and 18 percent were armed at the time of their arrests.<sup>8</sup>

According to one SRT leader, ATF encounters basically three types of suspects, those (1) who do not attempt, or even consider, doing anything other than following agents' instructions; (2) who will attempt to flee or provoke an incident if they are given an opportunity or perceive any weaknesses on the part of the agents; and (3) who are willing to do whatever it takes not to be taken into custody. Thus, according to the SRT leader, ATF agents try to prevent incidents from occurring through following proper procedures and eliminating opportunities for suspects to provoke incidents. However, he also said that agents must always plan and be prepared for the worst, so training is very important.

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### **FBI and DEA Also Use Dynamic Entries for High-Risk Search and Arrest Warrants**

FBI and DEA officials said they also use dynamic entry as the primary tactic when entry to premises is required to execute high-risk search and arrest warrants. According to FBI and DEA officials, ensuring agent, suspect, and the public's safety is the predominant reason they would choose to use dynamic entry versus another tactic. FBI and DEA officials agreed with ATF that the decision to use a dynamic entry or another technique is dictated by the unique circumstances presented in each operation and that factors such as the suspect's criminal history and violent tendencies, the location of the premise, and the amount of fortification expected are considered.

FBI has SWAT units in each of its field divisions that, like SRTs, generally are deployed for high-risk operations primarily involving search and arrest warrants. According to the FBI Washington Division's SWAT team leader, dynamic entry is the predominant technique used by the SWAT team as well as non-SWAT agents to gain entry to a premise during a high-risk search and arrest warrant operation. According to the SWAT team leader, although FBI special agents and/or the SWAT team will move rapidly to enter and secure the immediate entry area, they generally will de-escalate the speed and move more slowly through the rest of a premise. According to division

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<sup>8</sup>ATF did not compile data for suspects armed at arrest for fiscal years 1990 and 1991.

officials, the Washington Division's use of dynamic entry generally is representative of other FBI field divisions.

DEA has established a High Risk Entry and Arrest Team (HEAT) in its Washington, D.C., Division that, like SRTs, is deployed for high-risk operations primarily involving search and arrest warrants. According to Washington Division officials, the principal difference between HEAT and other DEA agents who conduct operations is that HEAT agents train more frequently as a unit and, thus, are better coordinated tactically. According to the DEA Washington Division's HEAT leader, dynamic entries represent the predominant tactic used by both DEA agents and the HEAT team to gain entry to a premise during high-risk search and arrest warrants.

DEA and FBI agents as well as their respective SWAT and HEAT teams are to receive training on the use of dynamic entries and other tactics during initial training. Also, according to Washington Division officials, SWAT and HEAT teams, like SRTs, train as a unit on a monthly basis in areas such as tactics and firearms.

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## **Equipment ATF Used in Dynamic Entries Is Generally Comparable to DEA's and FBI's**

The equipment ATF agents used during dynamic entries generally included weaponry; breaching equipment, such as battering rams; and/or other tactical equipment designed for safety, such as body bunkers, ballistic vests, and helmets. In addition to the equipment available to all agents, SRTs have access to additional firearms, such as bolt-action and automatic rifles, and specialized tactical equipment, such as diversionary devices. SRT vehicles generally include vans and trucks from which SRT teams can deploy and in which they store equipment. The equipment, vehicles, aircraft, and clothing used by ATF generally are comparable to that used by FBI and DEA during similar operations except where noted.

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## **ATF Used Weapons, Breaching Equipment, And/Or Other Tactical Equipment During Dynamic Entries**

ATF weaponry available for use during dynamic entries includes any of the agency's authorized firearms and less-than-lethal weapons, which include oleoresin capsicum (OC or pepper) spray<sup>9</sup> and expandable tactical batons. According to ATF policy, agents are to be assigned a 9mm semi-automatic<sup>10</sup> pistol as their primary duty weapon, and, if requested, a revolver as a

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<sup>9</sup>An inflammatory agent that may cause an intense burning sensation and an almost immediate swelling of the eyes and breathing passages. Physical effects may include involuntary closing of the eyes, coughing, choking, lack of upper-body strength and coordination, and nausea.

<sup>10</sup>A semi-automatic firearm is defined as one that ejects empty cartridge cases after the first shot and loads the next cartridge from the magazine but requires release and another pressure of the trigger for each successive shot.

backup weapon. Divisional offices or agents also are to be issued shotguns, semi-automatic rifles (e.g., Colt AR15s), and tactical carbines<sup>11</sup> (e.g., Heckler and Koch MP5s), which agents may use during various enforcement operations, including search and arrest warrants. Some MP5s are equipped with a selector switch that, when activated, permits the weapon to fire two rounds with a single depression of the trigger and qualifies them as automatic weapons. According to ATF officials, only SRT agents are allowed to use automatic MP5s. Also, forward observers on SRTs are to be issued bolt-action rifles and AR15s, which can be used to provide additional cover for agents during warrant services.

During our review of division training, we observed ATF agents qualifying with the 9mm pistols, revolvers, shotguns, AR15s, and MP5s at quarterly qualification sessions. Also, we observed the Washington and the Baltimore divisions' in-service SRT training sessions in which they used the 9mm pistols, shotguns, and MP5s. The only weapon we did not observe during these training sessions was the bolt-action rifle issued to forward observers because the forward observers did not qualify with this weapon on the days that we attended. However, the Washington Division forward observer stated that he has taken the bolt-action rifle on SRT activations to provide cover for agents during operations.

We obtained and reviewed listings of the firearms issued to agents and/or the division for use during dynamic entries from the Washington and Los Angeles divisions and determined that they included 9mm pistols, shotguns, AR15s, and MP5s as indicated by ATF policy. Furthermore, we reviewed listings from ATF's Inventory Tracking and Equipment Management System of the rifles and tactical carbines issued to agents and/or divisions throughout ATF and determined that the types of weapons included AR15s, MP5s, and bolt-action rifles as indicated by ATF policy. In addition, these inventories showed that some divisions were credited with having obtained or seized certain automatic weapons, such as M16s, for agent use. When asked about these automatic weapons in the inventory listings, the Chief of ATF's Special Operations Division said that ATF had acquired some M16s from the Department of Defense and converted them to semi-automatic rifles (e.g., AR15s) for use by agents. In addition, we spoke with the Chief of the Firearms and Technology Branch who confirmed that the M16s ATF had acquired for use by agents had been converted to semi-automatic rifles. Both these officials noted that some of the other automatic weapons in the inventory lists were incorrectly coded

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<sup>11</sup>A modern repeating rifle that is shorter and lighter than the standard rifle and fires lighter ammunition.

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as available for agent use when in actuality they were used only as display or prop weapons—usually seized weapons that are then used as show weapons during undercover operations. We contacted Baltimore and Washington division officials who also confirmed that the automatic weapons shown on the inventory listing for their divisions had either been converted to semi-automatic rifles or were being used only as prop weapons. Each of these officials stressed that the only automatic weapon used by ATF is the two-shot burst MP5, which is limited to use only by trained SRT members.

ATF agents also can use various breaching equipment during dynamic entries to gain entry through doors and windows during search and arrest warrant operations when there is no response to the ATF agents' knock and announcement, particularly at locations where the entrances have been reinforced or fortified to deter entry. ATF breaching equipment includes items such as one- and two-person battering rams, hydraulic door spreaders, pry bars, and other firemen's entry tools. Shotgun and explosive breaching has not been authorized by ATF. Agents also can use body bunkers, which are ballistic shields with clear viewports, during dynamic entries. These bunkers are capable of withstanding direct shots fired from various firearms and provide additional protection to agents as they enter and search premises. During our visit to the ATF National Academy, we observed agents making dynamic entries into buildings using body bunkers. Moreover, during our division reviews, agents demonstrated and/or provided examples of how this equipment has been used during dynamic entries.

SRTs have access to the weapons and equipment available to all ATF agents as well as some specialized equipment, including flash/sound diversionary devices (commonly called flash/bangs),<sup>12</sup> rappelling equipment, and night vision goggles. On the basis of our review of reports of all SRT deployments and in-service training sessions in fiscal year 1995 as well as course materials from the initial training received by SRT members at Fort McClellan, we determined that flash/sound diversionary devices represented the specialized equipment SRTs most frequently trained with and used during deployments. According to agents, flash/sound diversionary devices are used to disorient and confuse individuals to more safely obtain their compliance and detainment during enforcement operations. Factors such as the presence of children or elderly individuals

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<sup>12</sup>A flash/sound diversionary device is a device that generates a loud noise and a blinding light upon detonation that can be used for a tactical diversion as well as to confuse suspects within a location. Training is essential in their use because they are capable of causing injury and fire if not properly deployed.

are to be considered before the use of these devices, according to agents and SRT training materials. According to agents and several SRT deployment reports, these devices greatly assisted SRTs in subduing suspects, controlling situations, and avoiding shooting incidents.

Although SRT members conducted training on rappelling from buildings and aircraft at their initial training and/or fiscal year 1995 in-service training sessions, this tactic was not used during any deployments in 1995, according to the ATF records we reviewed. In addition, our review of fiscal year 1995 SRT deployment reports and several operational plans showed that SRTs used the weapons discussed earlier as well as body bunkers and various breaching tools during dynamic entries.

Depending on the unique circumstances present during an operation, SRT agents may be authorized to use any or all of the equipment during a dynamic entry. The following scenario represents an example of how this equipment has been used by both ATF SRTs and non-SRT agents during dynamic entries. An ATF agent knocks and announces ATF's identity and purpose. If there is no response after a reasonable period and the door is locked or fortified, one or two agents breach the door using a ram or other tool to gain entry to the premise. Teams carrying body bunkers then quickly enter and search the premise to locate suspects and clear the premise of any danger. A bunker team generally consists of two or three agents—one agent carrying the bunker and holding a 9mm pistol on one side, another agent following closely and holding a 9mm pistol on the opposite side of the bunker, and the last agent following closely and carrying a MP5. Additional agents follow the bunker team and handcuff or detain suspects as they are located, and agents located outside the premise provide rear and front security.

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## **SRTs Use Vehicles and Aircraft for Deployment and Surveillance**

The Enforcement Support Branch of ATF's Special Operations Division provides vehicles to ATF divisions for use in enforcement operations. According to ATF officials, they have not provided any armored vehicles to ATF field divisions. The vehicles provided generally include sedans, vans, and trucks. SRTs may have designated vehicles from which they can deploy during high-risk operations and in which they maintain their equipment. On the basis of vehicle listings from ATF's Inventory Tracking and Equipment Management System and our review of all SRT deployments in 1995, vehicles such as large delivery trucks, excess military ambulances, vans, and utility trucks have been obtained or donated to ATF for use by SRTs. Furthermore, our review of the 1995 SRT deployment reports showed

that SRTs had used these trucks and vans during actual operations. The only armored vehicles used by the SRTs identified through our review of the inventory listings and 1995 SRT deployment reports included: (1) a truck donated to the Los Angeles SRT by a private company that is engaged in the security and transfer of money and negotiable instruments and (2) a Dallas Police Department vehicle borrowed by the Dallas SRT on two occasions for search warrant operations in fiscal year 1995.

We observed the Washington, Baltimore, and Los Angeles divisions' SRT vehicles, which are used to store equipment and from which the SRTs had deployed during operations. The Washington Division's SRT vehicles included a van and large delivery truck, similar to those used by bread or package delivery companies, in which they had installed benches along each side and storage units for equipment. A similar large delivery truck was donated to the Baltimore Division's SRT and used for its operations. In addition to the armored truck, the Los Angeles Division's SRT vehicles included two large sports utility vehicles. All of the Los Angeles Division's SRT vehicles we observed had public address and siren systems installed. The Los Angeles Division's SRT also reported having a large delivery truck and van, which we were unable to observe, due to time constraints and their remote location.

ATF obtained five excess military armored "peacekeeper" vehicles from the U.S. Air Force in 1993 to test for possible tactical use, such as to protect agents from additional danger while they extract a wounded agent from a hostile situation. One of these vehicles was sent to the SRT training facility at Fort McClellan, and the rest remained at the Enforcement Support Branch in Rockville. According to Enforcement Support Branch officials, none of these vehicles was ever assigned to a division or used for enforcement operations. ATF decided not to keep these vehicles or obtain others for enforcement operations. At the time of our review, ATF had provided four of these vehicles to local law enforcement agencies. The remaining vehicle at Fort McClellan was awaiting disposal. Our examination of vehicle listings from ATF's Inventory Tracking and Equipment Management System confirmed that none of the peacekeeper vehicles was assigned to field divisions at the time of our review.

As of February 1996, ATF had obtained nine excess military fixed-wing twin engine two-seater aircraft for use in enforcement operations. Seven of these airplanes were strategically located within the United States and had been equipped with an advanced thermal imaging system that can be used for surveillance during low visibility conditions. According to ATF's Chief

Pilot, the remaining two airplanes were in storage. According to ATF policy, the airplanes primarily are intended for use during surveillance operations, such as aerial photography and general area surveys. According to the Chief of the Special Operations Division, these aircraft and/or previously leased fixed-wing aircraft have been used between 200 and 300 times a year in the past 4 years. In addition, ATF may obtain assistance from other agencies, such as the U.S. Customs Service, Department of Defense, and local law enforcement units, in conducting surveillance operations and transporting agents via aircraft. However, according to ATF policy, ATF agents must obtain approval from ATF's Chief Pilot in the Air Operations Branch of the Special Operations Division before using any non-ATF aircraft.

On the basis of the records we reviewed, in only one instance did an SRT use aircraft to transport agents during an operation in fiscal year 1995. In this operation, the SRT was deployed to provide surveillance and possible assistance in the arrest of a suspect in the Oklahoma City bombing investigation and was transported to the desert by the U.S. Customs Service's and a local Sheriff department's helicopters. Aircraft were more frequently used by SRTs for assistance in operational planning efforts. For example, we observed aerial surveillance photographs of locations at which the Los Angeles Division's SRT conducted several of its activations in fiscal year 1995. We were told that these photographs were used during operational planning.

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## **ATF Clothing Used for Agent Safety**

ATF agents' basic duty uniform for enforcement operations consists of a dark-blue jacket with matching teeshirt, pants, baseball cap, and ballistic vest. The uniform has yellow lettering in numerous places indicating "ATF," "AGENT," "POLICE," and/or the ATF shield. The uniform also includes a black pistol belt, black nylon holster, and magazine pouch. Agents are not issued footwear, but may obtain tactical boots for which they are to be reimbursed by ATF. Also, according to ATF officials, almost all agents are issued a U.S. Army excess tactical helmet—painted black—with a detachable, clear plexiglass shield for eye protection. The purpose of the tactical helmets is to provide additional safety for the agents' heads during high-risk operations.<sup>13</sup> The clear shield provides no ballistic protection, but is intended to provide protection from flying debris.

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<sup>13</sup>According to Enforcement Support Branch officials, ATF has documented three confirmed situations during which the tactical helmet protected ATF agents from receiving shots to their head.

Agents assigned to SRTs are to wear the same basic duty uniform described above with some additional clothing during enforcement operations. SRT members wear a black-webbed vest, which is used to carry extra equipment (e.g., diversionary devices, radios, and extra ammunition) over their ballistic vest. SRTs may also wear fire-retardant gloves for added protection during operations in which diversionary devices are authorized. In addition, the Los Angeles Division's SRT wears fire-retardant balaclavas<sup>14</sup> for further protection during these operations. However, according to the Los Angeles Division's SRT leader, division management requires the balaclavas to be removed as soon as the entry or operation is complete and the area is secure. ATF has obtained excess military clothing, such as camouflage battle dress, for use by agents during training, to reduce the wear on agents' basic duty uniforms. According to ATF agents, this clothing also may be worn during surveillance operations in rural areas. However, according to SRT agents and ATF headquarters officials, with only an occasional exception in rural areas, the camouflage clothing is not to be worn by entry teams during the execution of search and arrest warrants.

During our review of division training, we observed ATF agents wearing the basic duty uniform, tactical helmets and boots as well as SRT agents wearing their additional carrier vests. Agents with whom we spoke stated that this clothing represented what they wear during enforcement operations.

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### **ATF Equipment Is Generally Comparable to FBI's and DEA's**

On the basis of our discussions with FBI and DEA training and field division officials as well as our observations of the equipment at their Washington field divisions, ATF weaponry generally is comparable to the weapons used by FBI and DEA. However, unlike ATF, both FBI and DEA have and are authorized to use certain automatic weapons (e.g., M16 rifle) that, with a single depression of the trigger, will continue to fire rounds until the trigger is released or the ammunition is exhausted. However, DEA Washington Division officials stated they had never used the M16 during enforcement operations, and both DEA and FBI officials agreed that the M16 is not a very practical weapon for urban operations.

In addition, the breaching equipment, body bunkers, vehicles, aircraft, clothing, and specialized equipment used by SRTs also generally are comparable with those used by FBI SWAT and DEA HEAT teams. For example, FBI SWAT team members have black or green uniforms and DEA HEAT team members have green uniforms. Both FBI SWAT and DEA HEAT teams have

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<sup>14</sup>A balaclava is a knit hood covering the head and neck.

ballistic helmets and fire-retardant balaclavas. Also, FBI and DEA have aircraft that can be used for intelligence and surveillance operations, such as obtaining aerial photography, and the FBI SWAT and DEA HEAT teams generally have similar vehicles, such as sports utility vehicles, from which they can deploy and in which they store equipment. However, while FBI SWAT teams have some additional tactical equipment not available to SRTS for dynamic entries, such as additional breaching equipment, the DEA HEAT team has somewhat less equipment. For example, the DEA HEAT team does not train with or have equipment for rappelling, is not allowed to use flash/sound diversionary devices, and does not include a sniper/forward observer position and its related equipment.

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## Conclusions

Dynamic entry is a common tactic used by ATF, DEA, and FBI when entry to premises is used to execute high-risk search and arrest warrants. Dynamic entry is to be used when it is believed to be the safest alternative given the particular circumstances and requirements of an operation. The weaponry and equipment available for use by ATF, DEA, and FBI to effect dynamic entries are generally comparable.

# ATF Complied With Its Procedures for Investigating Shooting and Alleged Excessive Force Incidents

ATF has procedures in place for reporting, investigating, and reviewing shooting incidents and use of excessive force allegations involving ATF agents. These procedures are consistent with guidelines and/or standards recommended by IACP, PCIE, and the Commission on Accreditation for Law Enforcement Agencies.<sup>1</sup> Overall, ATF's procedures for shooting incidents also are comparable to those employed by DEA and FBI. However, while ATF's excessive force procedures are comparable to DEA's, there are distinctions with those employed by FBI.

Our review of available information in ATF's investigative files of reported intentional shootings and alleged use of excessive force incidents for fiscal years 1990 through 1995 showed that ATF complied with its investigative procedures in effect at the time of the investigation except that two investigative files did not contain a record of review<sup>2</sup> by the designated unit at ATF headquarters as required by procedures. Our review also showed that ATF investigations determined that all reported intentional shootings were justified and most reported allegations of excessive force were unsubstantiated. In addition, our review showed that ATF agents found to have engaged in misconduct received sanctions in the form of written reprimands and suspensions, and that ATF has implemented lessons learned from its investigations.

## ATF Procedures Are Consistent With Recommended Guidelines and Standards and Are Generally Comparable to Those Employed by DEA and FBI

ATF's procedures for reporting, investigating, and reviewing shooting incidents and allegations of use of excessive force are consistent with recommended guidelines and/or standards for law enforcement agencies established by IACP, PCIE, and the Commission on Accreditation for Law Enforcement Agencies. Overall, the shooting incident procedures are comparable to those employed by DEA and FBI. However, while the excessive force procedures are comparable to DEA's, there are distinctions with those employed by FBI.

ATF also has procedures for addressing administrative tort claims and civil lawsuits filed by complainants. Complainants may file such administrative claims and lawsuits in addition to reporting allegations of excessive force use.

<sup>1</sup>The Commission on Accreditation for Law Enforcement Agencies, a not-for-profit corporation, was established in 1979 by major law enforcement membership associations, including IACP. The purposes of the Commission are to offer (1) standards on law enforcement topics, such as the role and authority of law enforcement agencies, and (2) a process for addressing and complying with the standards. Compliance with standards to gain Commission accreditation is voluntary.

<sup>2</sup>A document maintained in the investigative file that indicates who reviewed the file and, where applicable, any annotated comments resulting from the review.

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**Procedures for Reporting,  
Investigating, and  
Reviewing Shooting  
Incidents**

ATF has procedures in place for reporting, investigating, and reviewing shooting incidents. These procedures were revised in October 1994.<sup>3</sup> The revisions were initiated by the ATF Director as part of an overall reorganization of ATF's operations. Under the revised procedures, ATF's OI<sup>4</sup> is responsible for investigating reported shooting incidents. Before the revision, ATF's Office of Enforcement (OE) was responsible for investigating shooting incidents. According to an OI official, the transfer of responsibility was part of an effort to make the investigative process independent of the enforcement process. As a result of the overall reorganization, OI reports directly to the ATF Director. The revisions also include changes in the reporting requirements and procedures and in the procedures for reviewing shooting incident reports. Appendix IV contains a detailed description of ATF's procedures for reporting, investigating, and reviewing shooting incidents.

As shown in figure 5.1, once a shooting incident occurs, the ATF agents involved in or present at the incident are required to immediately notify their supervisors. The incident is then to be reported through the chain of command to OE and OI, followed by a written notification within 12 hours of occurrence. Agents are not required to report shooting incidents related to authorized training and recreational shooting. According to the procedures, OI is to determine whether to conduct an investigation of any incident involving the discharge of a firearm within the criteria established by ATF. For example, the intentional discharge of a firearm by an agent is to be investigated. However, shootings of canines or other animals, while required to be reported, are not normally investigated. If an investigation of a shooting incident is required, OI is to assign it to a shooting incident review team (SIRT).

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<sup>3</sup>According to an Office of Inspection (OI) official, as of December 1995, an ATF order finalizing these revisions was being reviewed within ATF; but the revised procedures had been in effect since October 1994.

<sup>4</sup>According to an OI official, OI is also responsible for, among other things (1) inspecting ATF's 24 field divisions and their sub-offices and (2) reviewing the weapons and training qualifications of ATF agents.

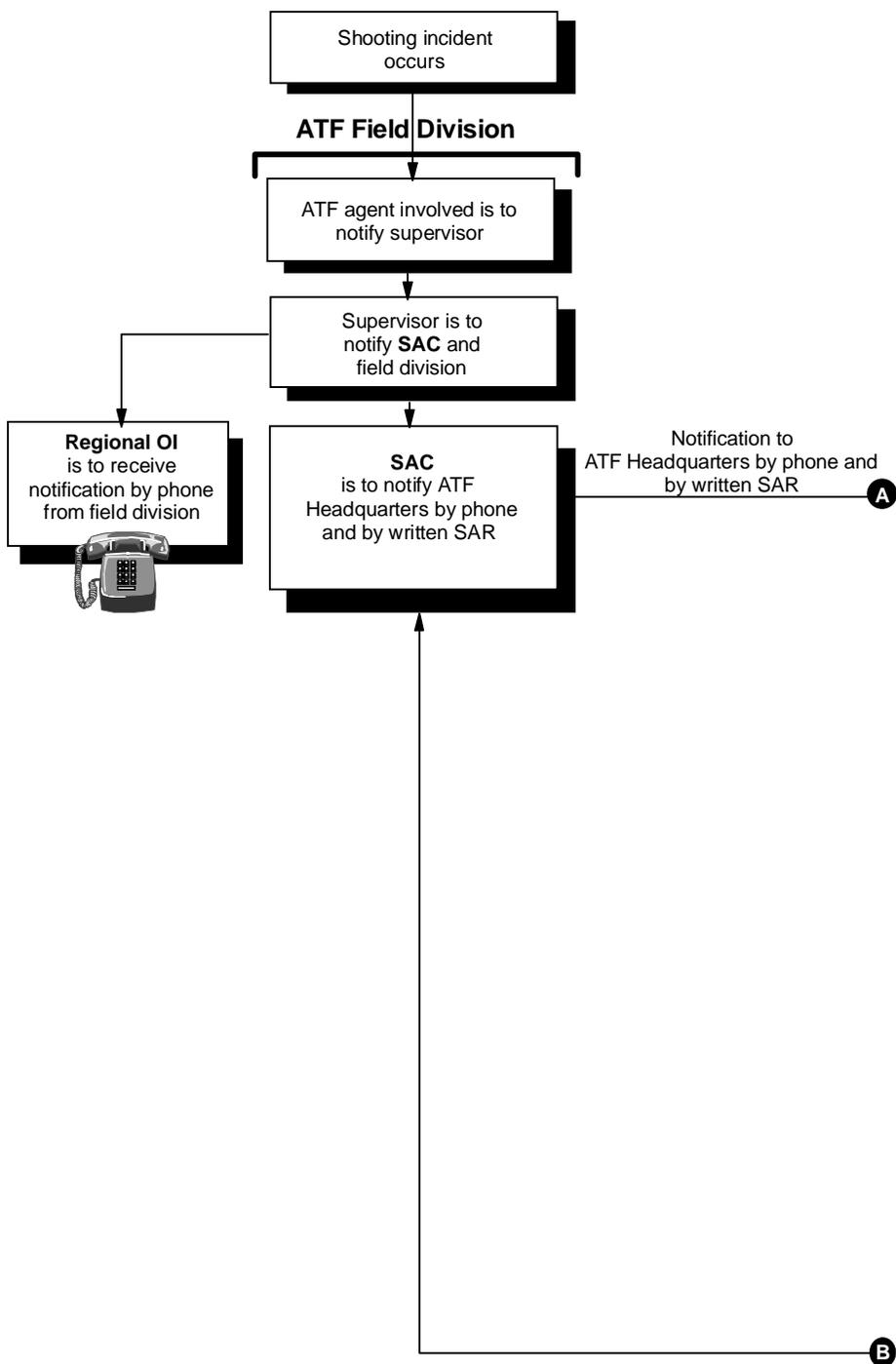
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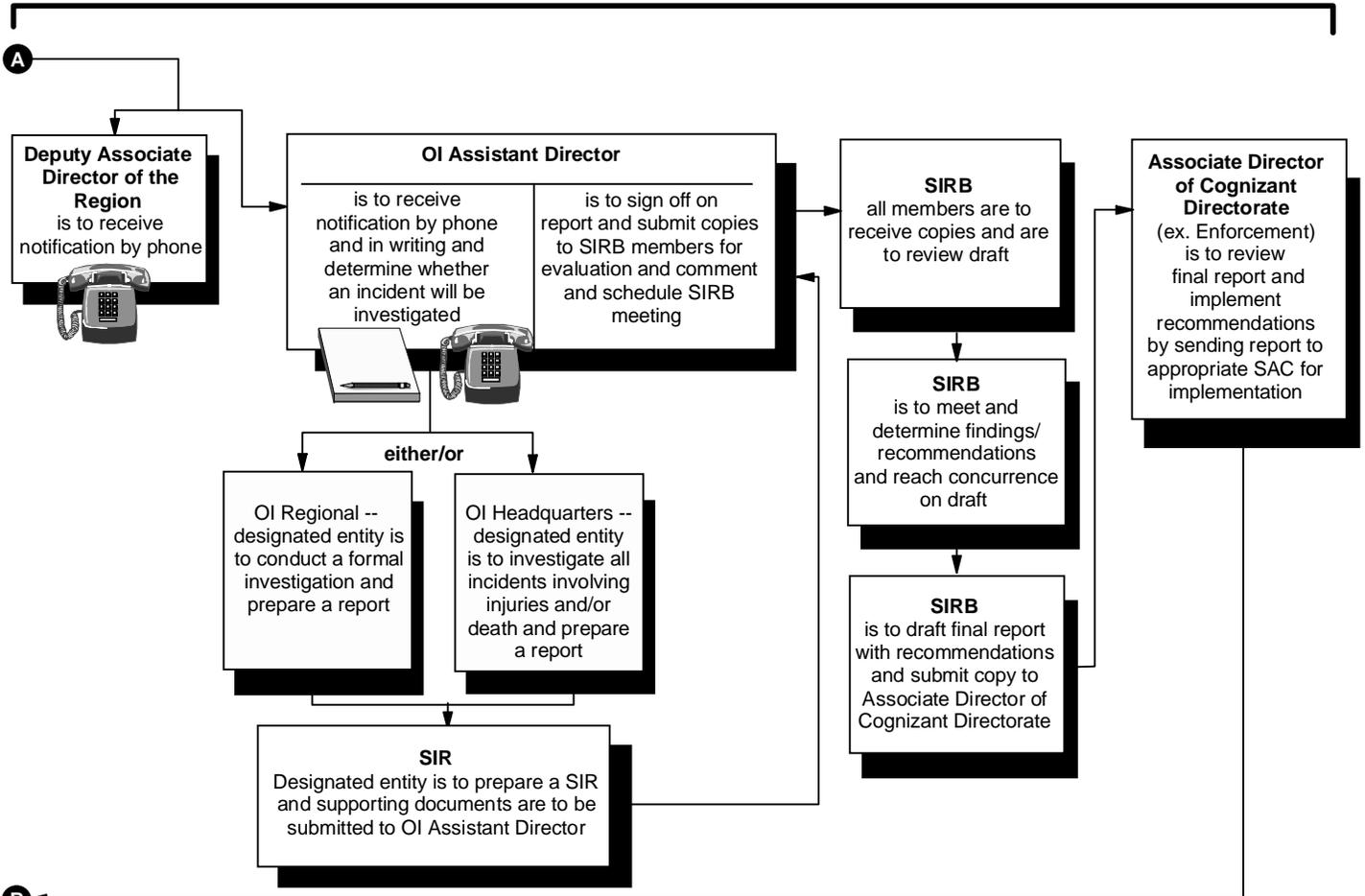
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**Figure 5.1: Procedures for Reporting, Investigating, and Reviewing Shooting Incidents**



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**ATF Headquarters**



Indicates the two areas from which one designated entity will be chosen to prepare a report.

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Note: ATF Bureau of Alcohol, Tobacco and Firearms  
OI Office of Inspection  
SAC Special Agent-in-Charge  
SAR Significant Activity Report  
SIRB Shooting Incident Review Board  
SIR Shooting Incident Report

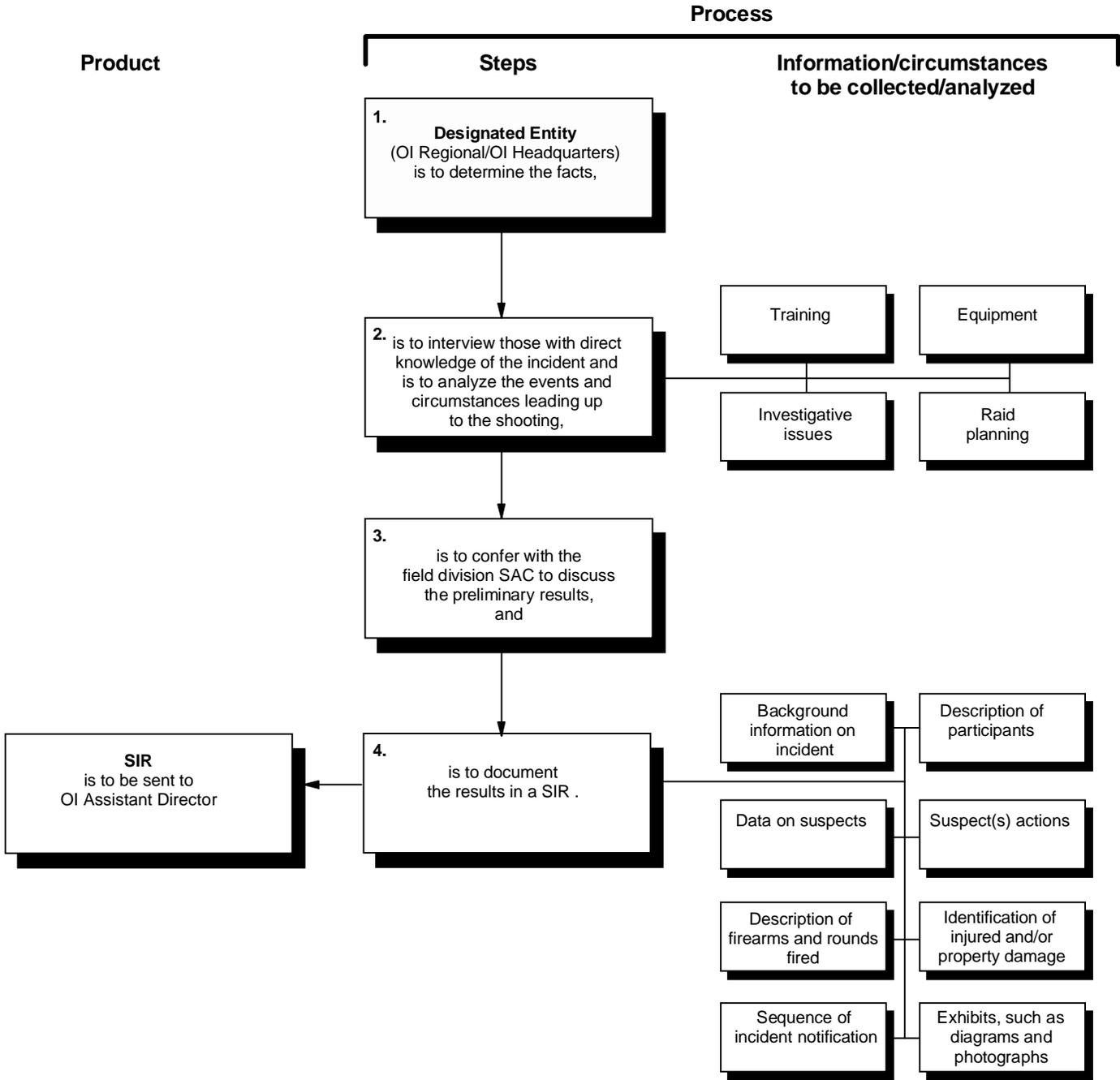
Source: GAO analysis of ATF data.

An SIRT is to investigate the shooting incident according to the process described in figure 5.2. The investigation is to include, among other things, the determination of facts and the analysis of the events and circumstances relating to the incident. The SIRT is then to issue a Shooting Incident Report (SIR) that is to include, among other things, background on the incident, information on suspects' actions, and exhibits. The report is to be submitted to the OI Assistant Director. On the basis of the incident's nature and seriousness, the Assistant Director is to submit copies of the report to all members of the Shooting Incident Review Board (SIRB). The SIRB is composed of the following ATF officials: (1) the OI Assistant Director; (2) the Deputy Associate Director for Criminal Enforcement Programs; (3) the two Deputy Associate Directors for Criminal Enforcement Field Operations in the West and East Regions, respectively; (4) the Associate Chief Counsel for Litigation, Office of the Chief Counsel (OCC); (5) the Assistant Director for Training and Professional Development; and (6) the Chief of the Special Operations Division.

According to the OI Assistant Director (and current Chairman), the SIRB meets at the Chairman's request, generally within 2 to 3 weeks after a SIR(s) has been submitted, to review the report(s) and determine whether the shooting(s) was justified. The SIRB may accordingly recommend, among other things, changes to training and operational policies. Cognizant ATF Directorate heads are responsible for implementing the recommendations and are to respond in writing within 30 days describing the actions taken. If the SIRB finds the shooting to be not justified, and potential misconduct by ATF agents, it is to forward the matter to ATF's Professional Review Board (PRB). As discussed below, PRB is to review incidents of alleged agent misconduct, including the alleged use of excessive force.

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**Figure 5.2: Investigative Procedures for Shooting Incidents**



Indicates the two areas from which one designated entity will be chosen to prepare a report.

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Note: OI Office of Inspection  
SAC Special Agent-in-Charge  
SIR Shooting Incident Report

Source: GAO analysis of ATF data.

**Shooting Incident Procedures**  
**Are Consistent With**  
**Recommended Guidelines and**  
**Standards**

ATF's procedures are consistent with guidelines and/or standards recommended by IACP, PCIE, and the Commission on Accreditation for Law Enforcement Agencies. Specifically, IACP reporting guidelines recommend that use-of-force incidents, including shooting incidents, be reported in an accurate and timely manner. These guidelines also recommend the preparation of a written report about the incident and the notification of supervisors. In addition, IACP guidelines recommend that shooting incidents be investigated and that the resulting investigative reports be reviewed to determine whether changes in training or other policies are needed. Consistent with these guidelines, ATF procedures require agents to immediately report shootings to their supervisors and to follow up with a written report. In addition, the procedures require that shooting incidents be investigated and—depending on the nature of the incident—the resulting reports be reviewed by the SIRB to determine if changes in policies are warranted.

PCIE standards recommend that investigators be qualified, exhibit professional proficiency, and exercise due professional care by following an investigative plan and relevant procedures. In addition, the standards recommend, among other things, the establishment of a management information system. Consistent with these standards, according to OI officials, (1) ATF investigators are special agents who have been trained—both collectively and individually—in the investigation of shooting and other use-of-force incidents, (2) ATF investigators use an investigative plan in the form of an action checklist, and (3) OI maintains investigative files and tracks investigations in a computer database.

Commission on Accreditation for Law Enforcement Agencies standards, like IACP's guidelines, recommend that shooting incidents be reported at least verbally by law enforcement officers within a specified period of time and to be followed by a written report as soon as practical thereafter. The Commission standards also recommend that law enforcement agencies review the incident reports. ATF's procedures for reporting and reviewing shooting incidents, discussed earlier, are consistent with these standards. For example, ATF's procedures require agents to immediately report shooting incidents to their supervisors. In addition, SIRB—depending on

the nature of the incident—is to review investigative reports of shooting incidents.

Both IACP's and PCIE's investigative guidelines and standards respectively recommend that investigations generally be impartial, thorough, and timely. These guidelines and standards also recommend that a thorough investigation is to involve, among other things, interviewing witnesses, gathering and preserving evidence, preparing a written report, and maintaining an investigative file. According to the IACP guidelines, the purpose of an investigation is to determine (1) the propriety of the use of force and (2) whether the use of force was in accordance with [departmental] policy. Our review of ATF's shooting incident procedures and investigative files showed that investigations were performed by OI, a Directorate that is independent of OE, which is the Directorate most likely to be involved in shooting incidents. The procedures require that the investigation be completed within 30 days of the incident. They also require that an investigation is to, among other things, include interviewing participants and witnesses, and gathering evidence. In addition, an ATF investigation is to (1) determine compliance with ATF and Treasury use-of-force policies, (2) establish a factual record for purposes of potential tort claims or litigation resulting from the incident, and (3) identify lessons learned.

**ATF's Shooting Incident  
Procedures Are Generally  
Comparable to Those  
Employed by DEA and FBI**

Overall, ATF's procedures are comparable to those employed by DEA and FBI. For example, DEA and FBI reporting procedures require their agents to immediately report shooting incidents through their chains of command to the SACS. The initial reporting is to be followed by the SACS' notification of their respective headquarters by teletype. Accordingly, for example, a DEA SAC is to notify DEA's Office of Inspection and the appropriate drug section. In addition, DEA and FBI procedures, like ATF's, require that written investigative reports be prepared. These reports are to include, where pertinent, witness interviews, police and medical reports, and incident scene diagrams and photographs, among other things. Finally, both DEA and FBI, like ATF's SIRB, have units to review shooting incidents.<sup>5</sup>

There are two distinctions in the three agencies' shooting incident procedures. The first distinction is related to investigative procedures. Specifically, DEA and FBI field divisions involved in a shooting incident may investigate that incident, while ATF field divisions cannot. For example, according to DEA procedures, DEA's Office of Inspections may designate a

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<sup>5</sup>DEA's review unit is called the Critical Incident and Firearms Policy Review Committee, while the FBI's unit is called the Shooting Incident Review Group.

DEA field division to investigate accidental and other firearm discharges it was involved in that did not result in significant injuries. Furthermore, according to a DEA official, the Office of Inspections is to monitor these investigations and conduct a post-investigative review of the field division's final report to determine compliance with investigative procedures. In addition, according to an FBI official, FBI field divisions also may investigate shooting incidents in which they were involved. The Assistant Director of FBI's Inspection Division, in consultation with the Assistant Director of the Criminal Division and the cognizant SAC, is to decide who will conduct the investigation. According to the FBI official, the decision is to be based on the seriousness of the shooting incident.

The second distinction is related to the review process. Specifically, FBI's Shooting Incident Review Group, in addition to FBI personnel, also includes one attorney each from Justice's Civil Rights and Criminal Divisions, while DEA's Critical Incident and Firearms Review Committee could include a representative from Justice—to be designated by Justice—on a case-by-case basis. In contrast, ATF's SIRB is composed of only ATF personnel.<sup>6</sup>

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### Procedures for Reporting, Investigating, and Reviewing Excessive Force Allegations

ATF also has procedures in place for reporting, investigating, and reviewing use of excessive force allegations. According to these procedures, OI is responsible for investigating allegations of various types of misconduct by ATF agents, including the use of excessive force.<sup>7</sup> Overall, DEA's procedures were comparable to ATF's in addressing use of excessive force allegations. However, there were distinctions between ATF's and FBI's procedures. ATF's OCC is responsible for reviewing administrative tort claims and civil lawsuits filed by complainants.<sup>8</sup>

### Procedures for Reporting and Investigating Excessive Force Allegations

According to an OI official, complainants generally report allegations of use of excessive force to the SACS of ATF field divisions or to local law enforcement agencies who, in turn, refer them to OI. Complainants have

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<sup>6</sup>It should be noted that, as discussed earlier, the SIRB does have an OCC representative, who, as discussed in footnote 8 of this chapter, is under the oversight of Treasury's Chief Counsel.

<sup>7</sup>ATF defines agent misconduct as any act or pattern of behavior that (1) is contrary to standards of conduct published by Treasury or ATF and to ATF directives or instructions and (2) might embarrass ATF.

<sup>8</sup>OCC is the chief legal adviser to the ATF Director and other ATF personnel, including special agents. However, to maintain its independence on rulings related to ATF matters, OCC is under the oversight of Treasury's Chief Counsel. Four Associate Chief Counsels (ACC) are within OCC: (1) ACC for firearms and explosives matters, (2) ACC for tobacco and alcohol matters, (3) ACC for administration—this ACC advises PRB on misconduct cases, and (4) ACC for litigation.

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also reported their allegations directly to OI and have filed administrative tort claims and/or civil lawsuits.<sup>9</sup> In addition, use of excessive force allegations have been reported by ATF agents who have witnessed such incidents. ATF procedures require agents to report these allegations promptly to OI.

OI has discretion over which use of excessive force allegations to investigate. According to OI officials, after an allegation is reported to OI and documented in an Incident Report, OI reviews the allegation and decides whether to launch a formal investigation. Criteria for determining whether to investigate the allegations include the seriousness of the allegations, the reliability of the source, and the timeliness of their reporting. According to the OI officials, while some allegations—following a preliminary review—are determined to be frivolous and, therefore, are not investigated, most of them are investigated. According to OI, an example of a frivolous allegation is one where complainants identify ATF agents as having used excessive force against them during an enforcement action, and a subsequent OI preliminary review determines that ATF agents were not involved in the enforcement action.

OCC may request an investigation of excessive force allegations as a result of an administrative tort claim or civil lawsuit filed by a complainant. Whether or not OI determines that an investigation is warranted, it is to prepare and retain an Incident Report documenting the allegations.

If OI decides to investigate use of excessive force allegations, the investigation is to be conducted by one of OI's four regional offices, overseen by OI's Deputy Assistant Director. The investigation is to be conducted using the same investigative procedures and techniques as those for shooting incident investigations discussed earlier (also see fig. 5.2 and app. IV). At the end of the investigation, a Report of Investigation is to be prepared and submitted to OI, where it is to be reviewed and signed by the Assistant Director and Deputy Assistant Director. The report is then to be submitted to PRB for further review.

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<sup>9</sup>As requested by the Subcommittee, we inquired as to whether ATF had a policy to protect complainants from retaliation by ATF agents. According to ATF officials, while ATF does not have a formal policy, the investigative process in itself provides a form of protection for the complainants. According to these officials, any agent who would retaliate during the course of an investigation could also become criminally liable for such retaliation. The ATF officials also told us that they were not aware of any incidents where agents had retaliated against complainants. In addition, the organizations we contacted during our limited check did not identify any incidents where ATF agents retaliated against complainants. According to DEA and FBI officials, their agencies also do not have specific policies for protecting complainants from retaliation. According to these officials, incidents of retaliation would be handled as separate matters and investigated as appropriate.

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According to ATF's misconduct procedures, all allegations of criminal violations by ATF employees are to be immediately reported to OI. OI is then to refer the matter to the local U.S. Attorney, Justice, or the appropriate state or local prosecutor for jurisdictional and prosecutorial determinations. In addition, if an OI misconduct investigation identifies potential civil rights violations resulting from the alleged use of excessive force, OI is to refer the matter to Justice's Civil Rights Division for jurisdictional and prosecutorial determination.

**Procedures for Reviewing Use  
of Excessive Force  
Investigations**

Reports of investigations involving alleged misconduct by ATF special agents—including use of excessive force—are to be reviewed by PRB. In addition, PRB is to review any shooting incident referred to it by SIRB for adverse or disciplinary action because of agent negligence. According to the PRB Chairman, from its inception in August 1995 until December 1995, PRB reviewed 44 investigative reports, of which he estimated about 10 were alleged use of excessive force incidents. According to the Chairman, none of the reviewed alleged excessive force reports resulted in disciplinary action against the agents involved.

PRB is composed of the following ATF members: (1) the Chief of OE's Enforcement Management Staff, who is also the PRB chairman; (2) the Deputy Assistant Director of the Office of Science and Information Technology; (3) the Chief of Laboratory Services of the Office of Science and Information Technology; (4) the Chief of OE's Alcohol and Tobacco Programs Division; and (5) the Chief of the Career Development Division's Office of Training and Development. According to an ATF official, before PRB, investigative reports were to be submitted to and reviewed by officials such as an agent's SAC or OE's Assistant Director to determine the need for and types of sanctions.

According to the PRB Chairman, PRB meets every 2 weeks to review the investigative reports submitted by OI. On the basis of the facts of each incident, PRB determines whether to propose adverse or disciplinary action against the agents involved.<sup>10</sup> PRB coordinates this decision with ATF's ELRB and OCC. If it is determined that adverse or disciplinary action—such as suspension, demotion, or termination—is warranted, PRB will propose such action in a formal letter. The letter, which ELRB drafts and the PRB Chairman signs, is presented to the agent(s) involved in the incident. The agent has 15 days within which to respond (orally or in writing) to the proposed action or appeal it to a deciding official, normally a senior

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<sup>10</sup>Adverse actions taken pursuant to 5 U.S.C. 7501-7514, include removal, suspension, reduction in grade or pay, or furloughs for 30 days or less. ATF Order 2750.1c further details adverse and disciplinary actions such as admonishment and reprimand.

manager in the agent's field or headquarters unit. The deciding official must coordinate his/her proposed decision with ELRB and OCC. If ELRB and OCC do not agree and a compromise cannot be reached, then the decision can be elevated to the next highest level, up to the Associate Director of the relevant Directorate. The ultimate deciding official is responsible for implementing the disciplinary action. PRB is to receive a copy of the final action decision. Agents retain rights to appeal a decision to the Merit Systems Protection Board (MSPB) or to file a complaint of discrimination or a grievance.<sup>11</sup>

**Excessive Force Incident  
Procedures Are Consistent  
With Recommended Guidelines  
and Standards**

ATF's procedures are consistent with guidelines and/or standards recommended by IACP, PCIE, and the Commission on Accreditation for Law Enforcement Agencies. IACP and PCIE guidelines and standards respectively for reporting, investigating, and reviewing use of excessive force incidents are the same as those for shooting incidents discussed earlier. The Commission's standards call for a specialized unit to investigate, among other types of misconduct, the use of force by law enforcement officers. The standards also call for written directives to investigate complaints and maintain records of such complaints. In addition, the standards call for the investigative unit to report to the agency's chief executive.

Consistent with the IACP, PCIE, and Commission guidelines and standards, ATF procedures designate OI, which reports directly to ATF's Director, to investigate complaints of misconduct, including use of excessive force. In addition, the procedures require agents to report misconduct, including use of excessive force, to OI. As discussed earlier, OI is to conduct preliminary investigations of allegations of misconduct, document them, and, if the facts warrant, formally investigate the alleged misconduct. The report resulting from the investigation is then to be reviewed by PRB.

**ATF's Procedures Are  
Comparable to Those  
Employed by DEA but Distinct  
From Those Employed by FBI**

Overall, ATF's procedures are comparable to DEA's in addressing use of excessive force allegations. However, there are distinctions between ATF's and FBI's procedures. According to DEA officials, complainants report their allegations either to local law enforcement agencies or to field division SACS. The SACS then report the allegations to DEA headquarters. Specifically, according to DEA's procedures, allegations of unnecessary (DEA's characterization of "excessive") force are to be reported to its Office of Professional Responsibility (OPR). OPR is to determine whether to investigate the allegations and which unit—agent's supervisor, the cognizant field division, or OPR—will investigate them. The resulting

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<sup>11</sup>As requested by the Subcommittee, we obtained information about ATF's adverse personnel actions taken as a result of the Waco incident. This information is presented in appendix VI.

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investigative reports are to be reviewed by DEA's Board of Professional Conduct. The Board is then to either clear the agent or propose disciplinary or adverse action. Authority for such actions is taken pursuant to 28 C.F.R., section 0.138.

The only distinction we noted between ATF's and DEA's excessive force incident procedures related to the delegation of investigative responsibility. According to DEA's procedures, use of unnecessary force allegations may be investigated either by the agent's supervisor, the cognizant field division, or DEA's OPR. In comparison, ATF's OI does not delegate its investigative responsibility.

There are distinctions between FBI's and ATF's procedures for investigating and reviewing allegations of excessive force. According to FBI's procedures, reported allegations of excessive force against FBI agents are to be referred by OPR to the FBI Criminal Investigative Division's Civil Rights Unit for investigation. The Civil Rights Unit is to first discuss all allegations with Justice's Civil Rights Division to determine whether Justice will request a criminal investigation or decline in favor of an administrative investigation. If the Civil Rights Division does not decline, a criminal investigation of an allegation is to be conducted by FBI agents under the supervision of the Civil Rights Unit and the Civil Rights Division. Once the criminal investigation is complete, and if the Civil Rights Division declines prosecution, the matter is to be referred back to OPR for administrative processing. Specifically, OPR is to review the Civil Rights Unit's investigative report and is to determine its completeness and whether specific FBI policies, procedures, and guidelines were violated. OPR is to then refer the report to the FBI Personnel Division's Administrative Summary Unit. The Administrative Summary Unit is to determine—and recommend as applicable—whether any administrative action is warranted, on the basis of investigative facts and applicable case precedents. Authority for such action is granted to FBI under 28 C.F.R., section 0.137.

In contrast to FBI, ATF's OI, as discussed earlier, is to first conduct an administrative investigation of alleged misconduct by its agents, including excessive force allegations. If the investigation identifies any potential criminal misconduct by an ATF agent, OI is to refer the matter to the appropriate federal, state, and local prosecutor, or to Justice for jurisdictional and prosecutorial determination. In addition, if the investigation identifies potential civil rights violations resulting from the

alleged use of excessive force, or is to refer the matter to Justice's Civil Rights Division for jurisdictional and prosecutorial determination.

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## Complainants Have Filed Administrative Tort Claims and Civil Lawsuits Related to Use of Excessive Force Allegations

In addition to reporting use of excessive force allegations, complainants have also filed administrative tort claims and civil lawsuits against ATF related to these allegations. During fiscal years 1990 through 1995, complainants filed 975 administrative tort claims and 528 civil lawsuits. As discussed earlier, during the same period, ATF initiated 76,542 investigations and arrested 46,930 suspects. Under ATF's procedures, OCC is responsible for reviewing the administrative tort claims and civil lawsuits and advising ATF, Treasury, and Justice decisionmakers on legal issues related to the claims and lawsuits.

## Tort Claim Process

In addition to reporting use of excessive force allegations to ATF, complainants may also file administrative tort claims—claims for monetary compensation—under the Federal Tort Claims Act (FTCA).<sup>12</sup> According to the ACC for litigation, these claims are filed against the United States for allegedly negligent or other wrongful acts—such as damaging property—committed by its employees, such as ATF special agents, during the course of their employment. All administrative tort claims involving ATF employees are initially to be filed with ATF's Chief of the Administrative Programs Division, who has the authority to make the final decision on the claims. After a claim is filed, the Chief is to refer it to OCC for legal review and advice. Procedurally, a claimant must first present an administrative claim to the appropriate federal agency. Once the claim has been denied, or 6 months after the claim has been filed, the claimant may bring a lawsuit in federal court.

At OCC, the ACC for litigation<sup>13</sup> is to assign the claim a unique number and enter it into a computerized case management and tracking system. The claim is then to be assigned to an attorney. The attorney is to conduct an initial screening of the claim to determine whether (1) it is filed in a timely manner and contains the prerequisite "sum certain"<sup>14</sup> in damages, (2) it includes sufficient documentation of the claimed damages, (3) an

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<sup>12</sup>Provisions of FTCA appear at 28 U.S.C., sections 2671-2680 and other scattered sections of 28 U.S.C.

<sup>13</sup>The ACC for litigation (1) advises ATF personnel on general law enforcement matters not covered by the other ACCs and defends them in civil litigation; (2) reviews all tort claims against ATF; and (3) as part of the SIRB, reviews shooting incident reports to determine whether there was legal application of the use-of-force and other relevant ATF and Treasury policies. The ACC for litigation may also be called upon to give legal advice or express an opinion on other aspects of an operation, such as its planning and implementation, that could have led to legal problems.

<sup>14</sup>A "sum certain" claim clearly identifies a monetary amount for damages or injuries.

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investigative or accident report was created, and (4) other agencies were involved in the incident resulting in the claim. If the claim does not contain a sum certain figure or sufficient documentation—such as medical reports and bills—to support the claimed damages, a letter to the claimant is to be prepared requesting additional information and documentation. In shooting incidents, the relevant SIR is to be obtained. In incidents where no investigative report is available, OCC is to request an investigation of the allegations from OI. If another agency was involved in the incident, counsel for that agency is to be contacted and the resolution of the claim is to be coordinated as required by Justice regulations on federal tort claims.<sup>15</sup>

The assigned attorney also is to conduct a legal analysis of the claim's facts and applicable law. Specifically, the attorney is to determine whether (1) the claim falls within FTCA, (2) the ATF employee was within the scope of employment at the time of the incident, (3) the claimed negligent or wrongful conduct is factually and legally supported, (4) there are any affirmative defenses under the applicable state law that bar recovery—such as the claimant was also negligent, and (5) damages are recoverable under state law.

To determine damages, the attorney is to consult comparable cases in the same state where the injuries were parallel. On the basis of this legal review, the ACC for litigation is to prepare a memorandum for the Chief of the Administrative Programs Division. The memorandum is to summarize the case and recommend whether the claim should be allowed in full or part or be disallowed. The memorandum is to be accompanied by a letter to the claimant and a payment voucher if the claim is being allowed. If the award involves more than \$25,000 and it is approved by the Administrative Programs Division Chief, it must also be approved by Justice. Without Justice's approval, the letter to the claimant cannot be sent.

During fiscal years 1990 through 1995, 975 administrative tort claims were filed against ATF. According to the ACC for litigation, 279 of the 975 claims—or about 29 percent—could be related to the excessive use of force.<sup>16</sup> Specifically, of the 279 claims, 143 resulted from the Waco incident, 14 resulted from the alleged destruction of or damage to firearms, 6 resulted from property damage caused by discharged bullets,

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<sup>15</sup>28 C.F.R. 14.2 (b) (2).

<sup>16</sup>The remaining 696 tort claims resulted from the following: 497 resulted from traffic accidents involving vehicles driven by ATF agents; 33 resulted from ATF employees claiming property damage during the course of employment; 15 resulted from explosives-related incidents; 3 resulted from “hot pursuit” traffic accidents where a suspect's vehicle may have struck another while attempting to evade ATF; and 148 resulted from all other sources, such as libel and slander, and arson investigations.

53 resulted from property damage caused during the execution of warrants, 8 resulted from shooting incidents, and 55<sup>17</sup> resulted from injuries during some type of law enforcement activity. Injury claims are filed for, among other things, assault and battery, such as striking, pushing, or kicking—25 of the 55 injury-related tort claims alleged such activity. Of the 55 tort claims resulting from injuries, 4 were granted, 12 were pending at the time of our review, and 39 were denied. Of the four tort claims that were granted, one was for medical costs of an arrestee (\$122.46), one was for detention of individuals during a state enforcement action in which ATF agents participated (\$200 for each claimant), one was for the execution of a search warrant at a wrong address (\$10,000), and one was for false arrest (\$15,000). Twenty-three of the injury tort claims also resulted in civil lawsuits. Of these, 12 were dismissed, 1 was settled for \$20,000 for false arrest, and 10 were pending at the time of our review.

## Civil Litigation Process

According to the ACC for litigation, civil lawsuits against ATF are filed by individuals either as (1) “Bivens cases” for alleged violations of their constitutional rights or (2) FTCA cases for negligence or wrongful acts committed by employees within the scope of their employment. Bivens cases are named after the 1971 Supreme Court decision<sup>18</sup> that held that an individual injured by a federal agent’s alleged violation of the Fourth Amendment may bring an action against the agent. FTCA cases fall under the tort claims statute discussed earlier.

All civil lawsuits against ATF and its employees involving official duties are to be forwarded to OCC. At OCC, the lawsuit is to be assigned a number and entered into a computerized case management and tracking system. The lawsuit is then to be assigned to an attorney for an initial review. The attorney is to determine whether the lawsuit is against the United States, ATF, an ATF employee in his/her official capacity, or an ATF employee in his/her individual capacity. The attorney is also to gather all documentation related to the incident, such as a tort claim file (if applicable), a SIR, OI’s misconduct report, decisions and rulings in related criminal cases, and related criminal investigative or compliance inspection reports.

If the lawsuit is against the United States, ATF, or an ATF employee in his/her official capacity, the appropriate ATF office and employee is to be notified of the lawsuit. Justice is to provide representation in the lawsuit

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<sup>17</sup>Of the 55 claims, 37 resulted from the execution of arrest and/or search warrants, 7 from arrests, 4 from undercover buy/busts, and 7 from unspecified activities.

<sup>18</sup>*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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without a written request from the employee. However, if the lawsuit is against an employee in his/her individual capacity, the employee is to be notified of the lawsuit and advised that Justice representation is available if requested. If the employee requests Justice representation, the employee must forward a written request concerning the facts of the allegations to OCC. The employee's supervisor must also provide written notice that he/she is aware of the allegations and the employee's conduct and has determined that the employee acted properly within the scope of employment. OCC is then to advise Justice on whether to represent the employee, on the basis of whether the employee acted within the scope of employment and representation is in the best interest of the government.

During litigation, Justice may solicit ATF's views regarding a settlement. In general, OCC is to prepare a memorandum analyzing the relevant law, facts, and litigation risk. If a settlement in excess of \$500,000 is recommended, it must be approved by Treasury's Assistant General Counsel for Enforcement if the lawsuit is against the United States, ATF, or an ATF employee in his/her official capacity. If there is a proposed settlement or adverse action against an employee in his/her individual capacity, the employee may request indemnification by making a written request to OCC. OCC is then to make a recommendation on the basis of an analysis of the case's facts and legal issues. The recommendation is to be submitted to Treasury's Assistant General Counsel for Enforcement and the Deputy Secretary for Enforcement for approval. Indemnification is approved and available only if the employee acted within the scope of employment, it is in the best interest of Treasury, and there are available appropriated funds for ATF.

During fiscal years 1990 through 1995, 528 civil lawsuits were filed against ATF. According to the ACC for litigation, of the 528 lawsuits, 183 were Bivens and FTCA-related lawsuits. Of the 183 lawsuits, 31 were filed as a result of a shooting or other allegation of excessive force use. Furthermore, of these 183 lawsuits, 106 alleged an illegal search and/or seizure; 35 were challenges to criminal convictions; and 42 were related to other allegations, such as failure to place an individual in a witness protection program, libel and slander, and invasion of privacy.<sup>19</sup> In

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<sup>19</sup>Certain lawsuits involved more than one allegation.

addition, 15 of the 528 lawsuits were filed as a result of the Waco incident.<sup>20</sup>

Of the 183 lawsuits not related to Waco, 11 were settled with no finding against or concession of wrongdoing by ATF, 115 were dismissed,<sup>21</sup> and 57 were pending at the time of our review. Among some of the lawsuit settlements, two were for trespass-type claims involving searches of property and four were for false arrest claims involving, among other things, mistaken identities. The settlements ranged from \$200 for false arrest claims to \$250,000 for the accidental shooting of a local law enforcement officer.

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## **ATF Complied With Its Investigative Procedures**

Our review of available information in ATF's shooting incident and excessive force investigative files for fiscal years 1990 through 1995 showed that ATF complied with its investigative procedures in effect at the time of the investigation except that two investigative files did not contain a record of review required by the procedures. The review also showed that ATF (1) investigations found that all reported intentional shootings were justified, (2) investigations found that most reported allegations of excessive force were unsubstantiated, and (3) agents found to have engaged in some type of misconduct received sanctions in the form of written reprimands and suspensions.

As discussed in chapter 1, due to time and methodological constraints, we did not evaluate the events that resulted in the incidents or the quality and adequacy of the ATF investigations. In addition, we did not verify whether all shooting and alleged excessive force incidents were reported, or whether all reported allegations of excessive force were investigated. Our conclusions about ATF's compliance with its investigative procedures are based on whether we found documentation required by these procedures

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<sup>20</sup>Of the remaining 330 lawsuits, 62 were filed under the Freedom of Information Act, 47 were filed under the Administrative Procedures Act, 32 were filed seeking relief—restoration of firearms rights—under the Gun Control Act, 41 were filed related to the revocation or denial of firearms licenses, 42 were filed related to motor vehicle accidents, 18 were filed related to tax collection issues, 1 was filed seeking private relief, and 87 were filed for various other reasons, including challenges to forfeitures.

<sup>21</sup>Of the 115 dismissed lawsuits, 7 were dismissed because the statute of limitations expired; 61 were dismissed because they lacked merit; 13 were dismissed because they were improperly filed; 4 were dismissed because of the lack of specificity in pleading; 10 were dismissed because of "collateral estoppel," meaning that they were already dismissed in criminal court; 5 were dismissed voluntarily; 5 were dismissed as frivolous; 2 were dismissed because of the lack of prosecution—the case was filed but there was no follow-up by the plaintiff; 3 were dismissed because of the lack of jurisdiction; 3 were dismissed because of the agent's prosecutorial immunity; and 2 were dismissed because of governmental immunity.

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in the investigative files of shooting and alleged excessive force incidents and whether the documentation indicated that investigative procedures had been followed. Where documentation was not initially found, we obtained documents and/or explanations from ATF officials. Our conclusions apply only to the files we reviewed.

**Review of Shooting and**  
**Use of Excessive Force**  
**Incident Investigations**

Our review of ATF’s investigations of shooting incidents focused on those incidents where ATF agents reported intentionally discharging their weapons at suspects. As shown in table 5.1, during the period of fiscal years 1990 to 1995, ATF agents were involved in 39 such incidents. We reviewed 38 files of shooting incident investigations. We did not review the shooting incident resulting from ATF’s operation at the Branch Davidian compound in Waco because it was investigated by Treasury and not by ATF. Of the 38 shooting incidents we reviewed, 4 were the result of ATF SRT operations. Of the remaining 34 shooting incidents, 11 resulted from non-SRT ATF operations; 19 resulted from task force or other joint operations with federal, state, and/or local law enforcement agencies; and 4 resulted from other situations.

**Table 5.1: Reported Intentional Shooting Incidents Involving ATF Agents, FYs 1990-1995**

| <b>FY</b>    | <b>Number of shooting incidents</b> |
|--------------|-------------------------------------|
| 1990         | 4                                   |
| 1991         | 9                                   |
| 1992         | 9                                   |
| 1993         | 2                                   |
| 1994         | 8                                   |
| 1995         | 7                                   |
| <b>Total</b> | <b>39</b>                           |

Source: GAO analysis of ATF data.

As part of our review, we also identified and reviewed all 92 files of investigations—conducted during fiscal years 1990 through 1995—involving reported allegations of misconduct by ATF agents in 3 categories of agent misconduct: (1) misconduct during the execution of a search warrant, (2) violation of a person’s civil rights, and (3) assault by an

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agent on a person.<sup>22</sup> As shown in table 5.2, 25 of the 92 investigations involved incidents specifically alleging the physical abuse of persons and/or property by agents. Of the 25 use of excessive force allegations, 1 was the result of an SRT operation. Of the remaining 24 use of excessive force allegations, 9 resulted from non-SRT ATF operations; 9 from task force or other joint operations with federal, state, and/or local law enforcement agencies; and 6 from other activities, such as a traffic dispute and the interrogation of a suspect.

**Table 5.2: Reported Excessive Force Incidents in Three Categories Involving ATF Agents, FYs 1990-1995**

| <b>FY</b>    | <b>Number of excessive force incidents</b> |
|--------------|--|
| 1990         | 3  |
| 1991         | 2  |
| 1992         | 5  |
| 1993         | 3  |
| 1994         | 8  |
| 1995         | 4  |
| <b>Total</b> | <b>25</b>                                  |

Source: GAO analysis of ATF data.

Our review of available information in ATF’s shooting and excessive force incident investigative files showed that ATF complied with its investigative procedures in effect at the time of the investigation with an exception discussed below. Specifically, all 39 reported shooting incidents involving ATF agents intentionally discharging their firearms were investigated—either by ATF or Treasury—as required by ATF procedures.

In addition, the 38 shooting incident and 25 excessive force investigative files we reviewed contained the following items as required by ATF procedures.

- The identification of individuals—such as ATF agents, other federal and/or state and local law enforcement officers, and suspects—and property involved in the incidents.
- Injuries and/or fatalities resulting from the incidents.

<sup>22</sup>Since ATF did not maintain a separate category for use of excessive force incidents, the three categories were selected judgmentally following consultations with OI officials and a review of a list of misconduct incident categories. The selection was based on the likelihood that these categories would include most, if not all, alleged use of excessive force incidents. However, we cannot be sure that these categories include all use of excessive force incidents.

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- The type of operation—such as SRT, non-SRT, and task force—and type of law enforcement activity that resulted in the incidents, such as serving search and/or arrest warrants or engaging in undercover operations.
- Written reports of the incidents and interviews with participants and witnesses.

The 25 investigative files of alleged excessive force incidents included a record of review by the designated unit as required by ATF procedures. The shooting incident investigative files generally contained a record of review by the designated unit. Specifically, 34 shooting incident files contained this information. One shooting investigation review was pending at the time of our review and one shooting investigation was submitted to ATF's then Office of Internal Affairs (the predecessor to OI) without a formal review. In addition, an OE official explained that following a search, a record of headquarters review could not be located in two shooting incident investigative files. These two incidents were investigated before the October 1994 revision of ATF's investigative procedures.

According to OI officials, other types of information, while not required by ATF procedures, could be included in investigative files if they are available, or—in the case of medical reports—are required by special circumstances, such as tort claims. For example, 35 shooting incident files included pertinent descriptions of the incident scenes and 30 files included descriptions of evidence, while 15 and 12 alleged excessive force files respectively included this information. In addition, 32 shooting and 20 alleged excessive force files contained a record of notification of the incident to ATF headquarters. Also, all 38 shooting and 22 of the 25 alleged excessive force files contained an indication of whether shootings were justified or the allegations were substantiated, and whether some type of sanction or corrective action was recommended. Finally, 11 shooting and 10 excessive force investigative files included a medical report.

According to the OI officials, the investigative files discussed above may not have included information for several reasons. For example, descriptions of evidence—such as weapons and vehicles—may not be available because such evidence may have been discarded by suspects and never recovered. Written records of incident notification—significant activity reports (SAR)<sup>23</sup>—are not material to OI investigations because OI is notified of incidents by telephone. This notification, in turn, is documented in an incident report, which is required to be included in the investigative file. Medical reports may not be included in a file because of legal access

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<sup>23</sup>ATF refers to this report as a KSAR.

and privacy issues. Complainants are required to provide medical reports only for incidents that result in tort claims.

### ATF Found All Shootings to Be Justified

ATF's investigations and the subsequent reviews determined that all reported shootings were justified and within the scope of ATF's use-of-force policies. The following are examples.

- In a 1991 incident, two ATF agents shot and killed a suspect during the serving of a state search warrant with local law enforcement officers at the home of the suspect. The agents were returning fire after being fired upon by the suspect. The suspect was under investigation for armed drug trafficking. The investigation and subsequent review determined that the agents acted within the scope of their duties because they were protecting themselves from hostile fire.
- In a 1991 incident, an ATF agent exchanged fire with a suspect during an undercover "buy/bust" operation. The suspect—classified as a high-risk "shooter," or someone likely to resist arrest—resisted arrest. The suspect was the target of a large-scale undercover operation by federal law enforcement agencies as a major cocaine dealer and convicted felon. The ATF investigation and subsequent review determined that the shooting was justified because the agents were defending themselves during a high-risk operation.
- In a 1992 SRT-related incident, two ATF agents shot and killed a suspect who was shooting at other agents and police officers. The incident occurred during the execution of an arrest warrant issued by a state. The execution of the warrant was a joint ATF/local police department operation. The investigation and subsequent review determined that the shooting was justified as self-defense and that ATF agents acted within the scope of their duties.
- In a 1994 incident, three ATF agents engaged in an undercover "buy/bust" operation exchanged fire with several suspects. The suspects were targets of a gang-related investigation involving narcotics and weapons trafficking. During the course of the operation, one of the suspects attempted to rob one of the agents of his "buy" money. At that point, the agent announced himself as a law enforcement officer, at which time the suspect shot and wounded the agent. The agent and two other agents returned fire. The suspects fled in a vehicle. One suspect was later apprehended. ATF and local law enforcement agency investigations determined that the shooting was justified since the agents fired in self-defense when confronted with a life-threatening situation.

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ATF Found Most Allegations of  
Use of Excessive Force to Be  
Unsubstantiated

ATF's investigations and subsequent reviews determined that most reported use of excessive force allegations were unsubstantiated due to the lack of evidence. Specifically, in 18 of the 25 investigations, the ATF agents involved in the alleged incidents were cleared of all allegations because these allegations could not be substantiated. Four investigations found some type of misconduct by ATF agents. Two investigations were ongoing at the time of our review. One investigation was closed without further action because OI determined that there was no need for adjudication. Specifically, the allegation dated from 1984 and could not be investigated because of the lack of witnesses and evidence. The following are examples of allegations that ATF's investigations could not substantiate.

- In a 1990 incident, a complainant alleged that an ATF agent assaulted him during an arrest for possession of an unregistered firearm. The complainant was admitted to a hospital as a result of the incident. However, ATF's investigation of the incident determined that, according to a medical examination, there were no bruises, and that the complainant was actually admitted for a heart condition. While in the hospital, the complainant told a deputy U.S. Marshal that he had actually lied about the assault and did so in an attempt to stay out of prison by being admitted to a hospital. Accordingly, the investigation and subsequent review determined that the allegations were unsubstantiated. The agent was cleared of the allegations.
- In a 1992 incident in which agents were eventually cleared, a complainant alleged that two ATF agents beat him on the face and scraped his arm during the execution of a search warrant. The investigation and subsequent review determined that the allegation was unsubstantiated. Specifically, a medical examination of the complainant showed that the injuries were self-inflicted, which was a fact that the agents had observed and reported. Subsequent to the medical examination's results, the complainant dropped the allegations against the agents. The agents received letters of clearance.
- In a 1994 incident, a complainant alleged that ATF agents damaged a lathe—a device used to refinish firearms—and firearms while returning them. The items had been seized as evidence for a court case. The investigation determined that the moving company hired by ATF to return the items had damaged the lathe and had twice offered to replace it at no charge. The investigation also determined that the complainant had repaired any damage to the firearms before ATF had an opportunity to examine them. As a result of the investigation, the agents received letters of clearance.

Agents Found to Have Engaged  
in Misconduct Received  
Sanctions

- In a 1994 incident, a complainant alleged that ATF agents assaulted and physically abused him during the serving of a search warrant. During the ATF investigation, the complainant underwent a polygraph examination. The examination determined that the complainant lied about the allegations. The complainant did not dispute the results and claimed that he had not really intended to file a complaint. The investigation and subsequent review determined that the allegations were unsubstantiated, and the agents received letters of clearance.

Four of the 25 investigations found evidence of some agent misconduct during incidents where use of excessive force was alleged. As discussed below, the agents found to have engaged in such misconduct received sanctions in the form of written reprimands and suspensions.

- In one incident, in fiscal year 1990, two agents were suspended for 1 day each for failing to report an incident to their supervisors. The incident occurred during the search of suspected gang members in front of a grocery store. According to the agents, the suspects were making threatening gestures at their unmarked government vehicle. During the search, a struggle ensued during which a suspect was shoved by an agent against a store window, which was broken as a result. The store owner reported the incident to a local law enforcement agency, which then reported it to the ATF SAC.
- In a second incident, in 1990, an investigation determined that during an SRT-related operation involving the undercover purchase of firearms, an ATF agent engaged in a loud and offensive confrontation with a confidential informant who was part of the operation. The agent apparently became upset because narcotics were found in the informant's vehicle. As a result of the incident, the agent seized the narcotics but never turned them over to any law enforcement agency. The agent later claimed that he flushed the narcotics down a toilet. The agent was suspended for 5 days for conduct "unbecoming to an agent" and for failing to properly handle suspected narcotics.
- In a third incident, in 1993, the complainant alleged that an ATF agent verbally and physically abused him, aggravating a pre-existing injury. The incident occurred during the serving of a federal search warrant. An ATF investigation and subsequent review determined that the allegations of physical abuse were unsubstantiated. However, the agent received a written reprimand for unprofessional conduct and for initiating a confrontation with the complainant that could have become more violent.
- In a fourth incident, in 1994, a suspect's girlfriend filed a complaint alleging an ATF agent struck her boyfriend—a parole violator—with a

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firearm while arresting him. The agent claimed that the suspect struck his head on the pavement during a brief struggle. The suspect submitted to a polygraph test the results of which indicated deception on the suspect's part. However, the agent received a written reprimand for failing to report an injury to a suspect during his official duties.

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## Results of Limited Check

As noted earlier, we did not verify whether all shooting and alleged excessive force incidents were reported, or whether all reported allegations of excessive force were investigated. However, we did a limited check to identify incidents that ATF may not have investigated by (1) conducting a literature search using the LEXIS/NEXIS electronic database to identify alleged ATF use of excessive force incidents reported in the media and (2) contacting the American Civil Liberties Union and the National Rifle Association to identify allegations of ATF excessive force reported to these organizations. Through these sources, eight incidents were identified. We then (1) cross-checked the alleged incidents we identified against ATF's (a) investigative records to determine if ATF investigated these incidents and (b) litigation records to determine if any complainants filed civil lawsuits against ATF related to these incidents, and (2) discussed these incidents with cognizant officials.

Our cross-check of ATF's investigative and litigation records determined that three of the incidents—one shooting and two excessive force allegations—were investigated by ATF. Our cross-check also determined that two other incidents did not involve allegations of excessive force.

Finally, our cross-check determined the following regarding the remaining three incidents:

- A 1991 incident of alleged excessive force reported by the National Rifle Association was not investigated by ATF. ATF officials told us that they were not aware of this incident because, for example, a complaint may not have been filed. Moreover, no lawsuit had been filed against ATF at the time of our review.
- A 1991 incident of alleged excessive force reported in newspaper accounts and by the American Civil Liberties Union was not investigated by ATF after its preliminary inquiry found that another federal law enforcement agency's personnel—not ATF's—may have been involved in the alleged incident. A lawsuit was filed naming ATF, among others, as a defendant. The district court dismissed all claims against all of the federal defendants.

Subsequent plaintiff motions were denied by the district court. The judgment of the district court was upheld on appeal.

- A 1993 incident of alleged excessive force reported in newspaper accounts and by the National Rifle Association was not investigated by ATF at the request of the local U.S. Attorney's Office litigating a related lawsuit against ATF. A district court dismissed a substantial part of the lawsuit.

In sum, our limited check showed that in the eight incidents, ATF's OI—or its predecessor—either investigated or had reasons not to investigate the shooting incident or allegations of excessive force that they were aware of. Of the three incidents that OI was not aware of, two did not involve an allegation of excessive force. With respect to the one incident that OI was not aware of, OI and OCC officials told us that no complaints or lawsuits related to the incident were filed with ATF and consequently they were not aware of the incident. It should be emphasized that these results cannot be generalized beyond the eight incidents.

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## **ATF Has Implemented Lessons Learned From Shooting Investigations**

As part of its review process, ATF has implemented lessons learned resulting from its investigations of shooting incidents. ATF is also in the process of implementing lessons learned from the 1993 operation at Waco.

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## **Procedures for Implementing Lessons Learned**

According to the SIRB Chairman, changes to various policies are transmitted to agents through the SIRB report review and recommendation process. As discussed earlier and in appendix IV, under this process, SIRB is to make formal recommendations about changes in enforcement operations and policies, training, and technology to the appropriate ATF Directorates. The heads of the Directorates are responsible for implementing the recommendations and responding to the SIRB in writing. The recommended changes are to reach field agents through their SACS, who are ultimately responsible for their implementation. While the SIRB does not have the power to enforce the recommendations, their implementation is to be verified as part of OI's inspection of ATF's divisions.

Our review of DEA's and FBI's procedures for implementing lessons learned from their investigations showed that these agencies' procedures were similar to ATF's.

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## Examples of Lessons Learned Being Implemented

ATF officials provided two examples of how lessons learned from ATF's investigations—and SIRB's subsequent recommendations—have been implemented. In the first example, following a February 1995 meeting, SIRB determined that some ATF agents were accidentally discharging their firearms while using body bunkers. SIRB concluded that factors such as wearing gloves and using the off/weak hand may have contributed to the accidental discharges. In a memorandum to the Associate Director for Enforcement, SIRB recommended that agents be trained in using firearms carried in their weak, or off, hands while also using a body bunker and be requalified for firearm use while wearing gloves. In response to these recommendations, both the Associate Director for Enforcement and the ATF Director issued separate memorandums to cognizant officials, such as SACs and the Chief of ATF's National Academy, informing them of the need to improve body bunker and firearms training. Accordingly, we observed agents at two ATF field divisions wearing gloves during their quarterly firearm training sessions.

In the second example, SIRB recommended that in response to the bursting of a shotgun barrel during a full-load test-firing—an incident that resulted in injuries—ATF's Director of Laboratory Services purchase and use remote and secure test firing systems and safety shields. The Laboratory Services Director responded in a memorandum that he not only had implemented SIRB's recommendations, but also had taken additional actions, such as modifying all safety procedures at ATF's laboratories.

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## Lessons Learned From the Waco Operation

In October 1995, ATF issued a report identifying issues arising from the operation at the Branch Davidian compound in Waco and outlining the corrective actions it had taken in response to these issues. According to ATF officials, they reviewed the Treasury report on the Waco operation and addressed each issue raised in the report. In addition, ATF consulted with experts from other organizations and law enforcement agencies, such as IACP, the National Tactical Officers Association, the FBI, and the Secret Service, to identify weaknesses that affected the policies and procedures used during the Waco operation. According to the officials, copies of the report have been distributed to all ATF field divisions to help implementation. Also, according to these officials, ATF will (1) continually evaluate the progress of its responses to the Waco lessons and make changes as necessary, and (2) annually update the October 1995 report to reflect the progress and changes made. Finally, according to the officials, ATF is continuing to develop training programs to reflect the changes and

to ensure that there is consistency between policy and training and the execution of enforcement operations.

According to the ATF report, ATF learned certain lessons related to the planning and execution of enforcement operations and addressing post-operation issues. The following is the report's summary of the lessons learned:

- ATF may not be able to carry out every tactical operation it encounters alone and must be prepared to seek assistance from other federal, state, and local law enforcement agencies when necessary;
- raid planners must have accurate and timely intelligence;
- raid planners must have training in a wide range of tactical options;
- raid plans must contain carefully constructed contingency plans so that the momentum of going forward does not take control over rational decisionmaking;
- raid commanders must be chosen on the basis of their ability to handle the type of operation involved and not simply on the basis of territorial jurisdiction;
- raid commanders must receive accurate and timely intelligence;
- raid commanders must have clearly defined duties and responsibilities;
- the incident commander must be located at the command post where he/she can have access to all relevant intelligence and operational developments;
- operational security must receive greater attention;
- in crisis situations, ATF agents who are emotionally involved and exhausted should not be left to handle media relations; and
- ATF personnel, at all times, must be prepared to tell the truth and admit mistakes. If misstatements are made, they must be corrected as quickly as possible.

According to the report, among its responses to these lessons, ATF is in the process of providing command and control and crisis management training to decisionmakers, developing a tactical intelligence structure, developing policy and training for operational security, and restructuring and enhancing the SRTs. Regarding the SRTs, ATF determined that they needed to be better equipped, to be provided with more specialized training, and to have expanded capabilities.

Also according to the ATF October 1995 report, as a prelude to other changes, the ATF Director in October 1994 restructured ATF's headquarters operations. Specifically, the Director elevated the training function to an

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executive-level position and created the Training and Professional Development directorate. He also created the Science and Information Technology directorate and, as discussed earlier, made the inspection function independent of the enforcement function.

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## **Conclusions**

ATF has procedures in place for reporting, investigating, and reviewing shooting incidents and allegations of excessive force by ATF agents. These procedures are consistent with guidelines and/or standards recommended by IACP, PCIE, and the Commission on Accreditation for Law Enforcement Agencies and overall are comparable to those employed by DEA and FBI, except for the distinctions noted herein.

On the basis of our review of ATF's investigative files, ATF has complied with its investigative procedures in effect at the time of the investigation except that two investigative files did not contain a record of headquarters review as required by the procedures. Also, ATF's investigations determined all shootings to be justified and most use of excessive force allegations to be unsubstantiated. In addition, agents who ATF determined had engaged in some type of misconduct were either suspended or received letters of reprimand. Finally, we found that ATF has implemented lessons learned from shooting investigations, and is in the process of implementing lessons learned from Treasury's investigation of the Waco incident.

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# Treasury and Justice 1995 Uniform Use of Deadly Force Policies and ATF, DEA, and FBI Prior Policies

The following policy statements were taken verbatim from Treasury, Justice, ATF, DEA, and FBI documents. Policies appear in their entirety, except where noted.

## UNIFORM POLICIES

### Department of the Treasury

**Subject:** Policy on the Use of Force

1. By virtue of the authority vested in the Secretary of the Treasury, including the authority vested by 31 U.S.C. § 321(b), I hereby establish a Treasury policy on the use of force. The policy set forth herein is intended to set a uniform standard for the use of deadly force and to provide broad guidelines for the Treasury Law Enforcement Bureaus. The provisions of this Order apply to all Treasury Law Enforcement Officers.

#### 2. Definitions.

a. Treasury Law Enforcement Officer, for the purposes of this Order, includes any Treasury employee who has authority to make arrests and/or carry, or use, firearms and/or other weapons.

b. Treasury Law Enforcement Bureau, for purposes of this Order, includes any bureau or office within the Department which employs Treasury Law Enforcement Officers.

c. Weaponless Control Techniques includes officer presence, identification, verbal commands and physical control techniques, such as comealongs, touch pressure points, and empty hand strikes.

d. Intermediate Weapons are weapons other than firearms or lethal weapons with non-lethal munitions that are approved by each Treasury Law Enforcement Bureau.

e. Deadly Force is the use of any force that is likely to cause death or serious physical injury. Deadly force does not include force that is not likely to cause death or serious physical injury but unexpectedly results in such death or injury.

#### 3. Use of Force Policy.

a. The primary consideration in the use of force is the timely and effective application of the appropriate level of force

**Appendix I**  
**Treasury and Justice 1995 Uniform Use of**  
**Deadly Force Policies and ATF, DEA, and**  
**FBI Prior Policies**

required to establish and maintain lawful control. A paramount consideration is the preservation of life and prevention of bodily injury.

b. The respective Treasury Law Enforcement Bureau heads shall set forth guidelines for weaponless control techniques, intermediate weapons and firearms or lethal weapons with non-lethal munitions, in accordance with that bureau's law enforcement mission.

4. Use of Deadly Force Policy.

a. Deadly Force. Treasury Law Enforcement Officers may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

b. Fleeing Felons. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe:

(1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death; and

(2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

5. Use of Non-Deadly Force. If force other than deadly force reasonably appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary.

6. Verbal Warning. If feasible and if to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the officer shall be given prior to the use of deadly force.

7. Warning Shots. Warning shots are not permitted, except as follows.

a. Warning shots may be used by Treasury Law Enforcement Officers in exercising the U.S. Secret Service's protective responsibilities, consistent with policy guidelines promulgated by the Director, U.S. Secret Service.

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b. Warning shots may be used by the U.S. Customs Service on the open waters, consistent with policy guidelines promulgated by the Commissioner of Customs.

8. Vehicles.

a. Weapons may not be fired solely to disable moving vehicles, except as follows: Treasury Law Enforcement Officers, in exercising the U.S. Secret Service's protective responsibilities, may fire weapons solely to disable moving vehicles, consistent with policy guidelines promulgated by the Director, U.S. Secret Service.

b. Weapons may be fired at the driver or other occupant of a moving motor vehicle only when:

(1) the officer has a responsible belief that the subject poses an imminent danger of death or serious physical injury to the officer or to another person; and

(2) the public safety benefits of using such force outweigh the risks to the safety of the officer or other persons.

9. Vicious Animals. Deadly force may be directed against dogs or other vicious animals when necessary in self-defense or defense of others.

10. Training and Proficiency Standards. Each Treasury Law Enforcement Bureau shall:

a. require newly-appointed Treasury Law Enforcement Officers to satisfactorily complete either Basic Criminal Investigator Training or Basic Police Training, as administered by the Federal Law Enforcement Training Center, unless otherwise authorized by the bureau head or his/her designee, prior to being authorized to carry or use a firearm;

b. be responsible for establishing training and re-training standards which ensure that Treasury Law Enforcement Officers are proficient in the use of weaponless control techniques and intermediate weapons as authorized by that bureau; and

c. consistent with its mission, establish qualification and firearms familiarization standards and, at least on a semi-annual basis, require Treasury Law Enforcement Officers to establish and maintain their proficiency in the use of authorized firearms. The Secretary or his/her designee may grant an exception to this subsection upon a showing of good cause.

11. Treasury Law Enforcement Bureaus may supplement this policy with policy statements or guidance consistent with this policy. It

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is the responsibility of the Treasury Law Enforcement Bureaus to review such policy statements or guidance in a timely and comprehensive manner.

12. Rights of Third Parties. Nothing in this Order and the attached commentary is intended to create or does create an enforceable legal right or private right of action.

Robert E. Rubin  
Secretary of the Treasury

Department of Justice

POLICY STATEMENT

USE OF DEADLY FORCE

I. Permissible Uses. Law enforcement officers and correctional officers of the Department of Justice may use deadly force only when necessary, that is, when the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person.

A. Fleeing felons. Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person.

B. Escaping prisoners.

1. Unless force other than deadly force appears to be sufficient, deadly force may be used to prevent the escape of a prisoner committed to the custody of the Attorney General or the Bureau of Prisons:

a. if the prisoner is escaping from a secure institution or is escaping while in transit to or from a secure institution; or

b. if the prisoner is otherwise effecting his or her escape in a manner that poses an imminent danger to the safety of other prisoners, staff, or the public (such as by attempting to ignite explosives).

2. The use of deadly force is not permitted if the subject is in a non-secure facility or a facility under the control

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of the Immigration and Naturalization Service, and (a) has not used or threatened the use of force likely to cause serious physical injury in his or her escape attempt, and (b) has not otherwise manifested an imminent threat of death or serious physical injury to the officer or community.

3. The use of deadly force is not permitted if the subject is in transit to or from a non-secure facility and is not accompanied by persons who are in transit to or from a secure facility and the subject (a) has not used or threatened the use of force likely to cause serious physical injury in his or her escape attempt, and (b) has not otherwise manifested an imminent threat of death or serious physical injury to the officer or community.

4. After an escape from the facility or vehicle and its immediate environs has been effected, officers attempting to apprehend the escaped prisoner may not use deadly force unless such force would otherwise be authorized in accordance with this policy.

C. Prison Unrest. Deadly force may be used to maintain or restore control of a prison or correctional institution when the officer reasonably believes that the intended subject of the deadly force is participating in a disturbance in a manner that threatens the safety of other inmates, prison staff, or other persons. The use of deadly force would be unreasonable and thus not permitted to quell a disturbance when force other than deadly force reasonably appears sufficient.

II. Non-Deadly Force. If other force than deadly force reasonably appears to be sufficient to accomplish an arrest or otherwise accomplish the law enforcement purpose, deadly force is not necessary.

III. Verbal Warning. If feasible and if to do so would not increase the danger to the officer or others, a verbal warning to submit to the authority of the officer shall be given prior to the use of deadly force.

IV. Warning Shots. Warning shots are not permitted outside of the prison context. In the prison context, warning shots may be fired within or in the immediate environs of a secure facility if there is no apparent danger to innocent persons: (A) if reasonably necessary to deter or prevent the subject from escaping from a secure facility; or (B) if reasonably necessary to deter or prevent the subject's use of deadly force or force likely to cause grievous bodily harm.

V. Vehicles.

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A. Weapons may not be fired solely to disable moving vehicles.

B. Weapons may be fired at the driver or other occupant of a moving motor vehicle only when:

1. The officer has a reasonable belief that the subject poses an imminent danger of death or serious physical injury to the officer or another; and

2. The public safety benefits of using such force outweigh the risks to the safety of the officer or other persons.

VI. Vicious Animals. Deadly force may be directed against dogs or other vicious animals when necessary in self-defense or defense of others.

VII. Rights of Third Parties. Nothing in this policy and the attached commentary is intended to create or does create an enforceable legal right or private right of action.

PRIOR POLICIES

Bureau of Alcohol, Tobacco and Firearms

CHAPTER A. USE OF FORCE POLICY

1. USE OF FORCE.

a. The primary consideration of the use of force is the preservation of life and the prevention of bodily injury. The objective in the use of force by a special agent is to establish and maintain lawful control.

b. Force may be used under the following conditions and circumstances:

(1) To minimize the potential for injury and provide for the safety of the agent and others in response to perceived danger.

(2) When necessary to accomplish duties as authorized by law.

c. The degree of force authorized is limited to that which is necessary to establish lawful order and control in a timely manner.

2. FIREARMS AUTHORITY.

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[For purposes of this report, this policy has been deleted.]

3. FIREARMS USE POLICY.

a. A firearm may be discharged when the special agent believes that there is no other means of control and perceives an imminent threat of death or serious bodily injury to himself/herself or other innocent persons.

b. The authority to bear firearms carries with it an obligation to exercise discipline, restraint, and good judgment. Accordingly, adhere to the following Treasury policy:

(1) Warning shots are prohibited.

(2) Firing at a fleeing person is prohibited, unless the agent reasonably perceives that the person poses an imminent threat of death or serious bodily injury to the agent or others.

(3) Firing at a moving vehicle or other conveyance is prohibited, except under the following circumstances and conditions:

(a) When a vehicle or conveyance is being used as a weapon and poses an imminent threat of death or serious bodily injury to the agent or others.

(b) When an occupant or operator of such conveyance poses an imminent threat of death or serious bodily injury to the agent or others.

(4) Firing from a moving vehicle or other conveyance is prohibited, except when there is an imminent threat of death or serious bodily injury to the agent or others.

(5) The use of a firearm directed at an animal is justified only if the special agent reasonably perceives that the animal poses an imminent threat of death or serious bodily injury to the special agent or others.

(6) It is permissible, where appropriate, to display a firearm in order to avoid its actual use. As a general rule, however, a handgun should be drawn only when the agent believes its use may be required. Shoulder weapons should be concealed unless the type of weapon or the situation requires display.

4. PROCEDURES FOR CARRYING WEAPONS ABOARD AIRCRAFT.

[For purposes of this report, this policy has been deleted.]

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5. POLICY FAMILIARIZATION. Special agents must be familiar with the policies and procedures regarding the use of force, firearms and ammunition standards, firearms proficiency standards, and postshooting procedures. Each first-line supervisor will certify to the SAC on an annual basis that special agents within his/her group have been informed of the procedures.

Drug Enforcement Administration

6122.13 USE OF DEADLY FORCE

A. Agents are not to shoot any person except in self-defense, when they reasonably believe they or another person are in danger of death or grievous bodily harm.

B. Firing warning shots is expressly prohibited. Agents will not fire at fleeing suspects except when there is probable cause to believe the suspect poses a significant threat of death or serious physical injury to self or others.

C. Shooting at a moving vehicle, tires, etc., with the intent of rendering it incapable of being operated poses a formidable danger to innocent parties and is prohibited. This does not preclude firing at suspects inside the vehicle when there is probable cause to believe the subject poses a significant threat of death or serious physical injury to self or others; but the hazard of an uncontrollable moving vehicle must be taken into consideration.

D. Firearms will not be used to intimidate or coerce suspects or defendants who are not threatening an agent or another person. Agents will not brandish or unnecessarily display firearms in public areas. This does not preclude drawing a firearm in a situation that is threatening or potentially threatening. Agents will always use sound judgment in displaying firearms.

Federal Bureau of Investigation

Policy Text - Agents are not to use deadly force against any person except as necessary in self-defense or the defense of another, when they have reason to believe they or another are in danger of death or grievous bodily harm.

Policy Statement: Whenever feasible, verbal warnings should be given before deadly force is applied.

Policy Text: No warning shots are to be fired by Agents.

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# Examples of Use-of-Force Scenarios Used to Train New Agents

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In training new agents, federal law enforcement agencies use various scenarios to illustrate the use-of-force policies and proper and improper applications of the use of force. We excerpted the following scenarios—situations and discussions—from new agent training materials provided us by the Federal Law Enforcement Training Center and the FBI Academy. The scenarios were selected to provide a variety of situations demonstrating proper and improper uses of force according to current use-of-force policies. In real situations, agents are confronted with threats that require them to make split-second decisions. How agents perceive the seriousness of the threats and their reactions to them may vary. For example, various factors, such as the size of the suspect relative to the size of the agent, could affect agents’ perceptions of the threat they face and their reaction to that threat. The following scenarios are provided for illustrative purposes.

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## Scenario 1

### Situation

A male subject approaches a border inspection station in a pedestrian line. The subject, in his early 20s, is 6 feet tall and weighs approximately 175 pounds. When the subject reaches the Inspector, he announces “American” and attempts to walk past the Inspector. When the Inspector tells the subject to stop, the subject bolts forward and jumps over the rail. The Inspector immediately begins to chase the subject. Upon entering an open field and in fear of losing the subject, the Inspector takes his handcuffs from their case and begins to swing them at the subject’s head. The subject shouts “Don’t hit me!” and falls to the ground. The Inspector proceeds to handcuff the subject and escorts him back to the station.

### Discussion

In this example, the subject was not in the process of attacking the officer. Therefore, the threatened use of handcuffs as an impact weapon was not only an inappropriate use of force but also a questionable use of a device.

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## Scenario 2

### Situation

John Doe is a 46-year-old male. He is 6 feet 2 inches tall and weighs approximately 210 pounds. Doe, a construction worker, has been unemployed the past 2 months. Doe has placed himself in a seated position directly in front of the state capitol building’s entrance and is holding a protest sign. You have advised Doe that his actions are illegal and that he must leave the entrance area and allow for public access. Doe

does not respond to your comments. You advise Doe three times that if he does not move, he will be arrested. Doe begins to spit at you and states, "It will take more than you to move me!" You move behind Doe and initiate a neck compression hold, which places Doe in an unconscious state.

Discussion

The application of this tactic at this time would be excessive use of force. The method of gaining compliance was at a higher level than deemed appropriate by the subject's actions.

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**Scenario 3**

Situation

In the same situation as scenario 2, instead of applying a neck compression hold, you move toward Doe, placing your right hand on his left elbow and your left hand on his left wrist. You state, "You are under arrest." Doe begins to rise to his feet but then grabs for your service weapon. Doe violently attempts to gain control of your weapon as you give him a frontal head butt to his nose. Doe falls to the ground and is handcuffed in a dazed condition.

Discussion

In this example, the officer was placed at a level of great bodily harm and/or death; therefore, such force was proper.

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**Scenario 4**

Situation

Two agents have a warrant to arrest a man for a bank burglary that occurred several weeks previously. Unable to locate the man at his apartment, they go to a nearby garage where he works as an auto mechanic. The agents approach the subject, identify themselves, and tell him that he is under arrest. The subject suddenly hurls a wrench at the agents, which they manage to dodge. The subject then removes a small canister from a nearby bench and shouts, "If you guys don't get out of my way, I'll mace you!" The agents hold their positions about 30 feet from the subject, draw their handguns, and order the subject to drop the canister. The subject does not comply with the command but continues to point the canister in the agents' direction as he moves toward them. When he is within 20 feet of the agents they both fire, striking the subject in the chest.

Discussion

The use of deadly force is permissible. Although there is no probable cause to believe the subject previously committed a crime involving the infliction or threatened infliction of death or serious physical injury, he is

posing an imminent danger to the agents by his violent resistance to arrest with what appears to be a chemical agent. A noncompliant subject who has the capability of rendering agents incapable of defending themselves also has the capacity to gain access to the agents' weapons and to kill or seriously injure them. The agents commanded the subject to drop the canister and surrender; he refused to do so, and increased the danger to the agents by advancing toward them in a threatening manner. There is no safe alternative to the use of deadly force to avert the danger. The agents are not required to retreat from their duty or to permit the subject to get close enough to use what is believed to be an incapacitant against them.

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## Scenario 5

### Situation

Two agents approach a subject suspected of a nonviolent felony offense in the break room of the manufacturing plant where the subject works. The agents have a warrant for his arrest. As they approach the man, who is of average size and not known to be violent, they announce their identity and tell him he is under arrest. When the agents are within arm's length, the unarmed subject executes a precise karate kick to one agent's groin, disabling him. The other agent backs away, draws his handgun, and orders the subject to surrender. The subject ignores the commands, adopts a martial arts fighting stance, and moves toward the agent. The agent fires.

### Discussion

Although there is no probable cause to believe the subject has previously committed any crime involving the infliction or threatened infliction of death or serious bodily injury, he is presently posing an imminent danger to the agent by his attack. The subject is not only capable of inflicting serious injury through his martial arts skills, he has the capacity to render the agents incapable of defending themselves. The subject's refusal to comply with the agent's command to surrender, his disabling attack upon one agent, and his apparent intention to attack the second presents the agent with no safe alternative to the use of deadly force. Agents are not required to permit an assailant to disable them, thereby making their firearms accessible to their assailant and rendering them incapable of protecting themselves.

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## Scenario 6

### Situation

Two agents go to the residence of the ex-wife of a drug fugitive who jumped bail, hoping to interview the woman about her former spouse's

whereabouts. As the agents approach the house from the street, the fugitive emerges from the front door, sees the agents and draws a handgun. The agents take cover behind their car. Drawing their weapons they yell, "Police, put your hands up!" The fugitive opens fire and begins to run across the front yard to get away. Turning the corner of the house, the fugitive trips and falls and is seen losing his gun, which flies into a thick hedge. Regaining his feet, the fugitive runs along the driveway toward the backyard but confronts a 6-foot-high chain link fence. He is climbing the fence when one of the agents again yells for him to stop. When the suspect ignores the command, the agent fires a shot, and the fugitive falls.

## Discussion

The use of deadly force is permissible. The fugitive has clearly demonstrated his dangerousness by firing at the agents. Even though the fugitive was seen to have lost his gun, the agents should consider the possibility that the fugitive possesses another weapon. Moreover, his efforts to escape from the vicinity of a violent confrontation in which he inflicted or attempted to inflict death or serious physical injury supports probable cause to believe that he poses an imminent danger to the agents or others. There is no safe alternative to the use of deadly force to prevent escape.

Agents are not required to pursue a demonstrably dangerous subject who has just attempted to kill them. The fugitive ignored commands to surrender. It is neither safe nor reasonable to require agents to attempt to physically overpower someone who has demonstrated that he will use violence to avoid capture. To do so exposes the agents to unnecessary risk. It is equally unreasonable to permit the fugitive to gain the tactical advantage of cover or to depart the scene and rearm himself in preparation for his next violent encounter with law enforcement officers.

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## Scenario 7

### Situation

Agents respond to an alarm indicating a bank robbery in progress. When they arrive on the scene, they observe a masked individual running from the bank with what appears to be a gun in his hand. The agents identify themselves and order the subject to stop. In response, the subject fires two shots in the direction of the agents. As the agents dive for cover, the subject flees into a nearby crowded restaurant. An agent pursues the subject and, from the entrance to the restaurant, sees the subject making his way through the crowd toward the rear exit. The agent fires at the subject.

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Discussion

Firing shots under these circumstances violates policy. The agents have probable cause to believe the subject has committed a crime involving the infliction or threatened infliction of death or serious physical injury. In addition, the subject is attempting to escape from the vicinity of a violent confrontation. There is clearly probable cause to believe that the subject poses an imminent danger to the agents and to others. However, the firing of a weapon into a crowded restaurant creates an unreasonable danger to the public that is not outweighed by the likely benefits. If other safe options are not available, the agents must permit the subject to escape. In considering the availability of other options, agents are reminded that pursuing an armed and dangerous subject is not a safe one.

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Scenario 8

Situation

Agents are involved in executing the arrest warrant on a man who has committed a series of bombings over a period of years resulting in several deaths and serious injuries. There is no information to suggest that the subject carries firearms or other weapons. When the agents approach the subject, he sees them from a distance of about 25 yards and quickly turns and runs in the opposite direction. The agents shout, "Police! Stop!" Ignoring the commands, the subject continues to run. When it becomes apparent that the agents cannot overtake the subject, one agent again shouts, "Police! Stop or I'll shoot!" When the subject continues his flight, the agent fires two rounds, striking him in the back.

Discussion

The use of deadly force violates policy. Although the subject's prior crimes justify the belief that he is dangerous, there is no probable cause to believe that he poses an imminent danger to the agents or to others as defined under this policy. Neither the egregious nature of his crimes nor the probability that he will continue his dangerous acts unless captured, satisfies the imminent danger requirement of the policy. In the absence of imminent danger, there is no need to use deadly force.

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Scenario 9

Situation

Two agents possess a warrant to arrest a man for a nonviolent felony. The agents go to the subject's residence to execute the warrant. As they walk up the walkway to the front door, they hear a noise of a door slamming from the rear of the house and see a man matching the description of the subject running from the back of the house toward the nearby woods. The

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agents immediately give chase but are unable to close the gap. Finally, one of the agents shouts, "Police! Stop or we'll shoot!" When the subject continues to flee, the agent draws his sidearm and fires a shot into the air. The subject continues to run and just before he disappears into the woods, the agent fires a second shot at the subject.

**Discussion**

The use of a warning shot and the use of deadly force violated policy. There is no probable cause to believe that the crime for which the subject is to be arrested involved the infliction or threatened infliction of death or serious injury, nor is there probable cause to believe that his escape poses an imminent danger to the agents or to others. If nondeadly means are not successful in effecting the subject's arrest, he will avoid arrest for the time being.

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# Case Examples of ATF SRT Tactical Operations

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The following are actual case examples of various tactics employed by ATF SRTs to execute high-risk search warrants and/or arrest warrant operations. The examples were taken from SRT activation files and were selected to demonstrate the various types of tactical options available for their use. The first two examples involve a bombing investigation, and the remaining three examples are investigations involving narcotics in which possession of firearms was involved.

According to ATF, a large number of high-risk warrants involve armed narcotics traffickers. One of the tactical options of the SRT in these cases is to “dynamically” secure the premises before suspects have an opportunity to destroy the evidence or to resist the agents in any manner. However, according to ATF, some teams are hesitant to use dynamic entries when there is no evidence on the premises that can be easily destroyed. Those teams prefer to surround the premises and, from covered positions, call the suspects out. Several of the examples below planned for or contained elements of the containment call-out and the dynamic entry tactics.

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## Five Tactical Operations Case Examples

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### Vehicle Stop of Suspect and Stealth Entry Into Premise

In a robbery attempt, four suspects transported and detonated an explosive device at a bank automated teller machine. The machine was blown across the street; however, no money came out of it. A search warrant was obtained for their house where two of the suspects lived for the purpose of locating additional explosive devices and evidence.

The primary suspect, a member of a gang, was a multiconvicted felon who had been convicted of and/or suspected of murder, armed robbery, and narcotics violations, among other felonies. The primary suspect was believed to possess a handgun. Furthermore, small children were known to reside at the house, whose windows and doors were fortified with burglar bars. A risk assessment was developed, and on the basis of this information, it was decided to request activation of the SRT.

Because small children and possibly explosives were present, SRT tactical planners decided to attempt to detain the primary suspect outside of the residence before executing the search warrant. For 3 days before

execution of the operation, SRT members surveilled the residence. The suspect's pattern of movement was documented, which enabled a plan to be developed.

Early in the morning on the day of the operation, SRT members saw the suspect leave his residence with his daughter and drive her to school. After dropping his daughter off and clearing the school zone, the suspect was pulled over without incident by a marked police vehicle. The suspect was taken to a location where he was debriefed. After debriefing the suspect, ATF and local law enforcement officers blocked all of the streets surrounding the residence, and the SRT entry team positioned themselves behind the residence. When all positions were secured, an ATF crisis negotiator telephoned the wife of the suspect and talked her and her three remaining small children out of the residence (a containment call-out tactic). After debriefing the wife, a six-member entry team used a stealth entry to enter the residence and clear it without incident.

A search team found flash powder, materials used to build a destructive device, tools used to build and place a destructive device, and pages copied from a book entitled *The Anarchist's Cookbook*, which contained a diagram of a destructive device. No arrests were made at this time.

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## Ruse

About seven months after the search of the home in the previous example, a federal arrest warrant was obtained for the primary suspect. Surveillance of the suspect's residence revealed that he still resided there. Because of the factors identified in the previous operation, it was decided to reactivate the SRT.

On the day before the operation, the SRT surveilled the residence but neither the suspect, his wife, nor their children exited the house. A check of the school found that one child was supposed to be attending. On the basis of the available information, the SRT developed the following four plans.

Plan 1 called for a vehicle stop using a marked police car similar to the plan that had worked earlier. However, on the day of the operation, the suspect did not take the child to school.

Plan 2 called for a containment call-out. Agents would surround the residence and telephone the inhabitants of the house to tell them to come

out. Plan 2 was dropped after an attempt to call the house was unsuccessful because the telephone had been recently disconnected.

Plan 3 called for a ruse. Using the premise of a routine interview, local police detectives and the ATF case agent approached the house and asked to talk to the suspect. This plan worked. The suspect exited the house and was arrested without incident.

Plan 4, which was not needed, called for a dynamic entry. If during the course of surveillance, the suspect had been seen at the house, SRT team members were to make an entry through the back door of the house.

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## Containment Call-Out

On three occasions, an ATF informant had purchased “rock” cocaine at the residence of a three-time convicted felon. During these purchases the suspect was observed with a rifle or possibly a shotgun. The suspect’s girlfriend and two young children also lived at the residence.

The suspect had been convicted of armed robbery, assault, and firearms violations and was also a gang member. The residence was fortified with burglar bars. On the basis of this information and a risk assessment, it was decided to activate the SRT.

Armed with a federal search warrant, the SRT decided to make a containment call-out. With the assistance of local police, the SRT surrounded the residence. The SRT hostage negotiator telephoned the residence without success (it was determined later that the telephone’s ringer had been turned off). When no response was received, the SRT employed a public address system to call out the suspect. After several announcements had been made, the suspect’s girlfriend exited the residence. After the girlfriend was debriefed, the suspect was then requested to exit the house, which he did. The suspect was debriefed and confirmed intelligence reports that a child was still in the residence and would not exit. The SRT entry team went into the house without incident and escorted the child out. SRT members assisting in the search of the house found one bolt action rifle and ammunition. The suspect was then arrested.

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## Dynamic Entry

A local police department determined that for approximately 6 months an armed cocaine trafficker had been distributing cocaine to local gangs. On the basis of this information, ATF initiated an undercover investigation. A

federal search warrant was obtained on the basis of several undercover purchases of cocaine made from the suspects. During these purchases, one of the suspects was armed with a small caliber handgun. The purchases occurred at the primary suspect's residence—a two-story apartment in a multistory apartment building—and three small children had been present. On the basis of the available information, it was decided to activate the SRT.

The SRT developed a plan to execute a dynamic entry using two three-man teams and two trailers—who are team members used for cover and prisoner control. One team was to secure the first floor of the residence, and the second team was to proceed directly to the second floor. Cover teams were to be used outside of the apartment to secure the front and back of the apartment. To gain entrance to the apartment complex, the front security gate was to be breached with a hydraulic door spreader—called a rabbit tool.

On the day of the operation, the front gate was breached. After the SRT knocked and announced their presence and intent without response, the front door to the apartment was breached with a small battering ram. The first team located one suspect downstairs. The second team, using a ballistic body bunker for protection, located two suspects upstairs. The apartment was cleared without incident, and no shots were fired and no injuries were sustained.

A search of the apartment found 1.5 kilograms of cocaine powder, over \$20,000 in cash, and numerous rounds of ammunition. The three suspects, two of whom had prior narcotics convictions, were arrested and charged with drug, firearms, and immigration violations.

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### **Dynamic Entry Planned but Stealth Entry Executed**

An ATF investigation of a street gang identified a narcotics house in an urban residential location that did a very active business. Through surveillance of the house, buyers had been seen making purchases there throughout the night. A confidential informant had been inside the residence and had purchased rock cocaine on several occasions. While in the house, the confidential informant had observed a large amount of narcotics and numerous weapons, including an assault rifle. Burglar bars covered the doors and windows and video cameras surveilled the outside of the residence. The suspects used police scanners to monitor local police frequencies. No children had been seen at the location, but a guard dog had been seen roaming the backyard.

The primary suspect had been arrested numerous times, once for murder, and had been convicted of several felonies including one for drugs, an assault with a firearm, and evading police while carrying a firearm. On the basis of the available information and a risk assessment, it was decided to activate the SRT.

Because of the possible threat of violence posed by the gang members, an “anytime” search warrant was obtained, and a plan for a dynamic entry was developed. Aerial and ground photography was obtained, and a tactical diagram of the house was developed. Photographs showed that breaching the front security door would be difficult and, thus, the SRT planned to hook a rope to the door, attach it to a vehicle, and attempt to spring the lock. A veterinarian was contacted, and it was decided to throw a hot dog containing sleeping pills into the yard several hours before initiating the operation in an effort to nullify the dog. Once the dog was immobilized, the plan called for electricity to the house to be shut down to disable the video surveillance cameras and police scanner. A check with the telephone company found that the house did not have a telephone; thus, it was decided to use a public address system to notify the suspects of the search warrant. The announcement would state “Occupants of [address stated], this is the police with a search warrant.” The announcement was to continue until told to stop by the SRT team leader.

On the day of the operation, surveillance was initiated at the residence in the early morning. Two hours before the operation was scheduled to begin, an agent placed the hot dog with the sleeping pills in the yard. Shortly, before the operation, a buyer made a purchase through a small window that was next to the front door. When the operation began, a team of four agents, with the responsibility of defeating the front security door, deployed to the front of the house; a rear security team deployed to the rear; and the entry team staged at the corner of the house.

A bolt cutter was used to cut the lock on the rear security gate, and the rear security team entered the backyard and turned off the electric power from the utility box to defeat the suspects’ surveillance devices. During the same time, the front security door team approached the door to attach the rope, and the public address announcements began. In the backyard, a guard dog that had not eaten the hot dog soon enough to be fully affected by the pills approached the agents. A flash-bang diversionary device was deployed, and the dog retreated. Other flash-bang devices were deployed at the back and sides of the house as a diversion for the front security door team. As the front security door team was about to set the rope, the front

door opened. The suspects were ordered to exit the house, and two complied.

The response at the front door changed the tactics from a planned dynamic entry to a stealth entry. The rear security team was ordered not to deploy additional diversionary devices, and the public address announcement was discontinued. The entry team held their position until the two suspects were debriefed. Both suspects said that no other people were inside the house. On the basis of the fact that the primary suspect did not exit the house, the entry team deployed a flash-bang diversionary device into the front of the house before entering. The entry team then entered the house using stealth entry tactics and cleared the rest of the house without incident. While the primary suspect was not found, a search of the house found .45 caliber ammunition, a small quantity of rock cocaine, and approximately 2 pounds of marijuana. Two suspects were arrested.

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# Procedures for Reporting, Investigating, and Reviewing Shooting Incidents

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ATF established the following procedures for reporting, investigating, and reviewing shooting incidents. As discussed earlier, these procedures were revised in October 1994. Major changes to the procedures are highlighted below.

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## Reporting Requirements for Shooting Incidents

ATF agents are required to report both the intentional or accidental<sup>1</sup> discharge of any firearm in six specific situations.

- First, when a firearm is discharged by an agent during any enforcement-related activity.
- Second, when a firearm is discharged by a law enforcement officer or agent, a suspect, or any other individual during an ATF enforcement activity.
- Third, when a firearm is discharged by anyone during an enforcement activity in which an agent is participating.
- Fourth, when a firearm is discharged by an agent or anyone in his/her presence during nonenforcement activities or off-duty hours.
- Fifth, when a firearm is unintentionally discharged during laboratory or technical examinations.
- Sixth, when a firearm is discharged by or in the presence of an ATF inspector during duty hours.

ATF agents are not required to report the discharge of a firearm in two situations. First, when a firearm is discharged during authorized training, unless the discharge occurs off the firing position. Second, when a firearm is discharged during off-duty recreational situations, such as target-shooting and hunting, unless personal injury occurs. The previous procedures did not specify in detail which shooting incidents were required to be reported and which incidents were not required to be reported.

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## Reporting Procedures for Shooting Incidents

The revised procedures established a new reporting sequence for shooting incidents. According to this sequence, the ATF agent involved in the shooting incident is to immediately report the incident to his/her supervisor. If the incident involves property damage, injury, or death, the procedures require that local law enforcement agencies also be notified. If the agent involved is unable to make notification, the senior agent present or the first agent on the scene is required to do so. The group supervisor or

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<sup>1</sup>“Accidental” refers to the unintentional discharge of a firearm by a law enforcement officer due to human error or equipment malfunction.

RAC—the agent in charge of a field office—is to report the facts and circumstances of the incident to the SAC and, if it has jurisdiction over the incident, the local U.S. Attorney’s Office. Thereafter, the supervisor or RAC is to respond personally to the scene of the incident. The SAC, in a new requirement, is to report immediately by telephone the facts and circumstances of the incident to the appropriate OI Inspector-in-Charge. The SAC is required to also notify the Deputy Associate Director for Enforcement having operational oversight over the division where the incident occurred. This verbal notification is to be followed within 12 hours by a SAR.<sup>2</sup> In another new requirement, the Inspector-in-Charge is to immediately notify the OI Assistant Director.

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## **Investigative Procedures for Shooting Incidents**

The OI Assistant Director is to determine whether a formal investigation of a shooting incident is required. A formal investigation would normally be required if, for example, the shooting incident resulted in the death or injury to ATF agents or others, or if agents and/or suspects intentionally discharged their firearms during authorized ATF enforcement activities. Conversely, although the discharge of a firearm at a canine or other animal must be reported, it would not normally require a formal investigation.

If a formal shooting incident investigation is required, the OI Assistant Director is to assign the necessary staff to conduct such an investigation. According to an OI official, OI headquarters’ staff are generally to investigate all incidents involving death or injury, while accidental discharges of firearms are to be investigated by one of OI’s four regional offices.<sup>3</sup> The assigned staff are to form a shooting incident review team (SIRT) and are required to report to the scene of the incident as soon as possible to begin their investigation. Under the previous procedures, shooting incidents could be investigated by agents from disinterested<sup>4</sup> ATF field divisions, field divisions where the incidents occurred, or ATF headquarters.

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<sup>2</sup>A SAR—referred to by ATF as a “KSAR”—is a report transmitted by teletype from an ATF field division that notifies ATF headquarters of a sensitive/significant enforcement activity or incident.

<sup>3</sup>OI’s four regional offices are located in Falls Church, VA; Atlanta, GA; Chicago, IL; and San Francisco, CA.

<sup>4</sup>A disinterested ATF field division is generally one adjacent to the division involved in the shooting incident. For example, according to an OI official, the New Orleans field division would investigate a shooting incident that occurred in the Chicago field division.

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**SIRT Investigations Are  
Fact-Finding in Nature**

According to an OI official, when conducting its investigations of shooting incidents, the SIRT is responsible for only gathering the facts related to a particular incident. Specifically, the purpose of an investigation is to (1) document compliance with ATF and Department of the Treasury use-of-force policies, (2) establish a factual record for purposes of potential tort claims or litigation resulting from the incident, and (3) identify lessons learned. According to the OI official, a SIRT investigation is not intended to reach any conclusions about responsibility for or misconduct during a shooting incident. The investigation is also not to recommend any changes in policy or recommend sanctions against those violating use-of-force policies.

As part of its investigation, the SIRT is required to interview all agents and other individuals with direct knowledge of the shooting incident. The SIRT is also required to review training, equipment, and investigative issues, and raid-planning, among others, related to the shooting incident. At the conclusion of the review, the SIRT is to meet with the SAC of the field division in which the shooting incident occurred to informally discuss its preliminary results.

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**Shooting Incident Report**

When the SIRT concludes its investigation, it is required to prepare a written SIR and submit it to the ATF Director, the Associate Director for Enforcement, and other Assistant Directors as appropriate for an initial management review. The report is to be submitted as soon as possible to the OI Assistant Director, but no later than 30 days after the shooting incident, unless directed otherwise by the OI Assistant Director. Upon reviewing the SIR, the ATF Director, the Associate Director for Enforcement, or the OI Assistant Director may mandate an additional inquiry based on the information in the report.

The SIR is to include certain types of information, including (1) a synopsis of the investigation and an overview of the shooting incident; (2) background on the enforcement action preceding the shooting incident; (3) information on the suspects and their actions and statements before, during, and after the shooting; (4) a description of the firearms and ammunition involved; (5) the basis for the decision to use deadly force; and (6) the extent of injuries resulting from the shooting. The report is also to include a list of exhibits, such as (1) copies of statements and records of interview, (2) copies of operational plans, (3) schematics and photographs of the shooting scene, and (4) copies of arrest and/or search warrants.

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## **Certain Shooting Investigations Are to Be Reviewed by Shooting Incident Review Board**

Certain SIRs are to be reviewed by ATF's Shooting Incident Review Board (SIRB). As part of the SIR review process, the OI Assistant Director is to decide—on the basis of the nature and seriousness of the incident—whether to submit a SIR to SIRB for review. SIRB was initiated by the OI Assistant Director and is intended to provide an independent review of SIRs by analyzing the circumstances related to shooting incidents that involved ATF agents. SIRB may also be tasked with reviewing the actions of other law enforcement personnel assisting ATF. SIRB is composed of the following ATF officials: (1) the OI Assistant Director; (2) the Deputy Associate Director for Criminal Enforcement Programs; (3) the two Deputy Associate Directors for Criminal Enforcement Field Operations in the West and East Regions, respectively; (4) the Associate Chief Counsel for Litigation; (5) the Assistant Director for Training and Professional Development; and (6) the Chief of the Special Operations Division. SIRB is to be convened normally within 30 days after the submission of a SIR for review.

SIRB members are to receive copies of the SIR before a formal meeting and are to individually review and comment on its contents. SIRB members are then to meet at ATF headquarters. During its meetings, SIRB is to determine a finding, or conclusion, on three issues: (1) use of force, (2) compliance with ATF policies and directives, and (3) the potential for agent negligence or inappropriate conduct. On the basis of its findings, SIRB is to make recommendations relative to needed changes to policy, directive, equipment, training, supervision, and safety issues identified in the SIR. SIRB may recommend such actions even if it determines that the shooting was justified. SIRB's recommendations are to be forwarded in writing to the cognizant Directorate, such as Training or Enforcement, for implementation. If SIRB finds the shooting was not justified and potential misconduct by ATF agents, it may forward the matter to the Professional Review Board.

In fiscal year 1995, SIRB reviewed eight shooting incident investigations. Four of these incidents involved the intentional discharge of firearms by agents, while the other four involved the accidental discharge of firearms by agents. SIRB concluded that all four intentional shooting incidents were justified.

Under the previous procedures, shooting incident reports were to be reviewed by OE's Special Operations Division. This division was to evaluate a report's conclusions and recommendations, obtain approval

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from its Assistant Director, and submit it to the cognizant Directorate for implementation of the recommendations.

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**Cognizant Directorate  
Responsible for  
Implementing SIRB  
Recommendations**

Cognizant Directorates at ATF headquarters are responsible for implementing SIRB's recommendations. The head of the Directorate has 30 days to respond in writing describing the actions initiated to address the issues identified by SIRB. For example, according to an OI official, the Associate Director for Enforcement—through the SAC of the field division involved in the shooting incident—is responsible for implementing changes to training and operational policies as recommended by SIRB. According to the official, OI maintains a file of recommendations that have not been implemented and may advise the cognizant Directorate head if the implementation of such recommendations is not proceeding in a timely fashion—a reminder memorandum is usually sent to expedite the action.

# DEA and FBI Data on Investigations, Arrests, Shooting Incidents, and Staffing Levels

This appendix presents DEA and FBI data on investigations, arrests, shooting incidents, and staffing levels. The data for these agencies are not comparable because of differences in their missions and in their definitions of investigations.

## DEA

Table V.1 presents data on the number of (1) domestic investigations initiated and (2) domestic arrests made by DEA special agents for fiscal years 1990 through 1995. The table also presents data on the number of intentional shooting incidents involving DEA agents and the agent staffing levels at domestic field offices for the same period.

**Table V.1: Data on DEA Investigations, Arrests, Related Shooting Incidents, and Agent Staffing Levels, FYs 1990-1995**

| FY           | Number of      |                |                    |              |
|--------------|----------------|----------------|--------------------|--------------|
|              | Investigations | Arrests        | Shooting incidents | Agents       |
| 1990         | 15,273         | 23,082         | n/a                | 2,233        |
| 1991         | 15,441         | 23,025         | n/a                | 2,490        |
| 1992         | 17,247         | 24,689         | n/a                | 2,812        |
| 1993         | 14,446         | 21,694         | n/a                | 2,838        |
| 1994         | 13,145         | 21,497         | 3                  | 2,775        |
| 1995         | 15,069         | 12,725         | 2                  | 2,710        |
| <b>Total</b> | <b>90,621</b>  | <b>126,712</b> | <b>5</b>           | <sup>a</sup> |

Legend: N/A equals not available.

<sup>a</sup>The agent staffing levels represent the average number for each fiscal year. Accordingly, the total number of agents has not been calculated.

Source: DEA.

## FBI

Table V.2 presents data on the number of (1) investigations initiated and (2) arrests made by FBI special agents for fiscal years 1990 through 1995. The table also presents data on the number of intentional shooting incidents involving FBI agents and the agent staffing levels at field offices for the same period.

**Appendix V  
DEA and FBI Data on Investigations,  
Arrests, Shooting Incidents, and Staffing  
Levels**

**Table V.2: Data on FBI Investigations, Arrests, Related Shooting Incidents, and Agent Staffing Levels, FYs 1990-1995**

| FY           | Number of      |                |                    |              |
|--------------|----------------|----------------|--------------------|--------------|
|              | Investigations | Arrests        | Shooting incidents | Agents       |
| 1990         | 113,820        | 10,830         | 13                 | 8,616        |
| 1991         | 114,083        | 11,981         | 19                 | 9,008        |
| 1992         | 124,925        | 18,390         | 18                 | 9,293        |
| 1993         | 130,554        | 25,134         | 10                 | 9,176        |
| 1994         | 120,136        | 26,083         | 16                 | 8,814        |
| 1995         | 110,423        | 26,653         | 13                 | 8,897        |
| <b>Total</b> | <b>713,941</b> | <b>119,071</b> | <b>89</b>          | <sup>a</sup> |

Legend: N/A equals not available.

<sup>a</sup>The agent staffing levels represent the average number for each year. Accordingly, the total number of agents has not been calculated.

Source: FBI.

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# Information on ATF Adverse Personnel Actions Resulting From the Waco Operation

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While we did not review the Department of the Treasury investigation of ATF's 1993 operation in Waco, TX, we did, as agreed with the Subcommittee, obtain information on ATF's adverse personnel actions resulting from that investigation. According to ATF officials, ATF removed two employees from employment as a result of the Waco incident. According to these officials, the removals were based on ATF's review of the Treasury report on the operation. The report criticized the employees' actions and performance during this operation. The two employees appealed their removals to MSPB. Before a hearing on the matter could take place, ATF reached a settlement with the employees. Under the terms of the settlement, the employees were rehired in nonenforcement positions.

According to ATF officials, the decision to reach a settlement was based on ATF's evaluation of the probability of success in subsequent litigation, if the individuals' appeal to MSPB was successful. Accordingly, ATF provided a written response—presented below—explaining its decisionmaking process in this matter.

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## ATF's Written Response

“The Bureau's number one priority in these cases was to assure that the two employees did not occupy positions as supervisory special agents, so that they would not be in a position to lead similar operations in the future. Settlement of the removal actions against these individuals was the only way to absolutely guarantee that result.

“Had these cases proceeded to litigation, for several reasons the MSPB might well have mitigated the removals. These reasons include the application of “Douglas” factors, which are a series of factors applied by the MSPB to determine if discipline imposed by an agency is reasonable. These factors include such things as an employee's length of service and prior disciplinary record. In addition, the Treasury Review identified a number of institutional problems that may have contributed to their errors in judgment; these employees were the lowest ranking officials faulted in the Review; and, in all likelihood, the individuals would have presented the testimony of experts who would testify about the impact of a major trauma on a person's ability to accurately recall and recount the trauma. Moreover, there was the strong possibility that a very significant charge—that of lying to the investigators—might well have been reversed by the MSPB due to a recent Board case<sup>1</sup> holding that an agency cannot charge an employee with the underlying misconduct and also include as a separate charge the fact that the employee made false statements regarding the misconduct.

“If the MSPB failed to sustain all of the charges, a strong likelihood existed that the Board would mitigate the removals. Thus, instead of removal, they might have ordered that the

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<sup>1</sup>Walsh v. Department of Veterans Affairs, 62 M.S.P.R. 586 (1994).

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**Appendix VI**  
**Information on ATF Adverse Personnel**  
**Actions Resulting From the Waco Operation**

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employees be suspended for some time, after which they would have to be returned to their original positions as supervisory special agents. This was the result that the agency felt was imperative to avoid.

“Even if the agency prevailed before the Board, the employees had the right to pursue an appeal of the decision to the Court of Appeals for the Federal Circuit. In at least three instances, that court has reversed MSPB decisions sustaining the removal of ATF employees, who the agency believed had engaged in serious misconduct. In all three cases, the court ordered the employees reinstated to their original positions.

“Finally, an MSPB trial would have been divisive, and emotionally difficult for the other agents involved in the raid. The settlement agreements in this case presented a solution that would allow ATF to accomplish with certainty its number one goal, would bring the matter to closure, and would spare our employees the trauma of a trial.”

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