

The Drug War against Civil Liberty and Human Rights

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Every year, the United States spends billions of dollars, imprisons many thousands of drug offenders, and seizes tons of drugs. Yet today in America, illicit drugs are readily available, and often cheaper and purer than ever before.

The war on drugs has caused a cancerous growth of predatory mis-government at the federal, state and local levels. The war has resulted in terrible violations of America's founding principles of individual liberty, limited government, and federalism.

Today in America the drug war is fought by both the military and by militarized police units. The drug warriors are well armed and funded, supported by extensive human and electronic intelligence gathering and surveillance, and by aggressive government propaganda. The casualties in the drug war are innocent Americans and American constitutional liberties.

I. Prejudice and Racism

The root of the drug war in the United States is exploitation of public fear of people who are different—fear of racial and cultural minorities.

During the first century of American independence, there were no drug laws at all. Although some states enacted laws restricting alcohol, there were no laws about drugs. It was perfectly legal to cultivate or consume cannabis, opium, or any of the other drugs which today are classified as "Controlled Substances." Quite obviously, the first century of American independence was not a period of national decline or degeneracy: the economy grew very rapidly, the United States expanded from 13 states on the Atlantic Ocean to a great nation reaching across North America to the Pacific Ocean.

The first move away from America's traditional drug policy came in 1875 in San Francisco, California. In order to provide cheap labor to build railroads in the West, many corporations had imported Chinese male workers, who were derisively called "coolies." The traditional pattern of immigrants to the United States had been for the immigrants to learn English, and to work hard to build a new home for their families in the United States.

The Chinese workers, however, were not brought to the United States for permanent settlement—only to work for a period of years. The corporation did not allow them to bring their families, because they were not expected to live permanently in the United States. Naturally, American workers resented the imported Chinese laborers, who worked for low wages and took jobs away from Americans.

A constructive resolution of the tensions caused by Chinese immigration would have been to ensure that Chinese immigrants were encouraged to follow the same path as European immigrants to the United States: to bring their families to their new home in America, to learn English quickly, and to join the American “melting pot.”

San Francisco, however, declared a culture war against the Chinese. The city council enacted a local ordinance banning the smoking of opium in opium dens. One of the rationales for the ban was that the Chinese opium dens corrupted white people: “that these places are patronized not only by the vicious and depraved, but are nightly resorted to by young men and women of respectable parentage.”¹

Logically speaking, the San Francisco prohibition made little sense. San Francisco for decades had been a thriving port with a reputation as a rough town with many bars and taverns. The many bars and taverns favored by the hard-drinking sailors and other toughs of San Francisco were surely much more dangerous to “young men and women of respectable parentage” than were the Chinese immigrant opium dens.

The opium ban was directed at smoked opium (the preferred method of ingestion by the Chinese immigrants) but did not apply to products such as laudanum, a mixture of opium and alcohol used commonly as a panacea by white Americans.

The first federal drug law was the Harrison Narcotics Act of 1914. The United States Constitution does not give the Congress a general power to pass criminal law. To the contrary, the Constitution authorizes federal criminal laws only a few specific subjects—such as piracy and counterfeiting. James Madison, “the father of the Constitution,” explained that ordinary criminal laws would be left to the state governments.²

¹ Dale Gieringer, “125th Anniversary of the First U.S. Anti-Drug Law: San Francisco’s Opium Den Ordinance,” Drugsense.org, Nov. 2000.
<http://www.drugsense.org/dpfca/opiumlaw.html>

² Even the Federalist Papers made it clear that criminal law enforcement would not come under the federal sphere under the new Constitution. James Madison wrote that federal powers

“will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce....The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and property of the people, and the internal order, improvement, and prosperity of the state.”

James Madison, The Federalist, number 45.

<http://www.foundingfathers.info/federalistpapers/fed45.htm>

The Constitution does give Congress the power to collect taxes.³ So Congress enacted the Harrison Narcotics Act in the guise of a tax law. The law required the payment of taxes for the production, importation, distribution and use of opium and coca and their derivatives (e.g., cocaine, morphine, and heroin). The Supreme Court upheld the Harrison Narcotics Act by refusing to recognize the plain truth that the Act was a criminal law, not a genuine tax law.⁴ Although federal government attorneys told the Supreme Court that the tax was not intended as prohibition, the taxes were quickly raised to prohibitory levels, and even people who could afford the taxes were not allowed to register to use or sell the substances lawfully.

Joseph McNamara, a Research Fellow at the Hoover Institution in Stanford, California, explains that anti-Chinese sentiment lay behind the Act, as prohibitionists told lurid tales of “Chinamen” seducing white women under the influence of drugs. “The impetus for the passage of the Harrison Narcotic Act of 1914 came from the lobbying efforts of American missionary societies in China. These groups enlisted the aid of other alcohol temperance organizations and religious groups in the United States to get their version of sin written into the penal code.”⁵

The Harrison Act was also incited by newspapers which printed wildly racist headlines to drive up sales and to create panic about the rape of white women by black men, high on cocaine. For example, a New York Times article titled, “Negro Cocaine Fiends, New Southern Menace” claimed “most of the attacks upon white women in the South are the direct result of the ‘cocaine crazed’ Negro brain.”⁶

As McNamara observes, the Harrison Act “represented a gross departure from past federal practice of not interfering with state police powers. The racist arguments convinced southern representatives, who were reluctant to acknowledge federal power over states’ rights, to vote for the act.”

In 1937, Congress passed the Marihuana Tax Act, again ostensibly as a revenue measure. In reality it was use of the tax power as a tool to

³ United States Constitution, Article I, section 8: “The Congress shall have the Power to lay and collect Taxes...”

⁴ *Alston v. United States*, 274 U.S. 289 (1927). Perhaps because of the climate of World War One, and because of the era’s great faith in big government, the Supreme Court at the time was more deferential to Congress than the Court has even been, before or since.

⁵ Joseph D. McNamara, “The American Junkie,” Hoover Digest Issue #2, Spring, 2004, page 3 <http://www.hooverdigest.org/042/mcnamara.html>

⁶ “The Racial History of U.S. Drug Prohibition,” Drug Policy Alliance, August 2001, http://www.drugpolicy.org/about/position/race_paper_history.cfm, citing New York Times, Feb. 11, 1914.

create laws on a criminal law issue over which the Constitution gave Congress no power.

In 1937 congressional testimony in support of the proposed Marihuana Tax Act, Clinton Hester, Assistant General Counsel for the Treasury Department explained how using taxation to achieve prohibition works:

“In order to raise additional revenue and to stamp out transfers to persons who would use marihuana for undesirable purposes, it is further required that on any transfer which is required to be made in pursuance of an order form a transfer tax shall be imposed. This tax will be at the comparatively low rate of one dollar per ounce, or fraction thereof, for transfers to registered persons, but at the rate of \$100 per ounce, or fraction thereof, on transfers to persons who have not registered and paid the special occupational tax whether or not they are required to register and pay the tax. It is made a criminal offense to acquire marihuana without having paid the transfer tax, when payment of such tax is required. Since those who would consume marihuana are not eligible to register under the bill, and since the \$100 tax on unregistered persons is designed to be prohibitive, such persons could not acquire marihuana.”⁷

Proponents of the Marijuana Tax Act fomented racist fear of Mexicans. In another 1937 Congressional hearing on the Act, Harry Anslinger, U.S. Commissioner of Narcotics and an avid prohibitionist, included a letter from the editor of the Alamosa, Colorado, newspaper, the *Alamosa Daily Courier*, as part of his official testimony:

“I wish I could show you what a small marihuana cigarette (sic) can do to one of our degenerate Spanish-speaking residents. That's why our problem is so great; the greatest percentage of our population is composed of Spanish-speaking persons, most of who are low mentally, because of social and racial conditions.”⁸

In a letter to Congress in support of the Act, Mrs. Hamilton Wright, a “special representative” of the Bureau of Narcotics wrote, “We know it as the ordinary hempweed which can be grown in any backyard in any State in the Union. Its use as a stimulant or narcotic is, however, of recent date. It was introduced about 10 years ago by Mexican peddlers in the form of

⁷ Statement of Clinton M. Hester, Assistant General Counsel for the Department of the Treasury Before the Committee on Ways and Means, Seventy-fifth Congress, April 1937, Shaffer Library of Drug Policy. <http://www.druglibrary.org/schaffer/hemp/taxact/t9.htm>.

⁸Statement of H.J. Anslinger, Bureau of Narcotics of the Treasury Department, Shaffer Library of Drug Policy. <http://www.druglibrary.org/schaffer/hemp/taxact/t10a.htm>

cigarettes. Its use has spread like wildfire and is associated with crime in its most vicious aspects.”⁹

Besides raw racism, the advocates of marijuana prohibition also raised fears of youth culture. Beginning in the 1920s, jazz music had become very popular with American youth. Many jazz musicians were black, since jazz is a combination of traditional black folk music with other musical idioms. Many jazz musicians did use marijuana, and many older people considered the whole jazz culture scandalous; they were outraged that people in their early twenties might go to dances without older people serving as chaperones, might kiss even when they did not intend to marry, and might dance to music which had strong sexual rhythms.

Today, the music of Glenn Miller and other jazz artists from the 1930s is considered calm and soothing, and mainly enjoyed by older people who listen to it quietly, or who dance to it elegantly. But at the time of the Marihuana Tax Act, Harry Anslinger was warning Americans that Glenn Miller was part of the jazz and marijuana culture that was destroying America.

A popular film from the period was “Reefer Madness.”¹⁰ The movie showed young people who went insane from smoking marijuana and dancing to piano music which was played too fast. Today, the film is shown on college campuses as a joke. But many people have spent decades in prison because they violated laws enacted by legislators who believed that propaganda such as “Reefer Madness” was the truth—by legislators who let themselves be terrified by mean-spirited accusations against Mexicans, blacks, and young people.

Racism in the Drug War continues today. In 1986, President Ronald Reagan signed into law the Anti-Drug Abuse Act, which appropriated nearly \$1.7 billion dollars to fight the drug war and created mandatory minimum sentences for drug offenses. Possession of one kilogram of heroin or five kilograms of cocaine is punishable by up to ten years in prison and the sale of five kilograms of crack cocaine is a mandatory five years.

A 1995 report on by the U.S. Sentencing Commission found that blacks were more likely to be convicted of crack cocaine offenses, while whites were more likely to be convicted of powder cocaine offenses.¹¹ In

⁹Letter from Mrs. Hamilton Wright, special representative, Bureau of Narcotics, Schaffer Library of Drug Policy. <http://www.druglibrary.org/schaffer/hemp/taxact/wright.htm>

¹⁰ A “reefer” is old-fashioned slang for a marijuana cigarette. <http://www.reefer-madness-movie.com/history.html>

¹¹ U.S. Sentencing Commission, Special Report to Congress, “Cocaine and Federal Sentencing Policy,” 1995.

1994, for example, 96.5% of defendants sentenced federally for crack cocaine offenses were non-white.¹²

Yet statistics from the National Institute on Drug Abuse (NIDA) reveal that most crack users are white. Of person reporting cocaine use (in anonymous surveys) in 1991, 75% were white; 15% black and 10% Hispanic. In the same year, persons reporting crack use were 52%, white, 38% black, and 10% Hispanic.¹³

The Hoover Institution's McNamara sums up the racism of the drug war:

“Actually, the overwhelming majority of American drug users have historically been Caucasians. The fact that minorities are arrested and incarcerated at vastly disproportionate rates for drug offenses contributes to false stereotypes and permits the continuation of one of the most irrational public policies in the history of the United States. Blacks make up approximately 15 percent of America’s drug users, but more than one-third of adults arrested for drug violations are black. Similar distortions in drug arrests and incarcerations apply to Hispanics.”¹⁴

The disproportionate racial arrest rates do not necessarily mean that modern law enforcement is intentionally racist. Some criminologists argue that racial minorities are more likely to be arrested for drug offense because they are economically poorer, and therefore are less likely to own the private spaces where they could use or sell drugs without detection.

Moreover, crack cocaine does appear to be more pharmacologically dangerous than powder cocaine, because crack users seems to be more likely to commit violent crimes while under the influence of the drug. Nevertheless, the extremely disproportionate penalties are unjust; after all, the majority of crack users, like the majority of users of all illegal drugs, do not commit violent crimes.

¹² U. S. Sentencing Commission, 1994 Annual Report, table 45.

¹³ National Institute on Drug Abuse, “Overview of the 1991 National Household Survey on Drug Abuse.”

¹⁴ Joseph D. McNamara, “The American Junkie,” Hoover Digest Issue #2, Spring 2004, p. 1. <http://www.hooverdigest.org/042/mcnamara.html>

II. The Growth of the Drug War Bureaucracy

In 1971, President Richard M. Nixon, declared drug abuse to be “public enemy number one in the United States” and the modern drug war was launched.

In 1970, Nixon signed into law the Comprehensive Drug Abuse and Control Act, which consolidated and updated all previous federal drug laws. It also allowed “no knock” searches; the police could break into homes without knocking first, in order to prevent drugs from being destroyed while the police knocked.

Part of the 1970 legislation was the Controlled Substances Act, which established five categories (“schedules”) of regulated drugs based on their medicinal value and potential for addiction. Drugs on Schedules II, III, IV, and V, are available subject to strict regulations, including the requirement for a doctor’s prescription. The federal government monitors prescriptions closely, and brings criminal charges against doctors who allegedly prescribe too many drugs, including pain-killers.

Schedule I is for drugs which have a very high potential for addiction, and which have no medical use. Scientifically speaking, however, Schedule I is nonsense. Included in schedule I are psychedelic drugs such as LSD. Scientific evidence clearly shows that these drugs have almost no potential for addiction.¹⁵ And these drugs have been successfully used in psychotherapy in Europe, and in the United States before they were banned.¹⁶

Similarly, marijuana is on schedule I, even though its potential for addiction is relatively low, and even though marijuana has established medical uses.¹⁷ (Medical marijuana is discussed in more detail later in this paper.)

The Comprehensive Drug Abuse and Control Act was based on Congress’s constitutional power “to regulate commerce...among the several States.” Yet the Act does not apply only to interstate commerce. The Act also applies to the sale, cultivation, or possession of drugs entirely within the borders of a single state.

¹⁵ Joann Ellison Rodgers, “Addiction: a whole new view,” *Psychology Today*, September-October 1994. http://www.findarticles.com/p/articles/mi_m1175/is_n5_v27/ai_15766724

¹⁶ John Horgan, “Tripping De-Light Fantastic, Are Psychedelic Drugs Good for You?” *Slate*, May 2003. <http://slate.msn.com/id/2082647/>

¹⁷ U.S. National Institutes of Health, “Report on the Medical Uses of Marijuana,” August 1997. <http://www.a1b2c3.com/drugs/mj022.htm>

In 1973 Congress created the federal Drug Enforcement Administration, consolidating the Office of Drug Abuse Law Enforcement (ODALE) and Bureau of Narcotics and Dangerous Drugs; the new agency also included agents from the U.S. Customs Service and the Central Intelligence Agency.

In 1989, President George H.W. Bush created the cabinet level Office of National Drug Control Policy (ONDCP) to oversee and coordinate U.S. drug policy. In charge of the new agency is a “Drug Czar.” In the United States—a constitutional republic—a high level government official in charge of a powerful internal law enforcement agency is referred to by the same term as an absolute Russian tyrant.

Today, America’s drug war apparatus is vast. President Nixon’s 1970’s federal drug enforcement bureaucracy consisted mostly of the fledgling DEA, which had around 1,470 special agents and a budget of roughly \$75,000,000.¹⁸ Today, the DEA has over 4,600 special agents and a support staff of nearly 5,000 more. Its budget in 2003 was \$1,879,000,000.¹⁹ Internationally, the DEA operate 80 offices in 58 different countries.²⁰

The DEA is hardly alone in the federal drug war. The U.S. Justice Department operates its own drug intelligence agency.

The new Department of Homeland security, created in response to the Sept. 11th terrorist attacks, devotes considerable resources to fighting drugs rather than fighting terrorism. The Department of Homeland Security is in charge of Immigration and Customs Enforcement (ICE), the U.S. Coast Guard, and the Border Patrol, all of which are heavily involved in narcotics interdiction and enforcement.

The U.S. Department of State has a Bureau of International Law Enforcement and Narcotics Affairs.

For fiscal year 2005, the ONDCP is scheduled to distribute over \$12,000,000,000 to a variety of federal agencies—above and beyond the agencies’ own budgets—for the drug war, including the Department of Defense, Homeland Security, both the Justice and State Departments.²¹

¹⁸ U.S. Drug Enforcement Administration, DEA Staffing and Budget, 1972-2005.
<http://www.dea.gov/agency/staffing.htm>

¹⁹ U.S. Drug Enforcement Administration, DEA Staffing and Budget, 1972-2005
<http://www.dea.gov/agency/staffing.htm>

²⁰ U.S. Drug Enforcement Administration, Foreign Offices table
<http://www.dea.gov/agency/domestic.htm#foreign>

²¹ ONDCP, Federal Drug Control Spending by Function, Table 1, Fiscal Year 2003-Fiscal Year 2005.

In addition, the ONDCP conducts a public relations advertising campaigns against drug users, and against citizen efforts to change American drug policies. One television commercial claims that Americans who smoke marijuana are helping terrorists.²²

The federal government organizes and leads multi-jurisdictional, multi-agency narcotics task forces combining local and state police agencies throughout the United States. Just in Colorado (a state with less than 2% of the U.S. population), there are at least 20 such task forces operating. Thus, the federal government takes a lead role in directing state and local law enforcement of state and local drug laws. Such federal control is contrary to the American Constitution, which, as James Madison explained, includes the principle that state and local law enforcement would be independent of the federal government.

The domestic federal drug war budget is over \$20,000,000,000 dollars today; add in state and local spending and the total exceeds \$40,000,000,000.

To put this in perspective, the average monthly Social Security retirement check in the U.S. in 1972 was \$177. Presently, the payment averages slightly more than \$900 a month. If, however, Social Security benefits had increased at the same rate as drug war spending, today's check would be around \$30,000 a month.²³

In proportion to the large scale expansion of the drug war machine has been a massive expansion of the prison population in America. A 2001 report from the Center on Juvenile and Criminal Justice shows that during the eight years of the Clinton administration alone (1993-2000), the federal prison population doubled, to more than 147,000, with 58% of those prisoners serving time for drug offenses.²⁴

State prison populations have also soared, with many state prisons taking in more drug offenders than property felons.²⁵

http://www.whitehousedrugpolicy.gov/publications/policy/budgetsum04/drug_control.pdf

²² Radley Balko, "The War on Drugs: Throwing Good Money at a Bad Idea," Cato Institute, February 2002. <http://www.cato.org/research/articles/balko-020228.html>;

http://www.whitehousedrugpolicy.gov/publications/policy/budgetsum04/drug_control.pdf

²³ Joseph D. McNamara, "The American Junkie," Hoover Digest Issue #2, Spring 2004, p. 4. <http://www.hooverdigest.org/042/mcnamara.html>

²⁴ "Too Little Too Late: President Clinton's Prison Legacy," Center on Juvenile and Criminal Justice. <http://www.cjcj.org/pubs/clinton/clinton.html>

²⁵ U.S. Department of Justice, Bureau of Justice Statistics, "Prison Statistics, 2003." In 2001, drug offenders made up 20% of the state prison population versus 19% for property crimes. <http://www.ojp.usdoj.gov/bjs/prisons.htm>

Overall, there are more two million Americans in prison, and another 4.5 million on probation or parole. Two million more people work in the prison business—making prison employees (like government school teachers), one of the most powerful lobbies in many state legislatures. Some of the prison-population increase is attributable to sterner attitudes toward violent and property crimes, but the explosive growth of the prison population over the last two decades would have been impossible without the massive incarceration of people for drug offenses.

According to Timothy Lynch at the Cato Institute, it took America 200 years to jail its first million prisoners, but a scant ten years to get to the second million. In 1981, 22% of federal inmates were drug prisoners, in 2000, 60% were drug prisoners and the rates have only increased since.²⁶

Besides creating a prison growth industry, the drug war diverts police resources away from investigating and arresting violent and property criminals. According to the FBI's own reports, in the year 2000, state and local police arrested 734,498 people for marijuana offenses, with 88% for possession, rather than sale or manufacture.²⁷

Yet despite the vast expansion of the drug war establishment and America's "success" in turning the United States into the world's largest jailer, both heroin and cocaine are purer, cheaper and at least as available today as they were 15 years ago.

Eric Sterling, former Counsel to the U.S. House of Representatives Judiciary Committee writes in the book "The New Prohibition", "The price for a pure gram of cocaine delivered at retail has gone from \$433 in 1982 down to \$184 in 1999. The price of a pure gram of heroin at retail has gone from \$3,285 in 1982 down to \$1,929 in 1999." Moreover, "Cocaine average retail purity has increased from 36% in 1982 to 64% in 1999. Heroin average retail purity has increased from 5% in 1882 to 27% in 1999."²⁸

According to the Drug Enforcement Administration's "State Factsheets" section of its website:

²⁶ Timothy Lynch, "Population Bomb Behind Bars," Cato Institute, February 23, 2000. <http://www.cato.org/dailys/02-23-00.html>. See also David B. Kopel, "Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety," Cato Institute Policy Analysis number 208 (1994). <http://www.cato.org/pubs/pas/pa-208.html>

²⁷ Federal Bureau of Investigation, Division of Uniform Crime Reports, "Crime in the United States, 2000," Section IV, persons arrested (2001) <http://www.fbi.gov/ucr/00cius.htm>

²⁸ Eric E. Sterling, "A Businesspersons Guide to the Drug War," in Ari Armstrong, editor, "The New Prohibition: Voices of Dissent Challenge the Drug War", Accurate Press, 2004. <http://www.accuratepress.net/np.html>.

- “Cocaine prices in 2001 remained low and stable, suggesting a steady supply to the United States.”
- “Average purity for cocaine at the gram, ounce, and kilogram levels remained stable at high levels. In 2001, the average purity of a kilogram of cocaine was 73 percent.”
- “Heroin is readily available in many U.S. cities as evidenced by the unprecedented high level of average retail, or street-level, purity.”
- “The increased availability of high-purity heroin, which can effectively be snorted, has given rise to a new, younger user population.”
- “The availability of South American (SA) heroin, produced in Colombia, has increased dramatically in the United States since 1993.”
- “Prices for commercial-grade marijuana have remained relatively stable over the past decade.”
- “Marijuana is the most widely abused and readily available illicit drug in the United States, with an estimated 11.5 million current users.”²⁹

In short, heroin and cocaine use in the United States is much greater than when the Harrison Narcotics Act was passed. Marijuana use is much greater than when the Marihuana Tax Act was passed. Millions of Americans have been arrested and jailed, huge amounts of tax money have been spent, and thousands upon thousands of government employees have been hired to fight the Drug War. Yet the United States is much further from the goal of creating a “Drug-free America” than when the Drug War began.

III. The Militarization of Federal Law Enforcement in the Drug War

In the Anglo-American legal tradition, police officers are supposed to be “peace officers.” That is, they are supposed to keep the peace by using force only when necessary, by using the minimum amount force, and by respecting the constitutional and other legal rights of all persons in the community, including suspected criminals. The English and Americans strongly rejected the French model of centralized and

²⁹ U.S. Drug Enforcement Administration, State Fact Sheets, “Drug Trafficking in the United States.” http://www.dea.gov/pubs/state_factsheets.html

militaristic law enforcement, because they believed that such a model was a grave danger to civil liberty.³⁰

Of course soldiers are expected to behave in an entirely different way from peace officers. Soldiers must destroy their enemy quickly, without asking questions. Soldiers do not minimize the use of force, but instead make sure to use so much force that the enemy is annihilated. Soldiers must obey orders without hesitation, except in very unusual circumstances. Soldiers do not worry about violating the “rights” of the enemy, because the enemy has no rights, other than the right to humane treatment as a prisoner of war, and a few other rights under international law.

Soldiers and peace officers both perform important functions in protecting a democratic society. But when law enforcement becomes the realm of the soldier rather than the peace officer, civil liberty is the victim. The American Drug War has led directly to a terrible militarization of American law enforcement, with horrific consequences for human rights.

One reason that the 13 American Colonies declared independence and fought a revolution against the British was that King George III used British soldiers to enforce customs laws and other policies of King George in the American colonies.

In the 1830’s, Texas fought and won a war of independence from Mexico. The Texan revolution was sparked in part by the Mexican government’s use of the army to enforce the civil law in Texas.

In 1878, in response to abuses from the U.S. military enforcement of laws against smuggling illegal liquor, Congress enacted the Posse Comitatus Act to outlaw the use of federal troops for civilian law enforcement.

But a century later, in 1981, Congress passed and President Ronald Reagan signed a bill which created a drug war loophole in the Posse Comitatus Act. In 1988, more loopholes were added, as part of an omnibus drug bill. One of the great traditions of Anglo-American law—civilian and civil law enforcement—is being destroyed.

³⁰ Sections III and IV of this Occasional Paper include excerpts from: David B. Kopel, “Militarized Law Enforcement: The Drug War’s Deadly Fruit,” a chapter in the book *After Prohibition, Adult Alternatives to the Drug War* (Washington, D.C.: Cato Institute, 2000). The chapter is available at: <http://www.davidkopel.com/chap/AfterProhibition.htm>. Information about the book is available at: <http://www.catostore.org/index.asp?fa=ProductDetails&pid=144986&method=search&t=after+prohibition&a=&k=&aeid=&adv=&pg=>

According to the revised law, the military may assist drug law enforcement agencies in surveillance and similar activities, although soldiers are still not supposed to confront civilians directly. Military equipment may be loaned to law enforcement agencies, and the military may train law enforcement agencies. The equipment and training may be for any purpose. If the purpose is drug enforcement, then the equipment and training are free; if the training is not for drug war purposes, the civilian agency must reimburse the military for the training and the equipment.

As the Posse Comitatus Act was weakened, the U.S. military created Joint Task Forces, whose *primary* mission was drug law enforcement. The most famous of these Joint Task Forces, JTF-6, was created in 1989. Based in Fort Bliss, Texas, JTF-6 is responsible for the entire continental United States.³¹

According to the JTF-6 website, “Since its inception, JTF-6 has completed over 5,300 missions in support of more than 430 federal, state and local law enforcement agencies and counterdrug task forces.”³²

Although the JTFs were created solely for the drug war, this limitation is disappearing. Early versions of JTF manuals discussed JTF cooperation with a “DLEA” (“Drug Law Enforcement Agency”), meaning that the JTFs would be working with agencies such as the Customs Bureau and the Drug Enforcement Agency whose job description includes enforcement of drug laws.

But now, the word “drug” has been dropped, and the JTF vocabulary simply refers to the “LEA.” This change reflects the fact that almost every law enforcement agency, no matter how specialized, can invent some connection to the drug war.

As the JTF-6 website continues, “The command’s efforts have led to both a greater recognition of the potential for military assistance in counterdrug efforts and a significant expansion of the partnership among active duty forces, reserve components, and LEA’s.”

For example, in February, 1993, the United States Bureau of Alcohol, Tobacco and Firearms (BATF)³³ launched an assault against the

³¹ JTF-6 was originally responsible only for the border states of California, Arizona, New Mexico and Texas. The JTFs have been restructured over the years, consolidating areas of responsibility. For instance, what used to be called Combined Joint Task Force Four (CJTF-4) is now Joint Inter-Agency Task Force East in Key West, Florida and has responsibility for the Caribbean and Latin America.

³² Joint Task Force-6 Website. <http://www.jtf6.northcom.mil/subpages/history.html>

compound of a small religious community, the Branch Davidians, outside Waco, Texas. Approximately eighty armed agents invaded the compound, purportedly to execute a single search and arrest warrant. The raid went badly; six Branch Davidians and four agents were killed, and after a fifty-one-day standoff, the United States Justice Department approved a plan to use CS gas against those barricaded inside. Tanks carrying the CS gas entered the compound. Later that day, fire broke out, and all seventy-four men, women and children inside perished.

As part of the planning for the Waco raid, the Bureau of Alcohol, Tobacco and Firearms went to the Joint Task Force Six, which covers Texas, and asked for training, medical, communications, and other support. The JTF-6 staff explained that they could only be involved if the case were a drug case. Immediately thereafter, BATF began asserting phony claims that the Waco case was a drug investigation; Branch Davidian prophet David Koresh was supposedly running a methamphetamine laboratory. It should have been obvious to JTF-6 that the supposed drug connection was false.³⁴

Nonetheless JTF-6 signed onto the mission of “training a National Level Response Team [BATF strike-force] for Counter Drug operations,” in “Support of BATF Takedown of Meth Lab.” According to documents received from the U.S. Special Operations Command under Freedom of Information Act requests, the Joint Training operation (JT002-93) was approved due to a request from BATF asking for U.S. and Texas National Guard assistance in serving a federal search warrant “to a dangerous extremist organization believed to be producing methamphetamine.”

As Waco illustrates, the drug enforcement exception to the Posse Comitatus Act has been very effective at undermining the honesty of law enforcement personnel, who are encouraged to allege a drug nexus in

³³ In 2002, the Bureau of Alcohol, Tobacco and Firearms (BATF) was removed from the Treasury Department, and placed under the Justice Department. The Bureau was renamed the “Bureau of Alcohol, Tobacco, Firearms and Explosives.”

³⁴ Had BATF actually been planning to take down a methamphetamine lab, its plans would have been far different. Testimony at the 1995 congressional hearings on Waco indicated the potential dangers of an explosion if a meth lab is not taken down properly. For instance, because a stray bullet could cause a major explosion, a “dynamic entry” (a violent break-in, the BATF’s method of “serving” the Waco search warrant) would be an extremely risky, disfavored approach.

In addition, the chemicals involved in methamphetamine production are toxic, capable of injuring lungs, skin, liver, kidneys, the central nervous system, and potentially causing genetic damage. Thus, DEA protocol for seizure of meth labs requires that agents wear special clothing and bring other specialized equipment. BATF not only made no such plans, but made express advance plans to use flashbang grenades--grenades which could set off a massive explosion in a real meth lab. For more, see David B. Kopel and Paul H. Blackman, “No More Wacos: What’s Wrong with Federal Law Enforcement and How to Fix It” (Buffalo, New York: Prometheus Books, 1996).

many investigations for the purpose of getting, gratis, federal military assistance.

U.S. military surveillance in support of the drug war includes sensors, listening posts, ground surveillance radar, and ground patrols. It was one of these ground patrols, conducted by U.S. Marines, which killed Esequiel Hernandez, an 18 year old Goatherd near his home in Redford, Texas. The patrol spotted Hernandez and his goats, and saw that Hernandez was carrying a rifle. (Carrying a rifle in open country is lawful in Texas, and is very appropriate for shepherd to protect his flock and himself from coyotes, rattlesnakes, and the like.) The Marines said that Hernandez fired two shots from the .22 rifle. They tracked him for twenty minutes, and when he allegedly raised his rifle again, a Marine corporal shot him, 400 yards from his home, with an M16 machine gun.

Far larger than the number of U.S. Army personnel involved in the drug war on any given day is the number of National Guardsmen. Although the National Guard was created under the Congressional war power, and the Guard is part of the military Reserve, and the Guard receives almost all of its funding and equipment from the U.S. government, the Guard operates under the legal fiction that it is not part of the military, and therefore does not have to obey the Posse Comitatus Act.

The Guard's militaristic law enforcement can be seen every fall, when Humboldt, Trinity, and Mendocino Counties in California are invaded by Army, Air Force, National Guard, and state and local forces, as part of the Campaign Against Marijuana Planting (CAMP). In 2003, the California Attorney General reported the 2003 CAMP program, with National Guard participation, had a record year, seizing over 466,000 marijuana plants during the 2003 growing season, a reported 100,000 plant increase over 2002.³⁵ In the 2003 Defense Department Appropriations bill, the U.S. House Appropriations Committee appropriated even more money than the Defense Department had requested for National Guard Counter-drug State Programs—a \$33,400,000 increase, for a total of \$167,722,000.³⁶

Although the U.S. military, including the National Guard, is stretched thin in counter-terror operations all over the world, this year the office of U.S. Senator Mitch McConnell (Republican of Kentucky) proudly announced he brought home a \$3,600,000 appropriation for the Kentucky

³⁵ Office of the Attorney General, State of California, press release, "2003 Campaign Against Marijuana Planting Program Has Record Breaking Season," October 19, 2003. <http://caag.state.ca.us/newsalerts/2003/03-133.htm>

³⁶ House Report number 107-532, Department of Defense Appropriations Bill, 2003, Drug Interdiction and Counter-Drug Activities. [http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp107&r_n=hr532.107&sel=TOC_357198&\(2](http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp107&r_n=hr532.107&sel=TOC_357198&(2)

National Guard's 2005 marijuana eradication program, which includes eradication, aerial surveillance and interdiction support.³⁷

In California and in many other states, use of the National Guard for marijuana eradication is sometimes preceded by a declaration from the Governor that marijuana cultivation represents an "emergency" which necessitates the use of the Guard. While most persons think of an "emergency" as a spontaneous and unexpected event (such as a flood), the Orwellian military use of "emergency" means "something that the Governor thinks is a serious problem, even if the problem has persisted at endemic levels for many years." The truth is another casualty of the war on drugs.

In 1993, Congress ordered the Department of Defense to sell military surplus to state and local law enforcement for use in counter-drug activities. Through low-cost sales and donations, the U.S. military is transforming the equipment possessed by state and local law enforcement in America. Some of the new equipment is unobjectionable, such as armored vests and Kevlar helmets.

But the donation program also provides police agencies with extremely sophisticated surveillance equipment, some of which can be used to spy on people inside their homes. This equipment, such as sophisticated night vision gear and thermal detection devices, is ideally suited for conducting warrantless searches inside homes. And as long as the warrantless surveillance is not used in court (but instead is used to develop leads for evidence that can be admitted), the warrantless surveillance is unlikely to be discovered. For many years the Los Angeles Police Department got away with thousands of illegal phone taps, by always being careful not have evidence from the illegal tap itself introduced in court.

The military donation program is also putting huge numbers of M-16 and M-14 automatic rifles, and M203 and M79 grenade launchers into civilian law enforcement—quite an increase in firepower from the traditional service revolver and back-up shotgun.

The drug war has also led to the proliferation of another type of firearm in law enforcement, the German-made Heckler & Koch MP-5 machine pistols—which are usually bought by law enforcement, rather than donated by the military. These weapons are sold almost exclusively to the military and police. Some of the company's advertising to civilian law enforcement has conveyed the message that by owning the weapon,

³⁷Office of Senator Mitch McConnell, press release, "Senator McConnell Announces Funding For Kentucky National Guard," June 22, 2004.
<http://mcconnell.senate.gov/record.cfm?id=223028&start=21>

the civilian officer will be the equivalent of a member of an élite military strike force, such as the Navy SEALs. One advertisement linked civilian law enforcement to an actual war: “From the Gulf War to the Drug War.” The MP-5 itself is a fine machine pistol, but the sensational advertising can promote overly militaristic attitudes among civil police officers who use the guns.

The military Joint Task Forces provide federal, state, and local law enforcement with extensive training. Among the subjects taught are patrolling, helicopter attacks, sniping, intelligence, and combat techniques. The combat techniques often fall under what is called “Advanced Military Operations on Urbanized Terrain” (AMOUT). This is a euphemism for Close Quarters Combat (CQC)—house-to-house urban killing, as practiced in places such as Stalingrad in 1943. Before 1993, official Army policy forbade teaching Close Quarters Combat to civilian law-enforcement, but that restriction has been abandoned. Much of the military training is provided by the Army Rangers or the Navy SEALs—élite attack teams.³⁸

IV. State and local militarization

In September 1999, a paramilitary police unit in Denver, Colorado, executed a no-knock raid on a home—based on the word of a junkie who claimed to have purchased crack cocaine there--and shot and killed its occupant, Israel Mena. It was the wrong house.³⁹

Far more common than the use of the military or National Guard is the use of paramilitary police units in the drug war. Over several decades of the drug war, “Drug Warrior” has replaced the term “Peace Officer” in many police departments across America, and the casualties have been piling up.

In the late 1960’s, the City of Los Angeles, California formed the first Special Weapons and Tactics (SWAT) team in America, which gained national notoriety, first through high profile missions in the late 60’s and early 70’s against the Black Panthers and Symbionese Liberation Army, both militant anti-government groups, and later in the 1970’s television police drama “S.W.A.T. “

At first, SWAT was a group of designated police officers who could be called out in the event of particularly difficult or dangerous situations such as hijackings or hostage situations. SWAT officers were only slightly

³⁸ “SEAL” stands for “Sea, Air, Land.” For information about the SEALs, see their official website: <http://www.seal.navy.mil>.

³⁹ David B. Kopel and Ari Armstrong, “Colorado Supreme Court Paved Way for Mena Killing.” <Http://www.davekopel.org/CJ/OpEds/mena.htm>.

better equipped and trained than regular police. The trend quickly caught on and in many police departments, SWAT became more specialized and “elite”--often operating outside the normal police command structure.

A survey by criminologist Peter Kraska found that by the late 1990’s, 89% of police departments had paramilitary “SWAT” units, and forty-six percent have received training from military personnel who were on active duty.⁴⁰ Although Kraska’s figure may be too high (because police departments without paramilitary units did not answer his survey), it is clear that local law enforcement paramilitarism has increased drastically over the last several decades.

In addition Kraska showed that nationwide, the deployment of SWAT teams had increased 538% since 1980; 75% of SWAT missions are for serving search warrants; almost all of the search warrants are for drugs. Drug searches are very different from SWAT’s original purpose of hostage rescuing.

The victims of drug raids are not only people who break the drug laws:

- In May of 2003, a squad of police from New York City’s Emergency Services Unit (ESU is the NYPD’s version of SWAT) use a stun grenade and dogs to raid the apartment of Alberta Spruill, where an informant had told them they would find drugs and guns. After being thrown to the floor and handcuffed, the 57-year-old grandmother died of a heart attack. Again, police had the wrong apartment. As author Joel Miller puts it, she was “literally scared to death.”⁴¹
- Less than a month before Israel Mena was killed in Denver, an unarmed 64 year old grandfather of 14, Mario Paz, was shot dead in his own home after a Compton, California, SWAT team blew the locks off his door in a late night drug raid where no drugs were found.
- In September, 2000, eleven year old Alberto Sepulveda was killed by a blast from a SWAT shotgun while spread-eagle on the floor of his parent’s Modesto, California, home during a drug raid where no drugs were found.
- A month later, 64 year old John Adams died at the hands of police while presumably defending his home from invaders when police kicked in his door at night to serve a drug warrant, the wrong door on the wrong house.

⁴⁰ Peter B. Kraska & Victor E. Kappeler, Militarizing American Police: The rise and Normalization of Paramilitary Units,” Social Problems, Feb. 1997, volume 44, issue number 1, pages 1-16. <http://www.pressroom.com/~afrimale/kraska.htm>

⁴¹ Joel Miller, “Kill Zone,” World Net Daily.com, July 17, 2004. http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=39486

- In Houston in the summer of 1998, six police officers broke into the home of Pedro Oregon Navarro and shot him dead. The pattern was the same as in so many drug war deaths: the police broke into his home at night, with no warning. When the victim grabbed his gun to protect himself from the invaders, he was shot 12 times. Navarro had nothing to do with drugs; the search warrant had been based only on the word of a drunk who, arrested for public inebriation, was given a chance to give the police the address of a “drug dealer,” in exchange for being released.

In Albuquerque, New Mexico, the city's SWAT team was dismantled after a study by Sam Walker of the University of Nebraska found that “the rate of killings by the police was just off the charts.”

One can be in favor of drugs being illegal, and still oppose “the war on drugs,” just as one can want food stamp fraud to be illegal without wanting a “war on welfare cheaters,” because to have “a war” is to make it likely that the military will become involved, or as happened in the U.S. police will become more like the military, and that, inevitably, innocent blood will be shed.

V. Asset forfeiture

Drug war violence is often inspired by forfeiture laws, which allow the police to seize property without permission from a court, and to keep the property even if the property owner is acquitted of criminal charges—or if criminal charges are never filed.

The earliest property forfeitures in America were in admiralty law, and were narrowly applied. Forfeiture of ships that failed to pay customs duties was considered necessary to protect the primary source of government revenue in the early American republic: import/export taxes.

In *United States v. La Vengeance*, a case involving the seizure of a French ship carrying illegally exported firearms, the 1796 U.S. Supreme Court held that the process was *in rem* and “does not, in any degree, touch the person of the offender.” In other words, the legal action was against a thing (the ship) and not against a person. Because only persons have a right to a jury trial, the Court held that the ship was not entitled to a jury trial.⁴²

As legal scholar Donald Kochan explains, “The legal fiction that a suit could be against the property for its role in an action by the owner was established and followed.” So when the government uses *in rem* civil

⁴² 3 U.S. (3 Dallas) 297 (1796).

proceedings in asset forfeiture, “[T]he right to an indictment, the presumption of innocence, the right to effective assistance to counsel, the right to a jury trial, the right not to be punished prior to adjudication of guilt beyond a reasonable doubt, the right not to be punished in a manner disproportionate to the crime, the general presumption that the state prove culpability, and the practice of resolving legal ambiguities in favor of the defendant all do not apply.”⁴³

Kochan continues:

“In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act containing the basic federal anti-drug civil asset forfeiture provisions. This original version allowed for forfeiture of property used in connection with controlled substances. In 1978, forfeiture of money and other things of value furnished or intended to be furnished in a drug exchange was authorized. In 1984, the law was amended to include all real property used or intended to be used in a drug exchange and all proceeds traceable to a drug exchange. Several other statutes intended to fight the drug war extended forfeiture power to money laundering, counterfeiting, and various other offenses. In 1992, an increase in the federal government’s forfeiture power occurred when a law was adopted completely eliminating any requirement that the actual property seized be ‘tainted’ by a connection to a crime. The statute allows the government to seize any property identical to the property involved in the offense if it can be found in the same place or same account. Thus, identification and connection are no longer required under certain statutes”

The Comprehensive Crime Control Act of 1984 established the Department of Justice Asset Forfeiture fund; the fund gives some federal forfeiture revenues to state and local law enforcement agencies. As a result, state and local police agencies throughout America became *de facto* subsidiaries of the federal Department of Justice. In 1985, the federal fund took in \$24,000,000. In 2003 the fund took in over \$466,000,000 and distributed over \$203,000,000 to various state and local police agencies.⁴⁴

⁴³Donald J. Kochan, “Reforming Property Forfeiture Laws to Protect Citizens’ Rights,” The Mackinac Center for Public Policy, July 1998. <http://www.mackinac.org/article.asp?ID=1291>

⁴⁴U. S. Department of Justice, FY 2003 Asset forfeiture Fund Reports, Equitable Sharing Payments of Cash and Sale Proceeds Executed During Fiscal Year 2003, by Recipient Agency. <http://www.usdoj.gov/jmd/afp/02fundreport/2003affr/report2b.htm>

The federal Department of Justice (DOJ) forfeiture fund is used to reward state and local law enforcement agencies for acting contrary to state and local laws about forfeiture! In 2000, the *Kansas City Star* newspaper broke a story detailing how police agencies in more than two dozen states had been circumventing state asset forfeiture laws, with the cooperation of the federal government.

“When police seize money, they call a federal agency instead of going to state court to confiscate it. An agency such as the Drug Enforcement Administration accepts the seizure, making it a federal case. The DEA keeps a cut of the money and returns the rest to police. State courts—and their and their generally more restrictive forfeiture laws—are bypassed altogether”.⁴⁵

In theory, the drug war induced expansion of asset forfeiture was meant to be used as a tool against drug lords and traffickers. In reality it has often been used as a form of legalized theft, encouraging police to seize people’s money and property on the flimsiest of pretexts. For example:

- “When Willie Jones, a Nashville landscaper, paid cash for an airline ticket, city police suspected him of being a drug dealer. They searched him, found no drugs, but seized the \$9,000 he was planning to bring on his flight to Houston to buy shrubs for his business. It took Jones two years and a federal lawsuit to get his money back”.⁴⁶
- On October 12, 1992, a multitude of federal and state agencies (including the National Park Service, the Forest Service, the Drug Enforcement Administration, and the National Guard) broke into the home of southern California millionaire Donald Scott. The no-knock, late night raid was supposedly designed to serve a warrant to look for marijuana plants growing on Mr. Scott’s estate, although there was no realistic possibility that Mr. Scott could have destroyed the marijuana plants (alleged to be hidden in trees far from his home) during the time it would have taken the police to knock at his door and demand entry. When Mr. Scott, awakened by the noise of people breaking into his home at night, attempted to protect his wife from the break-in by running into the living room with his legally-owned .38 caliber revolver, he was shot dead. The search yielded no evidence of drugs or illegal activity. A later investigation found that the basis of the warrant was fabricated and that the sheriff’s department that participated in the raid had conducted an appraisal

⁴⁵ Karen Dillon, “Cash in Custody,” *Kansas City Star*, May 19, 2000.
<http://www.kcstar.com/projects/drugforfeit/new3.htm>

⁴⁶ “Forfeiture Fury,” *Reason Magazine Online*, July 1999.
<http://reason.com/bi/bi-forf.shtml>

of the five-million-dollar Scott ranch before the raid, apparently with the expectation that the ranch would be forfeited to the government.⁴⁷

Federal government forfeiture laws and policies infringe the Tenth Amendment of the U.S. Constitution:

“The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people.”

By paying for state and local law enforcement officers to act contrary to state and local forfeiture laws, the federal government is audaciously attacking the reserved power of state and local government to control their own state and local law enforcement officers.

But because of the war on drugs, the American federal government exercises tremendous influence over the practices and policies of state and local governments. Centralized, national power of the “federal government” is subverting the Constitution’s federal system; under the constitutional system, the states deal with most issues, while a strong federal government addresses only a limited list of issues for which unified national policy is necessary.

VII. Medical Marijuana

During the last decade, nine states have passed medical-marijuana initiatives allowing the possession and use of marijuana for medical purposes. The laws were passed by voter initiative (despite vocal opposition from many politicians and police officials) in Alaska, California, Colorado, Nevada, Arizona, Oregon, Maine, and Washington. In addition, the Hawaii state legislature enacted a medical marijuana law.

And the reaction from the federal government? Members of Congress denounced voters who had authorized medical marijuana. One representative said of medical marijuana proponents, “It is despicable for legalization advocates to offer false hope to the sick in a cynical effort to legalize marijuana.”⁴⁸ Congress even barred the District of Columbia from counting the votes in the city's own medical marijuana initiative. The vote-counting prohibition was later struck down by a court for being an unconstitutional abridgement of political speech.⁴⁹

⁴⁷ For details on the Scott case, see Kopel and Blackman, “No More Wacos,” *supra*.

⁴⁸ Marijuana Policy Project, “Patients Protest Congressman Bob Barr’s Move to Overturn D.C. Medical Marijuana Initiative,” press release, Oct. 21, 1999. <http://www.mpp.org/releases/nr102199.html>

⁴⁹ *Marijuana Policy Project v. District of Columbia Bd. of Elections and Ethics*, 191 Federal Supplement 2d 196 (District Court for the District of Columbia, March 28, 2002);

The Bush and Clinton administrations have prosecuted people who complied with state medical marijuana laws, but who violated federal marijuana laws.⁵⁰

President Bush strongly opposes medical marijuana. As Governor of Texas, he signed a law to prevent cities or towns in the state from enacting medical marijuana laws. Even so, during his first presidential campaign, in 2000, Bush said that he believed the states ought to be able to decide the medical marijuana issue for themselves. He also repeatedly claimed to “trust the people more than the government.” If so, he should be especially trusting of initiatives enacted by the people in eight states. There are twenty-three American states which have the initiative process. In just a few years, a third of the initiative states have already approved medical marijuana.

But contrary to candidate Bush's state's rights view of medical marijuana, President Bush's federal government has aggressively suppressed state's rights. In California, the federal Drug Enforcement Agency (DEA) seized the medical records of medical-marijuana patients and destroyed the marijuana gardens of AIDS and cancer patients. In 2001, the DEA shut down the Los Angeles Cannabis Resource Center in West Hollywood. DEA agents seized about 400 marijuana plants, and the medical files of several thousand current and former patients. The DEA even took the baking mix the Center used to cook marijuana chocolate brownies.⁵¹

In October 2003, the federal DEA temporarily “deputized” as federal agents some local Colorado police. While under federal rather than state authority, these local police violated their own Colorado government's medical marijuana laws when they joined federal officers in raiding the home of a Colorado government-registered medical marijuana patient. The patient took the drug to alleviate constant pain from kidney cancer, diabetes and lung disease. The Colorado officers assisted the federal officer in seizing the patient's supply of marijuana.⁵²

The “drug war” as actually fought by the American central government in the national capital is partly a war against the rights of the

Marijuana Policy Project, “Medical Marijuana initiative Accepted for November Election,” press release, Sept. 17, 2002. <http://www.mpp.org/releases/nr091702.html>

⁵⁰ Ryan H. Sager, “Grass Roots: The Progress of Medical Marijuana,” National Review, Nov. 8, 1999.

⁵¹ The issue is not whether the DEA has the legal power to act in these cases. In 2001, the U.S. Supreme Court ruled that the Controlled Substances Act of 1970 does not allow a “necessity” defense in federal court, at least not in a context in which no individual's medical needs were before the court.

⁵² Karen Abbot, “Pot sparks showdown with feds”, Rocky Mountain News, Dec. 10, 2003. http://www.insidedenver.com/drmn/state/article/0,1299,DRMN_21_2491358,00.html

state governments and of the people to control their own state governments.

IX. Solutions

In response to egregious use of asset forfeiture, state legislatures throughout the U.S., including Colorado, have been reforming their laws.⁵³ Likewise, the federal government has made some reforms in its forfeiture laws.⁵⁴ Many reform laws require that a person be convicted of a crime before the government takes his property. Other reforms require that forfeiture money be spent on causes such as public schools, rather than being always given to the police who took the money.

Some other drug war reforms include:

- In 2001, and again in 2003, U.S. Representative Barney Frank and other Congressional Democrats (with a few Republican co-sponsors) introduced the “States Rights to Medical Marijuana Act”, which would simply allow states to implement medical marijuana policy without interference from the federal government. Foolishly, the Republicans who control Congress have refused to even allow a hearing on the bill. Congressional Republicans should seize the opportunity to show their commitment to federalism—without having to write a single new regulation or hire a single new bureaucrat—by at the very least allowing a committee hearing on the Act.⁵⁵
- Most state and local law enforcement officers who currently enforce drug laws or serve on federally sponsored narcotics task forces should be re-assigned to investigating crimes against people and property and first-responder preparedness for counter-terrorism.
- Likewise, federal drug agents should be re-assigned and the majority of the drug war budget de-funded or re-allocated to counter terrorism. For instance, those DEA agents currently involved in harassing sick and dying Americans for using medical marijuana might better serve American taxpayers, and the national security, in a border patrol uniform.

⁵³“ State of the States: Drug Policy Reforms: 1996-2002,” Drug Policy Alliance, Sept. 2003 http://www.drugpolicy.org/docUploads/sos_report2003.pdf

⁵⁴ H.R. 1658, The Civil Asset Reform Act of 2000.
[http://thomas.loc.gov/cgi-bin/query/z?c106:h.r.1658:](http://thomas.loc.gov/cgi-bin/query/z?c106:h.r.1658)

⁵⁵ “Newsbrief: “States’ Rights to Medical Marijuana Act” Reintroduced”, Drug War Chronicle, May 23, 2003.
<http://www.stophthdrugwar.org/chronicle/288/statesrights.shtml>

- Those Immigration and Customs Enforcement agents, and other federal agents currently looking for drugs should instead be looking for *al Qaeda* and other terrorists.
- Congress should close the drug war loopholes to the Posse Comitatus Act and de-fund the U.S. military's drug interdiction operations (to include the National Guard). The job of the military is to fight war against America's enemies, not against American constitutional liberties. The more that Americans realize that defeating Islamic terrorism is essential to American survival, the more that Americans will support making the war against Islamist Jihad the most important foreign policy goal. Therefore, whenever the war on drugs conflicts with the war against terror, the war against terror should win.

Current U.S. drug policies perpetuate an internal war against Americans and against the American tradition of freedom and liberty, the war on drugs makes America weaker and makes freedom everywhere weaker.

For three centuries, America has set a good example of freedom for other nations. America can continue that tradition by ending the freedom robbing drug war at home.

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For further reading:

By David B. Kopel and Michael Krause:

Book Chapters:

"A Foreign Policy Disaster," in *The New Prohibition: Voices of Dissent Challenge the Drug War* (Accurate Press, 2004).

<http://www.davidkopel.com/CJ/chap/ForeignPolicyDisaster.pdf>

To buy the book: <http://www.accuratepress.net/np.html>

Articles:

"Losing the War on Terrorism in Peru: The U.S. government has undermined the war on terrorism in Peru." *National Review Online*, Mar. 22, 2002.

<http://www.nationalreview.com/kopel/kopel032202.shtml>

"Wasted: Can't the DEA or Congress find a better way to use the DEA's resources?"

Medical marijuana raids in California. *National Review Online*, Nov. 19, 2001.

<http://www.nationalreview.com/kopel/kopel112601.shtml>

"License to Kill: The (drug) war on civilians in Peru." *National Review Online*. Aug. 16,

2001. <http://www.nationalreview.com/kopel/kopel081601.shtml>

"Out of Colombia: The drug-certification mandate and the international drug war are making America more like Colombia." *National Review Online*. Apr. 11, 2001.

<http://www.nationalreview.com/kopel/kopel041101.shtml>

"The Prohibitionist's Burden: Congress has repealed the Fourth Amendment for everyone on a ship." *National Review Online*. July 10, 2001. Coast Guard and the drug war.

<http://www.nationalreview.com/kopel/kopel071001.shtml>

"This is Kerry on Drugs: Starve a peasant, feed a terrorist." *Reason Online*. July 15, 2004. The drug war record of Rand Beers, Homeland Security Advisor to the Kerry campaign.

<http://www.reason.com/hod/dk071504.shtml>

By Kopel:

"Feel Like Dancing? Beware of Tom Daschle." *National Review Online*. Jan. 30, 2003. With Glenn Reynolds. Senator Daschle's omnibus crime bill attacks RAVes and dance parties by classifying them as "crack houses."

<http://www.nationalreview.com/kopel/kopel013003.asp>

"Smash-up Policing: When Law Enforcement Goes Military" in Busted: Stone Cowboys, Narco-Lords and Washington's War on Drugs (New York: Thunder's Mouth Press/Nation Books, 2002). Mike Bray, editor.

"Meth lab video fearmongering." TV program pits neighbors against each other in government's crackdown on illicit drug factories. Rocky Mountain News/Denver Post, June 2, 2002. <http://www.davekopel.com/Media/RMN/2002/MethLab.htm>

"One Trigger-Happy Attorney." Prosecution of dance clubs in New Orleans. National Review Online. April 30, 2001. With Glenn Harlan Reynolds. <http://www.nationalreview.com/kopel/kopel043001.shtml>

"Make Policy, Not War." Confusing drug policy with "war" is dangerous. National Review Online. Feb. 21, 2001. <http://www.nationalreview.com/kopel/kopel022101.shtml>

"Militarized Law Enforcement: The Drug War's Deadly Fruit." Chapter by Kopel in the Cato Institute book *After Prohibition: An Adult Approach to Drug Policies in the 21st Century*, edited by Timothy Lynch (November, 2000). <http://www.davekopel.com/CJ/chap/AfterProhibition.htm>

"Extreme Drug Law Tramples Bill of Rights. Flaws Seen in Uniform Controlled Substances Act." Independence Institute Issue Paper. 1992. <http://www.davekopel.com/CJ/IP/ExtremeDrugLaw.htm>

"Marijuana Jail Terms: Costly and Hasty." Independence Institute Issue Paper. 1991. <http://www.davekopel.com/CJ/MarijuanaJailTerms.htm>

"Drug Testing: Shaky Science May Nullify Good Intentions." Independence Institute Issue Paper. 1990. <http://www.davekopel.com/CJ/IP/DrugTesting.htm>

"Street Junkies are the Real Enemy." Phony drug war statistics. Colorado Statesman. May 18, 1990. <http://www.davekopel.com/CJ/OpEds/Street-Junkies.htm>

"It's an Assault on Our Privacy." Drug testing. Colorado Statesman, Sept. 15, 1989. <http://www.davekopel.com/CJ/OpEds/Assault-on-Privacy.htm>