NLWJC- Kagan

Counsel - Box 019 - Folder 006

[Ruby Ridge] [Bound Material]

RUBY RIDGE:

REPORT OF THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND GOVERNMENT

INFORMATION OF THE SENATE COMMITTEE ON

THE JUDICIARY

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Participating Senators

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INTRODUCTION

In the summer of 1995, the Senate Subcommittee on Terrorism, Technology and Government Information announced that it would hold public hearings into allegations that several branches of the Departments of Justice and the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The Subcommittee's inquiry into these allegations and the tragic deaths of three people in August 1992 – a highly-decorated Deputy United States Marshal, Weaver's wife and Weaver's young son – was propelled by deep national concern and outrage over the events at Ruby Ridge. While the government has conducted a series of internal investigations into the charges of misconduct at Ruby Ridge, no report of any government agency has ever been released to the public.

The Subcommittee held fourteen days of hearings from September 6 to October 19, 1995, heard testimony from sixty-two witnesses, interviewed many others, and reviewed thousands of documents, including the entire transcript and exhibits from the Weaver/Harris criminal trial and various internal reports prepared by the Department of Treasury, the Department of Justice, and the Federal Bureau of Investigation. In addition, the Subcommittee posed detailed inquiries to the Attorney General, the Secretary of the Treasury, the Director of the

Bureau of Alcohol, Tobacco and Firearms, the Director of the United States Marshals Service, the Director of the Federal Bureau of Investigation, the former United States Attorney for Idaho, and others concerning the role and performance of their agencies in the Ruby Ridge matter.

In fulfilling its oversight responsibilities, the Subcommittee's purposes in this inquiry were twofold. First, we sought to sift through the enormous amount of information generated about the events at Ruby Ridge in order to reach conclusions about what actually occurred and identify those responsible for any mistakes or governmental misconduct. Second, the Subcommittee sought to determine what policy changes and other reforms should be implemented or considered at the various federal agencies involved in the Weaver case.

Our efforts in this inquiry were motivated by the paramount concern that public confidence in government can be maintained only when officials at the highest levels of government are held responsible for their conduct. The Subcommittee believed that if the government's conduct at Ruby Ridge was not subject to searching public scrutiny and analysis, we could not have learned fully from our mistakes.

Overview of the Events at Ruby Ridge

In 1986, a confidential informant for the Bureau of Alcohol, Tobacco and Firearms ("ATF") met Randy Weaver at an Aryan Nations Congress and initiated a relationship with him. Weaver ultimately sold two illegally "sawed off" shotguns to that informant in 1989. ATF attempted to persuade Weaver to act as an informant within the white supremacist Aryan Nations, but he refused. The United States Attorneys' Office ("USAO") for the District of Idaho then indicted Weaver. Weaver was subsequently arrested and, following his arraignment, released on bond pending trial. When Weaver failed to appear for trial on the weapons charge, a bench warrant and later a grand jury indictment were issued. The United States Marshals Service ("USMS") then launched a seventeen-month investigation and surveillance program designed to facilitate Weaver's arrest on the weapons sale and for his failure to appear for trial.

On August 21, 1992, during a USMS surveillance mission to the Weaver property, a firefight broke out between several deputy Marshals and Kevin Harris, a friend of Randy Weaver, and Randy Weaver's 14-year-old son, Sammy. When it was over, Deputy United States Marshal William Degan and 14-year-old Sammy Weaver were dead. The USMS sought emergency assistance from the Federal Bureau of Investigation ("FBI"), which immediately mobilized its

elite Hostage Rescue Team ("HRT") and transported them to Ruby Ridge.

A week-long siege of the Weaver family ensued, involving hundreds of federal, state and local law enforcement officials. On the first day of that siege, an HRT sniper fired two shots: the first hit Randy Weaver; the second killed Randy Weaver's wife, Vicki, and injured Kevin Harris. One week later, the Weavers finally surrendered. Randy Weaver and Kevin Harris ultimately were tried on numerous charges ranging from conspiracy to murder. They were acquitted on all the major counts, including the original firearms charge. Randy Weaver was convicted for his failure to appear at trial and for committing an offense (carrying firearms) while on pretrial release.

Allegations of Government Wrongdoing

Defense counsel for Randy Weaver and Kevin Harris alleged throughout the trial that agents of the ATF, USMS, and FBI were themselves guilty of serious wrongdoing during the investigation, arrest and subsequent criminal trial. Following the conclusion of the Weaver/Harris trial, the Department of Justice created a "Ruby Ridge Task Force" to investigate these allegations. On June 10, 1994, the Task Force delivered its 542-

page report to the Department of Justice's Office of Professional Responsibility. That report has never been made public.

On January 6, 1995, FBI Director Louis J. Freeh announced that he had either disciplined or recommended discipline for twelve FBI employees, including Larry A. Potts, then Acting Deputy Director of the FBI, for their conduct in the Ruby Ridge matter. On May 3, 1995, one of those disciplined — the FBI's on-scene commander at Ruby Ridge, Eugene F. Glenn — wrote a letter to the Justice Department's Office of Professional Responsibility, complaining that he was effectively being made the scapegoat for misconduct by higher-ranking FBI officials. As Agent Glenn asserted in his testimony before the Subcommittee, "we could say that the ship saw some hungry sharks swimming close by and they decided that they would put a few tuna out there and see if they could satisfy them." (9/19/95 Tr. at 16-18, 57 (Glenn)).

In light of the detailed allegations by Glenn, the Department of Justice opened an Office of Professional Responsibility investigation into the events at Ruby Ridge. Since that time, a criminal referral has been made, and several high-ranking officials of the FBI have been suspended pending final resolution of that criminal investigation.

In pursuing its investigation into the events at Ruby Ridge, the Subcommittee has on every occasion attempted to avoid prejudice to the ongoing criminal investigations. In many instances, we agreed to respect the request of the United States Attorney that particular subjects or documents (for example, statements by targets of the investigation) be reserved for Subcommittee inquiry at a later date. But our deference to the ongoing criminal investigation means that the Subcommittee's effort to examine fully all aspects of the government's conduct in the Ruby Ridge matter is not yet finished.

Summary of Conclusions

The ultimate responsibility for what transpired at Ruby Ridge must be shared by many people. The first, of course, is Randy Weaver himself. Had he left his mountain home and appeared in court to face the charges that were pending against him, as every American citizen should, his wife and son and a Deputy United States Marshal would still be alive today. Weaver recognizes his mistake, and in fact candidly acknowledged it to us and to the American people on the first day of our hearings.

But while Randy Weaver made mistakes, so did every federal law enforcement agency involved in the Ruby Ridge incident. Federal law enforcement professionals are held to a

higher standard than ordinary American citizens. This country can tolerate mistakes made by people like Randy Weaver; but we cannot accept serious errors made by federal law enforcement agencies that needlessly result in human tragedy.

The Subcommittee recognizes, of course, the continuing need for strong law enforcement. We know, too, that the vast majority of federal law enforcement officers are dedicated to serving the ends of justice within the law. They put their lives on the line every day to protect the safety of all Americans, and we must never forget that. Deputy Marshal William Degan, who came upon a volatile situation that he had not created, and displayed valor and courage as he carried out his duty, is one of those people. His death is very much part of the tragedy that is Ruby Ridge.

Law enforcement cannot be strong, however, when the public loses confidence in its integrity, its judgment, and its ability to act fairly, independently, and responsibly. The public lost some of that confidence as a result of the events at Ruby Ridge. It was to restore that confidence that the Subcommittee conducted these hearings: to expose to the American people first-hand accounts about what happened at Ruby Ridge. By demanding public accountability for the mistakes that were made there, and informing the American public of policy changes and

other reforms that have been instituted, we hope to prevent similar tragedies in the future.

Several general themes emerged during our hearings. One is a disturbing absence of leadership from a variety of people who had responsibility for the events that led to, occurred during, and followed the August 1992 firefight and standoff. On many occasions, law enforcement officers demonstrated a disturbing lack of willingness to take charge, make difficult decisions, and then accept responsibility for the outcomes of their decisions. Too often, people in positions of authority permitted bad or uncontrolled situations to simply take their course, or inappropriately passed off decision-making authority to others.

The Subcommittee was also disappointed in the unwillingness of some high-ranking people in every agency to accept responsibility – to hold themselves accountable – for their actions and those of their subordinates. Accountability is essential to public confidence; unfortunately, many law enforcement officers who appeared before us attempted to lay the blame on others for what went wrong at Ruby Ridge. For example, we still have not satisfactorily determined the individual responsible for the Rules of Engagement that encouraged HRT snipers to shoot on sight: during our oversight hearings, no

individual acknowledged ultimate responsibility for those clearly unconstitutional Rules.

There were exceptions. For example, FBI Director Louis Freeh has admitted some of the mistakes his agency made in connection with the Ruby Ridge incident and the investigations that have followed, and he has moved to institute reforms so that nothing like it can happen again. We remain concerned, however, about Freeh's questionable judgment in simultaneously reprimanding and promoting his close friend, Larry Potts, to be the FBI's Deputy Director. A good leader is not one who makes no mistakes; rather, he is someone who recognizes and admits his errors so that he can learn from them and seek to avoid their repetition.

A second theme emerges from one of our most disturbing findings: that intelligence data used by every agency involved with the Weaver case was deeply flawed. Inaccurate or exaggerated information about Randy Weaver's conduct prior to August 1992, and his potential dangerousness was passed from one agency to another, without anyone taking the time to carefully and objectively examine what was actually known about Weaver. As Freeh described it: "...[O]ne misstatement of fact exaggerated to another one, into a huge pile of information that was just dead wrong." (10/19/95 Tr. at 73 (Freeh)). Law enforcement can

never hope to make correct decisions about the apprehension and prosecution of citizens based on inaccurate or exaggerated information. Investigative agencies must find a way to do a better job in this regard – especially when they investigate people who hold unpopular religious or political beliefs.

A third issue that crystallized during these hearings involves the basic ability of law enforcement agencies to investigate themselves fully and impartially. After reviewing numerous internal reports on the conduct of the agencies involved with the Weaver case and the Ruby Ridge incident, we question whether any of these agencies can fairly and objectively investigate and criticize itself in a case of this kind. With the exceptions of the Justice Department's Task Force Report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of Deputy Attorney General Jamie Gorelick, it appeared to the Subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they led.

We even heard evidence that FBI agents directly violated orders on how they should draft an investigative report, in an effort to render its final recommendation unduly favorable to the FBI: Barbara Berman, who headed the Justice Department Task Force, informed us that although the FBI Inspection Division

was instructed to refrain from making conclusions when it investigated the Ruby Ridge incident, the Inspection Division's Report did just that. For example, it concluded that the shots fired by Agent Lon Horiuchi were lawful. (9/22/95 Tr. at 91-92, 96-97 (Berman)).

Ruby Ridge represents a tragic chapter in the history of American law enforcement. The American people expect and deserve more. If our government is to maintain – indeed, even deserve – the trust of the American people, it cannot fear or avoid the truth. The career attorneys at the Department of Justice who drafted the Department's Task Force Report, under Barbara Berman's leadership, clearly understood this. Their Report appears to be the fairest and most objective attempt to find the truth – whatever that might be, or whomever it might call to account.

A. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

Many questions have been raised about ATF's conduct in connection with its pursuit of Randy Weaver for what many view as a relatively minor weapons offense. ATF's actions were the first in a string of events that resulted in Weaver's failure to appear for trial, the United States Marshals Service's efforts to arrest

him, and the siege of the Weaver family at Ruby Ridge by the FBI's Hostage Rescue Team.

The Subcommittee recognizes that the ATF has in the past performed and continues to perform valuable law enforcement work. However, enough troublesome questions have been raised about its conduct at Ruby Ridge, Waco, and other places that the Subcommittee urges ATF to examine its own policies, procedures, and training more critically than it has done in the past – with a view toward fundamental reforms. The Subcommittee will hold a further hearing to consider whether ATF should remain a separate agency.

In evaluating ATF's conduct in connection with the Weaver case, the Subcommittee considered the following specific issues.

1. Allegations that Randy Weaver was Targeted Because of His Religious and Political Beliefs

Randy Weaver and others have raised the issue of whether he was "targeted" for prosecution by ATF not because of any criminal conduct, but because of his religious and political beliefs – specifically his affiliation with members of the Aryan Nations, a white supremacist group. It is clear that prior to his arrest on the gun sale charges that led to the Ruby Ridge incident, Weaver had no criminal record, and it is also true that

the jury found Weaver not guilty of the gun sale charges on the basis of entrapment.

It is inappropriate for law enforcement agents to identify subjects for investigation or potential prosecution based on religious or political beliefs, or affiliations – no matter how odious those beliefs may be. Accordingly, we have considered carefully the claim that Weaver was inappropriately targeted.

It is clear to the Subcommittee that Weaver did not become a target for prosecution until October 11, 1989, the date on which he had a conversation with the ATF informant, Kenneth Fadeley, involving the sale of illegal shotguns – even though ATF had been well aware of Weaver's involvement with Aryan Nations for several years before that. The Secret Service had connected him with Aryan Nations members in 1985 and he attended an Aryan Nations World Congress in 1986. (Task Force Report at 22-25). ATF denies targeting Weaver on account of his beliefs, and the Justice Department Task Force Report, which the Subcommittee has found to be the most honest and objective of the previous governmental reports on Ruby Ridge, found no evidence to support a claim of targeting. (Task Force Report at 32).

Nonetheless the question persists of whether Fadeley's pursuit of Weaver, and ATF's interest in prosecution, were

motivated by the extent of Weaver's possible involvement with illegal weapons, or on account of his associations and beliefs. It is clear that ATF's standing policy is to "emphasize those violations that have the greatest potential to impact on crime and to disrupt illegal firearms activity," such as those involving armed drug traffickers and those who are "significant firearms sources to the criminal element." (ATF Order 3310.4B (Enforcement Policy)). Agent Herb Byerly, the ATF case agent, conceded to us that Weaver did not fit into the first category (9/7/95 Tr. at 12 (Byerly)), and the evidence as to the second is less than conclusive.

Clearly, the sale of two sawed-off shotguns, standing alone, would not indicate a significant gun trafficking operation. The ATF agents believed their tape recorded conversations with Weaver demonstrated Weaver's willingness to sell four or five guns per week, although many members of the Subcommittee did not believe the tapes so indicated. The tapes did contain Weaver's statement that he hoped the guns he was selling would end up with a "street gang," although in hindsight there is a question of whether that statement was evidence of a major gun dealer or just mindless misanthropy.

Of course, at the time ATF began its investigation of Weaver, it could not know what the final outcome would be — that

is inherent in the very concept of an investigation. In that context, it is important to note that the Aryan Nations and the people with whom Weaver associated – if not Weaver himself – did more than just espouse divergent political beliefs. Many had a history of actual violence, involving weapons and explosives. We believe that Weaver was targeted not so much for his beliefs, but for his association with violent people. It is clear that, after the gun sale occurred, ATF was not so much interested in prosecuting Weaver as in using its case against him as a carrot and stick to force him to become a government informant against those in political extremist groups, like the Aryan Nations, who may themselves have been engaged in significant criminal activity involving guns or explosives.

However, the distinction here – between targeting for offensive beliefs and targeting those who use their offensive beliefs to promote criminal violence – is a distinction that can easily collapse. For that very reason, special care must be taken by law enforcement agencies when investigating people like Weaver, and we are troubled here that ATF appears to have violated its own policy that incidents involving terrorist and extremist groups are to be treated as sensitive/significant investigations and therefore monitored at headquarters. (9/8/95 Tr. at 144-45 (Magaw)).

ATF Director John W. Magaw explained that Weaver was not viewed as a terrorist during Byerly's investigation. But that does not mean that the case should not have been treated as sensitive/significant. The ATF first made contact with Weaver at a meeting of the Aryan Nations – an alleged extremist group that had been involved in terrorist activities in the past. Weaver was then asked to become a government informant within that group. Had the case been monitored at the headquarters level, some or possibly all of the tragedy that followed might have been avoided.

2. Entrapment

At his trial, Weaver was acquitted of the charge of selling two sawed-off shotguns to ATF informant Fadeley. His only defense to these charges was entrapment, and the jury apparently believed him. ATF concedes that it was unable to convince the jury that Weaver had not been entrapped, and jurors interviewed after the trial confirmed that they believed Weaver had been entrapped. (9/8/95 Tr. at 106, 123 (Magaw)). However, the ATF denies that Weaver was entrapped, and the Justice Department Task Force found insufficient evidence, in their view, to support the claim of entrapment. (Task Force Report at 33-34).

Whether or not Weaver was entrapped, the Subcommittee is concerned that Fadeley had received virtually no training before he was sent to gather intelligence on the Aryan Nations. He was provided only the most cursory explanation of entrapment. Efforts should be made to ensure that adequate training and supervision is provided to informants who work undercover, particularly in political extremist organizations like the Aryan Nations.

3. Compensation of Informants

The Subcommittee considered Randy Weaver's claim that Fadeley's compensation for his work on the Weaver case depended on the outcome of the trial, and that this compensation scheme provided Fadeley with an incentive to entrap and convict Weaver. When he testified before us, Fadeley denied that he was ever told that his compensation would depend on the outcome of the Weaver trial. Director Magaw told the Subcommittee that it is not the policy of ATF to pay informants based upon convictions, and supplemented this testimony with a letter written at the conclusion of the hearings to the Subcommittee Chairman, Senator Specter.

We note, however, that on cross-examination during the Weaver/Harris criminal trial, Fadeley testified that he did not

believe that ATF would pay him unless Weaver was convicted. Moreover, the contracts that governed ATF's relationship with Fadeley show that the amount of money Fadeley was to receive was not determined until the trial's conclusion, when a contract was signed for his services. (9/8/95 Tr. at 138-40 (Magaw)).

ATF officials explicitly denied at the hearings and again in Director Magaw's letter that informants are paid contingent on the outcome of criminal cases. However, various ATF orders in effect through the years concerning the compensation of informants suggest that the results of judicial proceedings could be relevant to the reward given to an informant. The Subcommittee remains skeptical of Fadeley's recent recantation of his trial testimony, but it is unnecessary to make any finding based on these facts. Rather, we focus on broader policy questions raised by the possibility that Fadeley knew – or thought – he would not be paid absent a conviction.

First, we commend ATF for efforts it has initiated to revise relevant policies to make clear that no informant will ever be paid a reward contingent upon the outcome of a criminal case. (9/8/95 Tr. at 122 (Magaw)). We note with concern, however, the fact that compensation agreements are not finalized prior to the conclusion of a trial, and we are not convinced that ATF's reasons for following these procedures, outlined in

Director Magaw's recent letter, are sufficient to justify them. We therefore recommend that (1) the practice of finalizing compensation agreements only at the conclusion of a trial be reviewed; and (2) all federal law enforcement agencies consider adopting a standardized policy with respect to the compensation of informants and, in doing so, determine whether the salaried approach adopted by some agencies is a more appropriate compensation method, and one that would help avoid even the appearance of impropriety.

4. Infiltration of Extremist Groups

ATF is responsible for enforcing laws related to the sale, purchase, and use of firearms. The Subcommittee recognizes that, therefore, ATF may pursue investigations of persons engaged in illegal firearms activities, even if those persons are members of domestic terrorist or extremist groups. ATF began investigating the Aryan Nations Congress long before the Weaver case, apparently because of evidence that members of the Aryan Nations were involved in illegal explosives. In general, however, ATF should be careful not to use weapons offenses as a pretext to infiltrate these groups and to conduct extensive investigations of the broad range of their activities.

In fact, some people question whether ATF should be involved in these activities at all – usually on the ground that permitting multiple agencies to work on what is, in effect, a single case at best risks inefficiencies. For example, in this case, we heard testimony that Fadeley and an FBI informant attended meetings together, but neither was aware that the other also was a government informant. Indeed, at some meetings there were two informants from two different agencies but only one Aryan Nations member. According to Fadeley, his cover may even have been blown by an FBI counterpart. When asked to comment on this problem, FBI Director Freeh agreed that it "makes absolutely no sense, and it's quite dangerous." (10/19/95 Tr. at 92 (Freeh)).

Freeh testified that the Domestic Counter-Terrorism Center would remedy this problem. We ask the Department of Justice and the Department of the Treasury to report to the Subcommittee on how this problem will be avoided in the future. At the very least, we believe that uniform and specific guidelines should be adopted for all agencies to govern their conduct during investigations of extremist or domestic terrorist groups. In the meantime, we commend efforts of federal law enforcement agencies already underway to increase coordination and communication between agencies, and to reduce the incidence

of counterproductive "turf battles." (9/8/95 Tr. at 134-37 (Magaw)).

5. Quality of Information About Weavers

A theme that emerged repeatedly during these hearings related to the proliferation of false information concerning the activities of Randy Weaver and his family. This started with ATF. We examined evidence and heard testimony that ATF provided the United States Attorney's Office and the Marshals Service with inaccurate information about the danger Weaver posed to law enforcement personnel or to others.

There were three major pieces of inaccurate information that the ATF case agent passed on to the United States Attorney's office or the Marshals Service. First, ATF agent Byerly misinformed the USAO that Weaver was "considered to be active in white supremacy activities and has been convicted of activities." (9/7/95 Tr. at 42-45 (Byerly)). Weaver had not been convicted – or even arrested – for any crime before he came in contact with the ATF informant. Although Byerly testified that he thought the USAO was aware that Weaver was not a convicted felon, he never took any action to be sure that the USAO was informed that this information was inaccurate.

Second, there is evidence that Byerly informed the USAO that Weaver was a suspect in several bank robberies. Byerly conceded that there is a "possibility" that he did give this information to the USAO. (9/7/95 Tr. at 104-05 (Byerly)). In a memorandum from Chief Deputy Marshal Ron Evans to Chief of Enforcement Operators Tony Perez, Evans stated that the ATF case agent (Byerly) told the AUSA that Weaver was a suspect in several bank robberies. In addition, Byerly wrote in a report of investigation that "Weaver could be a suspect in several bank robberies in Spokane." This was wholly unfounded; Weaver was not a suspect in any bank robberies.

Third, Agent Byerly or another ATF agent informed the Marshals that Weaver had the potential to be another Bob Mathews – Mathews was an extremely violent man who had killed, bombed and robbed – and his home another Whidbey Island standoff. (9/7/95 Tr. at 79-80 (Byerly); 9/8/95 Tr. at 155 (Magaw)). Weaver had done none of these things. Of course, federal agents need to be aware of and cautious about potential threats. Nevertheless, in this case, the Mathews analogy was extreme and inaccurate.

It was this type of incorrect information and exaggeration that may have led to the decision to seek Weaver's prosecution on the gun charges in the first place. It also may

have influenced agencies, like the FBI and the Marshals Service, to overreact to the situation they were later to face — with deadly and tragic results.

Every agency involved with the Weaver case was careless at some level in the way it handled information. Without accurate information, it is impossible for law enforcement officers to make appropriate decisions with respect to the apprehension and prosecution of criminal suspects. As we have learned from what occurred at Ruby Ridge, the results of law enforcement reliance on inaccurate information can be devastating.

6. Need for Self-Critical Evaluation

A law enforcement agency that fails honestly and objectively to review its own conduct inevitably will lose credibility in the public eye. The Subcommittee is concerned that the internal investigation of ATF's activities in connection with the Weaver case, conducted by the Department of the Treasury's Inspector General, was inadequate. Allegations of misconduct among ATF officials and shortcomings of ATF policies were serious. The Subcommittee hoped for and expected a more probing analysis of the allegations than what appeared in the official report.

Similarly, ATF Director Magaw testified at the hearings that, in his view, ATF "agents' conduct [in connection with the Weaver case] was lawful and proper in every respect." (9/8/95 Tr. at 102 (Magaw)). Director Magaw said this even though previous questioning already had made clear that Byerly had given inaccurate information to other agencies about Weaver's past criminal history and dangerousness. This showed an unwillingness to look critically at the conduct of his own agents. Director Magaw ultimately conceded that it would be "inexcusable" to say that Weaver was a suspect in bank robberies when he was not. (9/8/95 Tr. at 163 (Magaw)). But in his submission after the hearings, Magaw denies that any ATF agent said such a thing. However, the documentary evidence contradicts this. (2/28/91 Letter from Chief Deputy Marshal Evans to Enforcement Operations Division Chief Perez).

The Subcommittee is also concerned that Director Magaw tried to justify Byerly's statement that Weaver could be another Bob Mathews. Weaver had never been convicted of, or even charged with a criminal act. To compare him to someone who killed, bombed, and robbed was improper. Condoning such conduct on the part of ATF agents may encourage similar hyperbole in the future – and there is no question that exaggeration of Weaver's

dangerousness was a major contributor to the eventual bloodshed on Ruby Ridge.

The attitude of Director Magaw stands in stark contrast to the testimony of FBI Director Freeh, who candidly admitted the shortcomings of the FBI in connection with its handling of the Ruby Ridge incident and its aftermath. Those in responsible positions must acknowledge their mistakes in order to restore confidence among the American people in the ability of law enforcement to act fairly and effectively. The ATF failed to do this. The Subcommittee, therefore, requests that Secretary of the Treasury Rubin review the conduct of ATF in connection with Ruby Ridge and report to us promptly: (1) his view of the conduct of ATF personnel in connection with this matter; and (2) whether ATF policies or procedures were violated or should be changed in light of the events of Ruby Ridge.

B. UNITED STATES MARSHALS SERVICE

1. Conduct of Randy Weaver

Randy Weaver must bear a great deal of the blame for the bloodshed at Ruby Ridge. This Subcommittee obviously does not have any oversight over the way Weaver leads his life or what he believes. However, it would be an error to characterize Weaver as an innocent, peaceful man sitting in bucolic isolation.

He was accused of committing a crime and was a fugitive from justice. It was the Marshals Service's duty to attempt to arrest him. And after the shootout of August 21, 1992 when a Deputy Marshal was killed, it was entirely proper for the FBI to arrest him.

Weaver resisted efforts to resolve his case peacefully. When he received conflicting trial dates, Weaver made no effort to resolve the discrepancies. He attempted to contact pre-trial services once, before receiving the letter with the March 20 trial date, but never again. He ignored repeated requests by pre-trial services and his own lawyer to contact him. If he had taken any responsibility for his upcoming trial, he could have clarified the confusion.

Once he was a fugitive from justice, Weaver resolutely stayed in his cabin and rebuffed all efforts to negotiate his surrender. His wife and children surrounded him and made law enforcement officers hesitant to confront the entire family for fear of harming them. The Marshals Service consistently sought to negotiate with Weaver. But Weaver terminated the discussions. Once his wife sent down a note stating: "My husband was set up . . . . There is nothing to discuss." (October 16, 1991). On more than one occasion, a family friend, Alan Jeppeson, who had acted as an intermediary and frequently visited the Weavers, told the

Marshals that they would "lose their lives if they go up there and threaten Weaver." (Task Force Report at 75).

Indeed, Weaver cannot seriously refute that he created the impression that he would not surrender voluntarily. He and every member of his family signed a March 5, 1991 letter written by his wife Vicki that stated:

> We, the Weaver family, have been shown by our Savior and King, Yahshua the Messiah of Saxon Israel, that we are to stay separated on this mountain and not leave. We will obey our lawgiver and King. . . . Whether we live or whether we die, we will not obey your lawless government.

Earlier in 1991, and before the trial date, Vicki Weaver sent two letters to the United States Attorney for Idaho, one addressed to him as the "Servants of the Queen of Babylon" and a second addressed to the "Queen of Babylon." In the "Queen of Babylon" letter she quoted from a letter written by Bob Mathews shortly before his fatal shootout with the FBI, in which Mathews wrote:

> A long forgotten wind is starting to blow. Do you hear the approaching thunder? It is that of the awakened Saxon. War is upon the land. The tyrants blood will flow.

As noted previously, and as discussed more fully in Section 2, below, the Subcommittee has uncovered numerous instances in which the ATF, the FBI, or the Marshals Service

passed on exaggerated, inaccurate or flatly wrong information about Weaver, which created a far more threatening and dangerous portrait of Weaver than was warranted. However, it would be equally mistaken to simply view Randy Weaver as a passive, unthreatening individual. Law enforcement had ample reason to approach Weaver with great caution. Kevin Harris himself admitted as much when he testified before the Subcommittee. (9/26/95 Tr. at 80-81 (Harris)). Weaver was not a quiet man who had never made threatening statements. The Marshals Service had reports that he had told people about building a "kill zone" around his house. He spoke of killing federal law enforcement officers who came to arrest him. He discussed "eliminating" the "false Jews."

In addition, surveillance by the Marshals Service had shown that the Weavers usually were armed when they moved about their property. Sammy, Sara, and Rachel Weaver, none of whom was older than sixteen, carried guns frequently.

During his testimony before the Subcommittee, Weaver denied ever making such inflammatory statements. But despite his claims, the Subcommittee is convinced that Weaver did indeed make many of the statements attributed to him. Weaver was less than candid with the Subcommittee about these facts. For example, an article published in 1983 in the Iowa Waterloo Courier shortly

before Weaver moved to Idaho quotes Weaver as saying that he intended to build a "300-yard 'kill zone'" around his house. When asked about this statement at the hearings, Weaver said that the reporter lied about the statement. (9/6/95 Tr. at 57 (Weaver)).

Similarly, two of his neighbors, Beverly and Ed Torrence, reported that Weaver told them that he would shoot federal law enforcement officials who came on his property. According to Ed Torrence "[Weaver] definitely said that he was not going to be arrested by anybody, that if any federal agents came around, they might take him out, but he's going to take them with him." (9/29/91 Interview). Weaver denied making that statement. (9/6/95 Tr. at 57 (Weaver)). Weaver likewise denied making any of the inflammatory statements reported by various neighbors and reporters. Weaver said that all of these people lied about him or were paid informants. (9/6/95 Tr. at 91 (Weaver)). However, subsequent testimony before the Subcommittee by some of the people to whom Weaver made these statements — most of whom had no reason to make false allegations about Weaver — convinces us that he did in fact say such things, and that he did on occasion portray himself as a man capable of violence, at least in defense of his house and family.

In summary, the Subcommittee doubts that Weaver ever intended to come to his trial, regardless of the trial date. Rather, he intended to stay up on Ruby Ridge indefinitely with no plans to deal with the charges against him, and he was, at a minimum, intent on convincing everyone around him that he would use violence to defend himself.

2. Information and Intelligence Gathering and Transmission

From the time Weaver was indicted until October 1991, members of the Marshals Service on several occasions attempted with the help of intermediaries to negotiate Weaver's surrender. At the same time, they continued a background investigation to assess the danger he might pose and to determine how they might safely secure his arrest. To this end, they interviewed several people whom they believed were Weaver's friends and associates, relying heavily – at least into the late fall of 1991 — on information supplied by Ruth Rau, a neighbor of the Weavers who had been feuding with them for some time.

A sixteen-page report, or "Threat Source Profile," drafted on March 7, 1991 by Senior Deputy U.S. Marshals Hunt and Mays concluded that Weaver was "extremely dangerous" and might be "deliberately seeking a confrontation with the government. . . . There maybe [sic] no turning back from a confrontational

situation. Weaver appears self-destructive and willing to martyr himself for his beliefs." As the Marshals' investigation continued through the summer and early fall of 1991, this general assessment never changed significantly. Through negotiation efforts and contacts both with ATF agents familiar with the Weaver case and with friends, family, and neighbors of the Weavers, the Marshals came to accept a portrait of Randy Weaver and his family composed variously of fact, falsehood, misinterpretation and exaggeration. By late 1991, the Marshals believed that:

- The area surrounding Weaver's home might be booby-trapped with various weapons and explosives and outfitted with tunnels or bunkers. (9/12/95 Tr. at 55 (Johnson)). This theory was based in part on what proved to be an exaggerated account of Weaver's military record and in part on uncorroborated reports from "associates" of the Weavers. (Neither bunkers nor booby-traps existed on his property.)

- Weaver might be growing marijuana on his property as a source of income. Most of the information the Marshals actually received on this issue indicated that Weaver's income – to the extent he had any – derived from other sources and that he was, in fact, adamantly opposed to drugs and drug use. However, based on this hypothesis, the Marshals Service was able to

commission an army helicopter to conduct surveillance of the property. (9/12/95 Tr. at 94-95 (Johnson)).

- Weaver was strongly affiliated with virulent anti-government, right-wing supremacist individuals and organizations. In fact, according to a later FBI report, Weaver was affiliated with Aryan Nations only "in some limited capacity."

- Weaver had made threats on the life of the President of the United States and other political leaders. (9/12/95 Tr. at 52 (Hudson)). The United States Secret Service investigated this allegation in 1985. However, in the face of Weaver's denial, they filed no charges against him, citing "lack of probable cause." (Task Force Report at 25; USMS 2/20/91 Report of Investigation).

- Weaver was a convicted felon and a suspect in several bank robbery cases, and was considered dangerous. Weaver also associated with a known bank robber. (9/12/95 Tr. at 51, 89-90 (Hudson)). These robberies were thought to finance white supremacist organizations, for example through the purchase of land in Idaho for use as an operations base. It was later established that these rumors were unfounded.

- Weaver would not voluntarily leave Ruby Ridge to face the charges pending against him. He would kill any law enforcement official who came to arrest him. His children

followed his beliefs, would defend him if any attempt were made to hurt him or take him away, and were willing to die if necessary. This assessment was based, in part, on a brief psychological profile completed by a person who had conducted no first-hand interviews and was sufficiently unfamiliar with the case that he referred to Weaver as "Mr. Randall" throughout.

- Weaver was involved with ongoing disputes with several of his neighbors, some of whom alleged that gunshots were directed toward them from the Weaver property. One of these feuds had escalated to the brink of open violence by the time of the August 21 surveillance mission, and a neighbor had threatened to take matters into his own hands if authorities did not act. (9/12/95 Tr. at 19 (Hudson)). The neighbor, Ruth Rau, reported the gunshots to local law enforcement officials, although she did not actually see where they were directed. (9/20/95 Tr. at 125 (Rau)).

To be sure, significant portions of this information were correct, or at least reasonable. For example, although the Secret Service declined to file charges against Weaver for threatening the President's life, we were unable to learn if this was because they conclusively believed Weaver did not make such statements or because the case simply would be too hard to prove. In addition, the Marshals Service's conclusion that Weaver would

not leave his cabin voluntarily, and might try to kill any law enforcement officers who tried to arrest him, was based upon credible information, including interviews with various neighbors who had heard him make such remarks. But, as we have noted, major portions of the information were incorrect or only partially credible.

The Subcommittee is also concerned that, as Marshals investigating the Weaver case learned facts that contradicted information they previously had been provided, they did not adequately integrate their updated knowledge into their overall assessment of who Randy Weaver was or what threat he might pose. If the Marshals made any attempt to assess the credibility of the various people who gave them information about Weaver, they never recorded their assessments. Thus, rather than maintaining the Threat Source Profile as a living document, the Marshals added new reports to an ever-expanding file, and their overall assessment never really changed. These problems rendered it difficult for other law enforcement officials to assess the Weaver case accurately without the benefit of first-hand briefings from persons who had continuing involvement with him.

We are also concerned that it was not until the fall of 1992 and early spring of 1993 that numerous friends, relatives, and acquaintances of Randy Weaver and Kevin Harris were

interviewed by the FBI, which by this time was gathering information to be used against them at trial. These range from high school teachers to old family friends to relatives, none of whom appear to have been contacted by USMS investigators during the eighteen months when Weaver was a fugitive. Had the Marshals interviewed Jackie Brown in 1991, a close family friend who regularly visited the Weavers, she would have contradicted some of the information that the Raus and others were providing concerning Randy Weaver. (9/20/95 Tr. at 104 (T.Brown), 133-34 (Browns)).

Last spring, in an April 5 letter addressed to various components of the Department of Justice, Deputy Attorney General Jamie Gorelick opined that:

> The assumptions of federal and some state and local law enforcement personnel about Weaver — that he was a Green Beret, that he would shoot on sight anyone who attempted to arrest him, that he had collected certain types of arms, that he had "booby-trapped" and tunnelled his property — exaggerated the threat he posed.

In fact, many of these assumptions were refuted wholesale or at least brought into question by the Marshals themselves during their investigation. But so far as we can determine, the Marshals never undertook a comprehensive re-evaluation of the facts that had comprised the foundation of their initial assessment of Randy Weaver. Indeed, when the

totality of the facts now known to be true about Randy Weaver is added up, his propensity for violence seems, more than anything, to have been a propensity for bluff and bluster. The concern for his potential for violence seems to have been blown out of proportion, based on misinformation from which those having to make decisions about how to deal with Weaver assumed – incorrectly – that they were dealing with an individual with a criminal record, one with links to a number of bank robberies, rather than an individual with no criminal history whatever. We find this disturbing, and a potential contributing factor to the tragic events that occurred at Ruby Ridge on August 21 and 22, 1992.

3. Foreclosure of Nonconfrontational Alternatives

Marshals involved with the Weaver case did pursue a negotiated resolution to the standoff throughout their investigation. However, their efforts continuously were thwarted by the local United States Attorney's Office ("USAO"), which refused to consider various suggestions for actions other than arrest, and which eventually shut down all negotiations. (The USAO's actions are discussed in further detail below at part C.)

Although we agree with the Justice Department Task Force's conclusion that negotiations might not have been

successful in any event, we also agree that they should have been given an adequate opportunity to succeed. We commend the Marshals for their efforts to negotiate a resolution of the Weaver situation in the face of opposition from the local USAO; we only wish that they had followed their own judgment and either tried even harder to see the trial judge -- who was insistent upon a quick arrest -- or else pursued an appeal of the United States Attorney's decisions to the Department of Justice. The Subcommittee recognizes, and regrets, that the foreclosure of nonconfrontational alternatives forced the Marshals to devote resources to Weaver's case that were out of all proportion to the charges against him.

4. Inadequate Preparation for Possible Confrontation During Surveillance Missions

In a critique prepared by FBI Agent John Uda for use in a post-incident discussion between FBI Deputy Assistant Director Danny Coulson and USMS Director Henry Hudson, several concerns were raised relating to the Marshals' failure to plan for possible, though unintended, compromise of one of their surveillance missions. We agree that the high number of missions carried out to develop an arrest plan may have raised the odds that a confrontation would occur. We further agree that on August 21, 1992, the Marshals approached the Weaver residence too

closely, and unnecessarily made noises that risked a response without having any specific plan for retreat. (9/15/95 Tr. at 97. (Cooper)). Policies should be adopted to ensure that operations plans for future missions include adequate plans for such unanticipated outcomes.

5. August 21, 1992 Firefight

On the morning of August 21, 1992, six Deputy United States Marshals went to the Weaver property to conduct surveillance and reconnaissance. During their time there, three of the Marshals became involved in a firefight with 14-year old Sammy Weaver and Kevin Harris, a friend of the Weavers. The firefight occurred about half a mile from the Weaver cabin, at a fork on a dirt road known as the "Y." During the firefight both Deputy United States Marshal William Degan and young Sammy Weaver were killed. The three most significant questions that arise from the firefight are: 1) who fired the first shot? 2) who killed Sammy Weaver? and 3) when did the Marshals first learn that Sammy Weaver had been killed?

In an effort to answer these three questions, the Subcommittee heard testimony from the surviving Deputy Marshals, Randy Weaver, Kevin Harris and others. We also reviewed the Weaver/Harris trial transcript on this issue, various sworn

statements and FBI interview memoranda, and a letter written by Sara Weaver on August 26, 1991. Subcommittee Counsel visited Ruby Ridge and talked with local law enforcement personnel. Counsel also reviewed the physical and expert evidence in connection with the firefight. Finally, the Subcommittee retained two independent experts to explore who shot Sammy Weaver. Following are the conclusions the Subcommittee has reached with respect to the three issues.

a. Who Fired The First Shot at the Y?

Six Deputy United States Marshals – Arthur D. Roderick, Jr., William F. Degan, Larry Thomas Cooper, David A. Hunt, Joseph B. Thomas, and Francis "Frank" Norris – walked up the mountain in the early morning hours of August 21 with the aid of night vision equipment. Their purpose was to conduct surveillance and reconnaissance of the Weaver residence. They had been instructed to avoid confrontation with the Weaver family, especially the children. All were dressed in camouflage; none wore visible identification of themselves as U.S. Marshals. All carried weapons. (9/15/95 Tr. at 19-21 (Cooper); 40 (Roderick); 68 (Hunt)); Task Force Report at 97, 99-100).

The Deputy Marshals split into two groups: Roderick led a reconnaissance ("Recon") team comprised of himself, Degan,

and Cooper. Hunt led the remaining two Marshals in an observation post ("OP") team to a stationary position on the north ridge above the house, approximately a quarter mile away. The OP team was to conduct surveillance and to advise the Recon team of any movements within the area. (9/15/95 Tr. at 21-22 (Cooper); 41 (Roderick)).

Between 7:00 and 8:00 a.m., Hunt observed 14-year-old Sammy Weaver conducting a perimeter check, at times accompanied by Kevin Harris. At around 9:00 a.m., the Recon team joined up with the OP team at the OP and stayed with them for 15-20 minutes, using spotting scopes and binoculars to observe activities at the compound. (9/15/95 Tr. at 22 (Cooper); Task Force Report at 101-02).

The Recon team then descended closer to the cabin. Between 9:30 and 10:00 a.m., Roderick tossed two rocks to the lower driveway to see whether that would evoke any reaction from the house. During the Weaver/Harris criminal trial, Hunt testified that Roderick had first called up to the OP, asking them to observe (1) how the sound carried and whether they heard the rocks; and (2) whether the rocks had alerted the dogs to their presence. Neither Cooper nor Roderick heard the first rock hit; Degan, however, heard the second, as did Hunt, who communicated this fact to the Recon team through Thomas. There

was no immediate reaction from the Weavers. (9/15/95 Tr. at 23-24 (Cooper); 43-44 (Roderick); Task Force Report at 103; Trial Transcript, 6/1/93, at 172 (Hunt)).

At approximately 10:20 a.m., Roderick radioed the OP team to ask them to watch for any movement in the "hot spot" as the Recon team moved toward the Weavers' spring house and lower garden area. Thomas radioed that he heard a vehicle approaching — and, moments later, that the Weavers were reacting. The dogs began to bark and people ran out of the house toward a rock outcropping near the house. One family dog, Striker, may have scented the Marshals. As they realized the dog had alerted on them, and that the Weavers were following the dog to their location, the Recon team decided to retreat from their position to avoid discovery or confrontation. However, the dog continued to lead the Weavers toward the retreating Marshals. Sammy and Kevin Harris, both armed, followed Striker down a trail after the Marshals through the woods toward the Y. Randy Weaver moved south and west along the "logging road," which also leads from the house to the Y. Weaver and Harris both testified that they thought Striker had scented game or possibly a bear or a cougar. (9/6/95 Tr. at 105 (Weaver); 9/26/95 Tr. at 8 (Harris)). In the heavy woods, it is unclear whether Sammy and Harris could actually see that they were trailing people. Hunt warned the

Recon team that they were being followed down the hillside. (9/15/95 Tr. at 24-25 (Cooper); 6/1/93, Trial Transcript, at 233-34 (Thomas)).

As the Recon team retreated, Roderick noted that the dog might have to be killed because it had picked up their scent. The Marshals continued moving, and finally broke through the woods into a fern field, and took up defensive positions at the end of a canopy of trees, in the woods around the Y. At about the same time, Randy Weaver encountered the Marshals at the Y, screamed at them, and then ran away up the logging trail back toward the house. At least one of the Marshals yelled at Randy to freeze either as he arrived at the Y or after he set off back up the trail toward the house. (9/15/95 Tr. at 28 (Cooper); 47-48 (Roderick); Trial Transcript, 5/24/93, at 237-43 (Roderick)).

When Sammy and Harris, following the dog, caught up to the Marshals' position, a firefight broke out. Marshal Degan and Sammy Weaver were killed during the firefight. A hotly contested issue during the Weaver/Harris trial and our hearings was who fired the first shot.

Harris stated at the hearing and in prior statements that when he reached the Y area with Sammy, he saw a man (apparently Cooper), dressed in camouflage, "jumping around" on the west side of the road, yelling something about the dog.

After the dog walked away from the first man, a second man (apparently Roderick) shot the dog and then retreated into the brush. Sammy yelled, "you shot Striker, you sonofabitch," and opened fire in the direction of the man who shot the dog. By the time Sammy began shooting, Harris had caught up to him. Harris realized that they were taking return fire, and so retreated to the east side of the road behind a tree stump. Harris fired one shot into the woods – and immediately heard a man (apparently Degan) groan and say "I'm hit". The shooting stopped for a moment, and by this time Sammy was running back up the road, yelling in pain. Harris heard Randy calling for Sammy to come home. Another shot was fired, and Harris heard Sammy yelp once and then fall silent. (9/26/95 Tr. at 9-11 (Harris)).

Harris saw another man (apparently Roderick again), also dressed in camouflage, exit the brush further down the hill and begin moving toward him. Harris fired, aiming five or ten feet in front of the man, hoping to scare him. The man retreated back into the brush, at which point Harris watched as another man (apparently Cooper) emerged and yelled "Federal Marshal". Harris continued to watch as one man (apparently Cooper) began dragging another man (apparently Degan) down the hill. He remained behind the stump for approximately five or ten minutes before returning up the hill through the woods. On the way back to the house, he

found Sammy's body on the road. Sammy had been shot in the arm and the back. (9/26/95 Tr. at 11 (Harris)).

It was Cooper's testimony that as he reached the canopy of trees, he saw Striker, followed by Harris, enter into the fern field. He also saw Sammy there. When he spotted Randy coming down the other trail from the direction of the house, he thought that the Recon team was being ambushed and yelled "back off, U.S. Marshals". Weaver did, in fact, turn and run back toward the house. Meanwhile, the dog caught up to Cooper, who held it at bay with his gun but did not shoot because he was in plain view of Sammy and Harris and did not want to precipitate a gunfight. Striker finally released, and turned in the direction Randy had gone. (9/15/95 Tr. at 27-28 (Cooper); 86-87 (Roderick)).

Cooper, then about ten feet off the open trail and behind a natural rock bunker in the woods, saw Sammy and Harris emerge from the tree line. Both appeared to be walking quickly past Degan's position. Then Degan rose from behind a tree stump in the woods about three feet from the trail. Degan pointed his weapon in Harris's direction, and said "stop, U.S. Marshals." Harris wheeled around and shot at Degan. Cooper saw Degan go down, knew he had been hit, and then returned fire (a three-round burst) toward Harris. Harris dropped and Cooper pointed his weapon at Sammy but did not fire. Then, Cooper heard two shots

back off to his right, and watched Sammy as he turned, saying "you sonofabitch," and took off up the trail out of view. When Degan called out for help, Cooper fired a second three-round burst for cover as he went to help Degan. Cooper then saw Sammy heading back toward the cabin area. (9/15/95 Tr. at 29-30 (Cooper)).

Roderick supported Cooper's version, although Roderick did not see Degan get shot. Roderick said that he shot the dog after he heard a shot to his left. (9/15/95 Tr. at 48 (Roderick)).

The Subcommittee concludes that Harris shot Deputy Marshal Degan. Although we cannot conclude with certainty that Roderick shot the dog first, the scenario testified to by Harris does seem more plausible than the testimony of the Marshals. If the very first shot that was fired was Harris' mortal wound to Deputy Marshal Degan, Deputy Marshal Degan would have had to have fired all of his seven shots after he was mortally wounded. Although there was expert testimony at the trial that this was possible, it seems unlikely. (9/15/95 Tr. at 85 (Cooper)).

In addition, if Deputy Marshal Degan was shot first, it is hard to understand why neither Cooper nor Roderick immediately shot Harris, who was standing in the Y – clearly visible – and had just shot a Deputy U.S. Marshal. Finally, once the shooting

started, it seems less likely that Roderick would have wasted a shot on the dog whose back was to him as the dog was walking up the hill.

It seems plausible that a 14-year-old boy, on seeing his dog shot, would have opened fire at the person who shot his dog. At that point, it was likely that the Marshals would shoot back at the two people who were firing on them. In the course of the gunfire, Marshal Degan was shot by Harris and Sammy Weaver was shot in the arm and in the back.

That the first shot was Roderick's shooting of the dog is consistent with the early reports from the scene. An Idaho State Police Captain reported that he understood from talking to Roderick on the night of August 21 that he shot the dog first. (9/15/95 Tr. at 80-81 (Roderick)).

b. Who Shot Sammy Weaver?

During their testimony at the hearings, Deputy Marshals Roderick and Cooper stated that they believed that Randy Weaver accidently shot his own son. (9/15/95 Tr. at 73 (Roderick); 104 (Cooper)). This contradicted what had been the government's position at the trial: that it was Marshal Cooper who had shot Sammy Weaver. After hearing Marshal Cooper's testimony on this issue, the Subcommittee retained two experts to review the

evidence and conduct further testing, if necessary, to determine, if possible, who shot Sammy Weaver. The Subcommittee, while it is still awaiting the results of various tests to be performed by the experts, has seen no evidence which would support the Marshals' claim but did not want to hold up the issuance of this report until those analyses are completed. The Subcommittee will release the opinions of the experts when we receive them.

In addition, since the close of the hearings, local law enforcement personnel in Boundary County, Idaho, have collected an additional forty pieces of evidence from the Y area. Analysis of this evidence may shed some light on the question who shot Sammy Weaver.

c. When Did A Federal Law Enforcement Officer First Learn that Sammy Weaver Had Been Shot?

The federal government has steadfastly maintained that it did not know that Sammy Weaver had been shot until his body was found in the birthing shed on August 24, 1992. The United States Marshals who testified before this Subcommittee insisted that they did not know at any time on August 21 that Sammy Weaver had been shot. Randy Weaver and Kevin Harris brought that testimony into question when they said that the Marshals who were at the Y had to have seen either Sammy fall or his body lying on the ground. Randy Weaver also testified that when he and his

wife Vicki walked down to the Y to bring Sammy home, they screamed and cried when they saw his body. (Because the Weavers took Sammy's body away with them, there is now no conclusive evidence of where he fell.)

In addition, Jeffrey Howard, the current Attorney General of the State of New Hampshire, testified that on the morning of August 22, 1992, when he was working as Principal Associate Deputy Attorney General at the Department of Justice, he received a call from a high ranking FBI official (perhaps Potts or Coulson) who told him that Sammy Weaver may have been shot and killed, because throughout the night, "someone on the scene had overheard the mother or Ms. Weaver wailing about her son having been shot or her son having been murdered." (9/26/95 Tr. at 118 (Howard)). In addition, Henry Hudson's 302 said that Hudson learned on August 21 that Sammy had been shot. Henry Hudson denied this at the hearings and said that his 302 was wrong in this respect. (9/12/95 Tr. at 23 (Hudson)).

The Subcommittee is not able to determine conclusively when the Marshals first realized that Sammy had been shot. The Marshals all denied under oath that they knew on August 21 that Sammy had been killed.

6. Failure Timely to Brief FBI Officials

None of the Marshals who were present at Ruby Ridge on August 21 was interviewed in detail by FBI officials about what occurred that day, what they knew about Randy Weaver, or what they understood about the actual circumstances on the mountain until after the FBI's Hostage Rescue Team operation was well under way on August 22. (DUSM Dave Hunt, who was on the OP Team and therefore had no first-hand knowledge of the firefight itself, did brief local and federal law enforcement officials about what had happened around 6:00 p.m. PDT on August 21.) Thus, the HRT's initial planning and briefings occurred with little or no first-hand knowledge of what actually occurred before, during, and immediately after the firefight at Ruby Ridge. This should not have happened. Once the Marshals were safely rescued from the mountain, they should have spoken – even if briefly – with FBI officials to inform them of whatever information might be important to the formulation of operations and arrest plans.

7. Failure to Conduct Comprehensive Formal Internal Review

We were disappointed to learn that, based on his desire to avoid creating discoverable documents that might be used by the defense in the Weaver/Harris trial and his understanding that

the FBI would conduct a comprehensive investigation of the incident, former USMS Director Henry Hudson decided to conduct no formal internal review of USMS activities connected with the Weaver case and the Ruby Ridge incident. (9/12/95 Tr. at 118 (Hudson)). For the same reasons, no internal shooting incident report was prepared on the August 21 firefight. In fact, the only review that has been undertaken was completed in February of this year by current USMS Director Gonzalez, who was responding to the Justice Department's Task Force Report and its criticism of some aspects of USMS activities in the Weaver case.

In fact, it would have been appropriate for Director Hudson to review his agency's activities at Ruby Ridge with a critical eye in an effort to improve policies and procedures, and ultimately to prevent the kinds of mistakes that occurred at Ruby Ridge from being repeated in future cases. And while we commend Director Gonzalez for his efforts, including his work to establish formal USMS Undercover Operations Guidelines for future crises, we think his view that the Task Force Report made "no adverse findings" regarding his agency's performance is something of an overstatement. We believe this resulted in an insufficiently self-critical evaluation.

The Subcommittee is similarly disappointed that the Justice Department delayed its review of the Ruby Ridge incident

until after the Weaver/Harris trial was over in late July 1993. It then took until June 1994, almost two years after the Ruby Ridge shootings, for the Ruby Ridge Task Force Report to be completed. This delay in conducting a complete review of an incident which had been the focus of intense public concern, and which resulted in the deaths of a mother and her teenage son, as well as a highly decorated Deputy Marshal, was not only unwarranted, but probably contributed to the buildup of public distrust.

C. UNITED STATES ATTORNEY'S OFFICE

Idaho's highest ranking federal law enforcement officer is its United States Attorney. One of the most discouraging findings we made during the hearings related to the lack of leadership exhibited by the Idaho United States Attorney's Office in connection with the arrest and prosecution of Randy Weaver.

Rather than assisting the Marshals Service in attempting to diffuse what they had concluded was a volatile situation, the United States Attorney's Office placed unnecessary obstacles in the way of the Marshals' efforts to avoid a violent confrontation. For example, pretrial services incorrectly informed Weaver that his trial date was March 20, rather than February 20. Knowing this, the United States Attorney's Office

nevertheless indicted Weaver on March 14 for his failure to appear – six days before the date he officially had been given. (A bench warrant already had been issued by Judge Harold Ryan when Weaver failed to appear in February.) At least equally disturbing is the fact that prosecutors failed to inform the Grand Jury of this exculpatory evidence when they argued for Weaver's indictment.

The mistakes or poor judgment did not end there. In October 1991, the USAO ordered the Marshals to discontinue ongoing negotiations with Randy Weaver on the ground that talking to him without his attorney present violated ethical rules. Apart from the fact that this was a highly questionable conclusion, and probably at variance with existing Justice Department guidelines, the United States Attorney's Office easily could have continued the negotiations by simply bringing Weaver's lawyer into them.

Finally, the prosecutor also rebuffed USMS Director Hudson's personal efforts in the early spring of 1992 to break what was by then a year-long impasse. Hudson offered to speak directly with Judge Ryan to ask him to permit the Marshals to wait Weaver out rather than attempting his arrest atop the mountain. He also suggested that the USAO dismiss the indictment (at least part of which had been questionably obtained in the

first place) and refile it under seal, thus also permitting the Marshals to wait Weaver out. Both of these suggestions were dismissed out of hand or ignored.

United States Attorneys and Assistant United States Attorneys should represent the highest standards of ethics and leadership in the area of law enforcement. Members of the United States Attorney's office should have taken the lead in trying to find a way to resolve the standoff without endangering either federal law enforcement agents or the Weaver family. Instead, the United States Attorney's Office pushed toward confrontation, and aggravated the situation.

D. FEDERAL BUREAU OF INVESTIGATION

The traditional public perception of the FBI is that it is the most professional, well trained law enforcement agency in the United States, if not the world. The FBI's performance at Ruby Ridge, therefore, was all the more disappointing. It is true that all of the past mistakes made in connection with the investigation and apprehension of Randy Weaver set the stage for the FBI's actions. But the FBI then made its own mistakes and the ultimate result was the tragic killing of a mother as she held her ten-month old daughter in her arms.

The FBI operation was marked by inadequate information gathering; the failure to take a deep breath before charging up the mountain; a focus on a tactical, rather than a negotiated response to the situation; and the use of unconstitutional shoot on sight Rules of Engagement which led to the death of Vicki Weaver. Director Louis Freeh, who was not the FBI Director at the time of the Ruby Ridge incident, has instituted certain reforms in the FBI to make sure that there is never another Ruby Ridge and the Subcommittee commends him for his actions. In certain respects, however, we have concluded that Director Freeh has not gone far enough.

1. Information Gathering Problems

FBI agents who were briefed in Washington and in Idaho during the early stages of the crisis at Ruby Ridge received a great deal of inaccurate or exaggerated information concerning the Weaver case generally, and the firefight at the Y in particular. For example, Weaver was described as a former Special Forces or Green Beret member, highly trained in the use of explosives. (9/19/95 Tr. at 4 (Glenn); 9/14/95 Tr. at 26-27 (Tilton)). The FBI was told that Weaver might have built tunnels and bunkers on his property, rendering the area extremely

dangerous to law enforcement officers. (9/19/95 Tr. at 5 (Glenn)).

It is true that the Marshals Service agents who had been actively involved with the case could have corrected at least some of these misconceptions. But the FBI itself is partly to blame for these problems. Even if, as the FBI claims, the Marshals who participated in the firefight did not make themselves available until mid-day on August 22, 1992, FBI officials should have demanded more timely debriefings. These lapses may have contributed to an overreaction to the crisis by those same officials.

The merit of waiting for more information is demonstrated by the fact that former Criminal Investigative Division Deputy Assistant Director Danny O. Coulson became very skeptical of the charge against Weaver and Weaver's dangerousness when, on August 23 or 24, he learned the facts from the Marshals and others at the scene. After Coulson testified before the Subcommittee, the Subcommittee received from the Department of Justice a document that contained handwritten notes with what appeared to be the initials "DOC" after them. Special Counsel interviewed Coulson about this document. It is stamped OPR 004477 and contains a typed list of nine points followed by four handwritten notes which state:

"Something to Consider

1. Charge against Weaver is Bull S____.
2. No one saw Weaver do any shooting.
3. Vicki has no charges against her.
4. Weaver's defense. He ran down the hill to see what dog was barking at. Some guys in camys [camouflage] shot his dog. Started shooting at him. Killed his son. Harris did the shooting. He is in pretty strong legal position."

Coulson stated in the interview that the handwritten notes are his and that he may have typed the nine points himself. The document represents his reaction to the assault plan proposed by the on-site commander, Agent Eugene Glenn, a day or two after August 22, 1992. The assault plan submitted by Glenn was based on the premise that Vicki Weaver would kill her children. Coulson was not convinced of that premise and asked to know the basis for it. He was also convinced that the assault plan was otherwise faulty.

Coulson explained his handwritten notes. The basis for his comments were draft 302s and other information he received from Idaho, including interviews of the Marshals. He thought that the "charge against Weaver is Bull S____" because Weaver's crime was a minor one. When Coulson heard that Weaver had been to the Aryan Nations' meeting at Hayden Lake, Idaho, he concluded that ATF was using the gun charge to try to make Weaver an informant against Butler, the Aryan Nations leader. Point two was referring to the fact that Randy Weaver had not shot at the

Marshals on August 21. Similarly, point four suggested Randy Weaver's defense to the events of August 21. Randy Weaver ran down the hill to see why the dog was barking. Some men in camouflage shot his dog and killed his son. Harris – not Weaver – shot Marshal Degan. Randy Weaver, therefore, had a strong legal position. These were points that Coulson communicated to Glenn – either by faxing these notes or giving them orally to Glenn. Coulson suggested that these points be made to the Weavers in trying to talk them out of the cabin.

While the Subcommittee appreciates the need to isolate and contain suspects in the shooting death of a federal law enforcement officer, we are unconvinced that there was any need to rush up the hill to engage in a confrontation with Randy Weaver or Kevin Harris. The Marshals who were involved with the previous day's surveillance mission had safely returned to their command post at Schweitzer Ski Resort. The Weavers had taken no hostile action for more than a day – since Sammy Weaver's death. The only danger that they posed was to law enforcement personnel who went up the mountain to confront them. These circumstances gave the FBI an opportunity to speak with the Marshals who had investigated the case and those who had been involved with the firefight, to gather other relevant intelligence, and, only then, to decide how best to proceed.

This was especially important in light of the fact that the initial purpose for deploying the Hostage Rescue Team had been to rescue the Marshals who remained on the mountain. When the Marshals were rescued, the FBI should have recognized that no one was in immediate danger – and taken a deep breath before deciding on a course of action.

2. Inadequate Negotiation Alternative

The FBI not only acted precipitously, it also stressed a tactical rather than a negotiated response to the problem. This is reflected in the operations plan that was faxed to FBI Headquarters on the afternoon of August 22, 1992. The operations plan contained no negotiation option, and it contained shoot on sight Rules of Engagement.

In the operations plan, Glenn proposed that an armored personnel carrier (APC) would first announce the FBI's intent to effect the arrest of those persons in the Weaver cabin. If no surrender occurred, APC's would return the next day and begin destroying the outlying buildings in the Weaver compound and certain parts of the Weaver cabin itself. Following this destruction, the APCs would insert tear gas into the cabin; thereafter, HRT members would make an armed entry into the cabin in the hopes of arresting the adults and taking control of the

children. Clearly, this initial operations plan proposed a high-risk, life-threatening, direct aggressive action against the Weavers without consideration of a negotiated resolution.

It is to Coulson's credit that he rejected this operations plan "because it violated every principle of crisis management training he had undergone." (Letter from attorney for Danny Coulson to Special Counsel of Subcommittee). In Coulson's view, the first essential of any crisis situation is to isolate and contain the subjects. Once this has been accomplished, law enforcement personnel should create an atmosphere for negotiations with the subjects. The prerequisite to creating such an atmosphere is to slow the process down. Glenn's plan contemplated an acceleration, rather than a deceleration, of events. It was also inconsistent with any negotiations option. Coulson, therefore, rejected the operations plan.

It was only then that former Supervisory Special Agent Fred Lanceley was asked to draft a negotiations annex for the operations plan. Lanceley, who prior to the Ruby Ridge incident had worked through hundreds of hostage crisis situations, ranging from hijackings to prison takeovers, had arrived with members of the Hostage Rescue Team in the early morning hours of August 22, 1992. The HRT Commander, Assistant Special Agent in Charge Dick Rogers, informed Lanceley and others during a briefing that this

would not be a long siege. Lanceley concluded, based on this comment, that there would be no negotiations, and confirmed his suspicion directly with Rogers. (9/20/95 Tr. at 89-90 (Lanceley)). It was not until he was asked to draft the negotiation clause that Lanceley became directly involved with the FBI's efforts at Ruby Ridge. Id. at 92. But it was already too late. The HRT sniper-observers had already been deployed up the mountain, increasing the chance that a violent confrontation, rather than a negotiated settlement, would end the stand-off.

The use of an HRT robot with shotgun further demonstrates how deeply flawed the HRT operation was. On August 22, 1992, within an hour after the HRT snipers fired two shots, the FBI made a surrender announcement to Randy Weaver and delivered a telephone to the Weaver cabin using a robotized vehicle. A shotgun was attached to the robot. It should have come as no surprise to anyone that, rather than aiding the negotiation process, this equipment frightened the Weavers and slowed the negotiation process. The Subcommittee agrees with Director Freeh that use of the robot with shotgun was the "stupidest thing I ever heard of." (10/19/95 Tr. at 95 (Freeh)). The Subcommittee notes that no one has ever taken responsibility for this.

3. Rules of Engagement

The second major flaw of the operations plan was that it contained unconstitutional Rules of Engagement. Those Rules provided:

> a. If any adult male in the compound is observed with a weapon prior to the [surrender] announcement, deadly force can and should be employed, if the shot can be taken without endangering any children.
>
> b. If any adult in the compound is observed with a weapon after the surrender announcement is made, and is not attempting to surrender, deadly force can and should be employed to neutralize the individual.
>
> c. If compromised by any animal (dog), that animal should be eliminated.
>
> d. Any subjects other than Randall Weaver, Vicki Weaver, Kevin Harris presenting threats of death or grievous bodily harm, the FBI Rules of Deadly Force are in effect. Deadly Force can be utilized to prevent the death or grievous bodily injury to ones' self or that of another.

For the adult parties in the cabin, Randy Weaver and Kevin Harris, these were virtual shoot-on-sight orders. They said that agents should shoot an armed adult male — even before a surrender announcement — if the shot could be taken without endangering the children.

These Rules were inconsistent with the FBI's standard deadly force policy. As that policy was in effect in August 1992, it provided:

> Agents are not to utilize deadly force against any person except as necessary in self defense or for the defense of another when they have reason to believe that they or another are in serious danger of death of grievous bodily harm. Where feasible a verbal warning should be given before deadly force is applied.

At our hearings, Director Freeh and DAG Gorelick essentially conceded that the Rules of Engagement were inconsistent with this. (10/18/95 Tr. at 100, 114-15 (Gorelick)).

Indeed, members of a Denver FBI SWAT team deployed to Ruby Ridge during the crisis immediately recognized that the Rules of Engagement were inconsistent with the FBI deadly force policy. (10/13/95 Tr. at 6 (King); 10/13/95 Tr. at 14 (Kusulas)). Special Agent Sexton understood that "if you see an adult armed male up there on Ruby Ridge, you had the green light." He said that the Rules were "out of line" and served to liberalize, rather than limit, the standard deadly force policy. (10/13/95 Tr. at 21, 28-30, 45 (Sexton)). Other SWAT Team members, including Special Agent Donald W. Kusulas, agreed that the Rules of Engagement were not consistent with the FBI's deadly force policy. (10/13/95 Tr. at 14-15 (Kusulas)). According to Special Agent Peter K. King, the SWAT Team members felt the Rules

were inappropriate and therefore refused to abide by them. (10/13/95 Tr. at 15 (King)).

We also agree with the Justice Department Task Force Report that the Rules of Engagement are constitutionally infirm. Again, Director Freeh and Deputy Attorney General Gorelick agree. (10/18/95 Tr. at 100, 114-15 (Gorelick)). Critical to both Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) and Graham v. Connor, 490 U.S. 386, 396 (1989), the two most significant cases governing the use of deadly force, is the requirement that law enforcement officers personally and contemporaneously evaluate the risk of grievous bodily harm or death to themselves and/or others before employing deadly force. Paragraphs a and b of the Rules relieve the officer of this requirement. The language that force "should" be used encouraged the use of force without a simultaneous analysis by the officer on the scene of the threat posed by the suspect. Paragraph a also relieves the officer of the requirement of giving a warning which Garner states should be done, if feasible – as it was by the time of the HRT deployment on Ruby Ridge. Paragraph d implies that the standard deadly force policy did not apply to Randy and Vicki Weaver and Kevin Harris. Rules of Engagement cannot eliminate constitutional rights with regard to certain suspects, even if they are particularly dangerous.

One of the most disputed issues is who approved the Rules of Engagement. Although he did not testify before our committee, HRT Commander Rogers previously has stated that the Rules were approved by Criminal Investigative Division Assistant Director Larry A. Potts during discussions they had while Rogers was flying across the country to Idaho. (Trial Transcript, 6/2/93 at 24-25). Potts, although he acknowledges discussing the Rules, adamantly denies having approved them as enacted.

Like Rogers, Special Agent in Charge Eugene F. Glenn also maintains that Potts approved the Rules. However, according to his testimony before this Subcommittee, it appears that while Glenn and Potts discussed the Rules of Engagement by telephone, they never discussed the precise language that would be used. It is therefore possible that Glenn was talking about one set of Rules and Potts about another.

According to Potts' notes of the conversation he had with Rogers on the night of August 21, armed adults were to be considered an immediate threat under the Rules:

> Make every effort to avoid contact with the children. When contact made and they armed, will not fire unless it fits normal FBI firing policy of threat to life. Adults who are seen with a weapon are to be considered an immediate threat and appropriate action can be taken.

Potts testified at the hearings that, on the night he wrote these notes, he later dictated a confirmation of the Rules which stated:

> This will serve to document rules of engagement agreed to by AD Larry Potts and HRT ASAC Dick Rogers at 10:25 pm (EDT) on 8/21/92. Every effort will be made to avoid contact with the children. If contact is made will not fire unless it becomes necessary due the threat of death of serious bodily harm. Any adult with a weapon who is observed with a weapon in the area of the Weaver home or the general location of the gun battle may be the target of deadly force.

This version of the Rules never was faxed to Rogers.

We note that Potts' handwritten notes are different from the dictated, typed version. The Rules as stated in Potts' handwritten notes could be interpreted to take from officers on the scene the right to determine whether or not a particular individual posed an immediate threat. Even though Potts did not use "should" language in the second half of his handwritten notes, and instead said "appropriate action can be taken," Rogers may still have inferred from those words that it was appropriate to say that deadly force can and should be used against an armed adult.

Glenn also testified that Coulson approved the Rules when he approved the operations plan of which the Rules were a part. Coulson has admitted that he received an operations plan

which included, on page two, the controversial rule. According to Coulson, either he did not receive page two of the plan at all or he never read it, because he did not read past the first page when he rejected the plan for lack of a negotiation provision.

We think it unlikely that page one would have been faxed to Coulson without page two. If in fact Coulson received only one page of the operations plan, he certainly should have called and requested that the whole plan be re-faxed. At best, Coulson either received page two and failed to read it, or he received only page one and never called to obtain the rest of the fax. In either situation, he inadequately supervised and monitored the Ruby Ridge operation.

The Subcommittee agrees with the concern expressed by Barbara Berman, who led the DOJ-OPR Task Force investigation of the Ruby Ridge incident:

> The Rules of Engagement were in effect . . . from the 22nd of August until the 26th of August, and yet, inexplicably, no one at headquarters admits to having been aware of what the Rules were or having read them.

(9/22/95 Tr. at 87 (Berman)). Berman noted that the Task Force found it "inconceivable" that nobody at headquarters knew the content of the Rules of Engagement during the four days they remained in effect, because "you have people who are in the field who are acting under orders. You have operation plans that are

being sent to FBI headquarters and apparently significant documents like that that are not even being read, and that concerns me." (9/22/95 Tr. at 95 (Berman)).

During their testimony, Potts and Coulson insisted that they were not in a position to approve the Rules of Engagement. According to them, the senior FBI agent on the scene — Eugene Glenn — was responsible for formulating and approving the rules. Potts and Coulson testified that their main role was in providing logistical support and coordination.

Potts and Coulson may technically be correct: in the FBI authority scheme at the time, perhaps Glenn did have the sole and sufficient authority to approve the Rules. However, from the initiation of the Ruby Ridge mission, FBI headquarters asserted a far more hands-on and substantive role in Ruby Ridge than any technical FBI authority scheme might imply. The Subcommittee is skeptical of Potts and Coulson's claim that they did not need to or could not approve the Rules, because evidently the first draft of the Rules was formulated by Potts and Rogers together. Rogers himself explicitly asked Potts to draft a memorandum indicating his understanding of the Rules and Potts' approval of them. (9/21/95 Tr. at 44 (Potts)). Potts did so at FBI headquarters. When Rogers arrived at the scene, he handed Glenn the draft Rules and told him that they had been drafted and approved by FBI

headquarters. Given this genesis of the Rules, it was quite natural for Glenn to look to FBI headquarters for guidance and approval for the Rules. And FBI headquarters certainly maintained a supervisory role throughout.

Although we cannot conclude on this record who (if anyone) at headquarters approved the specific language of the Rules of Engagement, Potts should nevertheless be criticized for allowing ambiguity to arise concerning an issue as critical as the Rules of Engagement. At best, his conduct was negligent. At worst, it would allow him to have the best of both worlds, taking credit for a successful operation while distancing himself from events in case of a failure. Likewise, Coulson either approved them or was negligent in not reading them. It appears that Potts and Coulson – on realizing the tragic results caused by the Rules – have distanced themselves from the approval process. Their determination to lay the blame for what occurred on others constitutes, in our view, a deficiency in their leadership. Potts and Coulson were ultimately in charge of the Ruby Ridge operation, and, as a result, were accountable for what occurred there. They should have accepted responsibility for whatever mistakes were made by themselves or those they supervised.

We further note that the Rules, as Potts admits approving them, suffer in part the same constitutional

infirmities as present in the Rules actually used in Idaho. Potts approved a rule that adults with a weapon should be "considered an immediate threat." The Constitution requires that that determination must be made by the individual officer on the scene as he or she considers using deadly force. It should not and cannot be made from afar, or arbitrarily, as Potts did. Indeed, while the Ruby Ridge hearings were in progress, Director Freeh announced a prohibition against incorporating threat assessments into Rules of Engagement.

4. Two Shots Taken by Sniper/Observer on August 22, 1992

The shooting of Vicki Weaver as she held her baby daughter will haunt federal law enforcement for years to come. It is this tragedy which was a central focus of the hearings. The Subcommittee explored: 1) why an FBI sniper/observer took those two shots on the evening of August 22, 1992? 2) whether he was influenced by the unconstitutional Rules of Engagement? and 3) whether either shot was appropriate under the Constitution, the FBI's then current deadly force policy, or the new deadly force policy?

a. Overview of Testimony

The following overview of the testimony concerning the two shots is not in dispute. At approximately 3:00 p.m. on August 22, 1992, nine HRT snipers were deployed to four different positions on the ridge overlooking the Weaver cabin. At 5:07 p.m., Lon Horiuchi and Dale Monroe ("Sierra 4") arrived at their position, the closest to the Weaver compound. From this location, due north of the cabin and almost parallel to its front door, Horiuchi could view both the front and back porches. He could see the cabin's front door only when it was ajar.

As the last sniper team reached its assigned destination just before 6:00 p.m., an HRT helicopter took off for its sixth observation mission of the day. Armored personnel carriers also were operating in the area. Soon after the helicopter's engines started, Randy Weaver, Sara Weaver, and Kevin Harris emerged from the cabin and proceeded to a nearby rock outcropping. A few moments later, when he saw Randy Weaver appear at the side of the "birthing shed," Horiuchi fired his first shot. Weaver sustained a relatively minor wound to the fleshy part of his left arm.

When Randy Weaver was hit, he, Sara Weaver, and Kevin Harris ran back to the cabin, with Harris trailing slightly behind. Vicki Weaver held open the cabin door, and Randy and

Sara ran inside. As Harris reached the door, Horiuchi fired his second shot, which entered through the door window, killing Vicki Weaver and severely wounding Kevin Harris.

(1) Horiuchi's Testimony

Although Horiuchi testified for the Government at the Weaver/Harris criminal trial, he refused to do so before this Subcommittee, instead invoking his Fifth Amendment right against self-incrimination. The Subcommittee has, therefore, reviewed Horiuchi's trial testimony with great care.

At the trial, Horiuchi stated that, around 5:45 or 5:50 p.m., he heard the Weavers' dog barking, after which a young woman ran from the cabin toward the rock outcropping. The girl remained outside the cabin for approximately two or three minutes. Horiuchi did not fire because the girl was unarmed and he assumed she was a child. Soon after the girl returned to the cabin, Horiuchi observed a man on the back porch, apparently checking to see whether ponchos or blankets that were hanging there had dried. He immediately returned to the cabin. Again, Horiuchi did not shoot because the man appeared to be unarmed. Trial Transcript, 6/3/93, at 58-67.

Horiuchi testified that he heard the helicopter start its engines in the valley a few minutes after the man on the back

porch returned to the cabin. The helicopter lifted off to his left and then disappeared behind some trees. Just then, three people – the young woman he had seen earlier and two men – emerged from the house and ran in the direction of the rock outcropping. The last, whom Horiuchi identified as Harris, was carrying a long gun at high port carry. Based on information he had received at operation briefings, Horiuchi assumed these people had emerged in response to the noise of the helicopter and armored personnel carriers, to take up defensive positions along the rock outcropping. Trial Transcript, 6/3/93, at 67-81.

Horiuchi then observed the person he thought was Harris come around the back end corner of the birthing shed. The man moved along the side of the shed and picked up a stick and poked at the ground with it. He then looked up to where Horiuchi assumed the helicopter was positioned, above and behind him, and to the right. The man moved to the front of the shed and around, where he disappeared from Horiuchi's view. Trial Transcript, 6/3/93, at 81-87.

A few seconds later, the same man again came around the back end corner of the shed. He had his weapon at high port and was scanning the sky behind and to the right of Horiuchi's location. Horiuchi assumed he was watching the helicopter. The man moved along the shed watching the helicopter, and brought his

weapon up as if trying to fire at the helicopter. The man then turned his back to Horiuchi, and seemed to be running around to the other side of the shed. Horiuchi fired his gun, and thought he hit either the edge of the shed or the man. He was not sure whether he shot the man because the man continued to move, and then disappeared behind the shed. Trial Transcript, 6/3/93, at 88-102.

Horiuchi testified at trial that almost at the same time that Horiuchi pulled the trigger, the man made a sudden move. He grabbed the edge of the shed with his right hand, and he held up the gun in his left. Horiuchi thought that the man was trying to slow himself down to turn the corner and was using the arm with the gun to balance himself. Trial Transcript, 6/3/93, at 88-102; 6/4/93, at 36-47.

Horiuchi stated that after the first shot, he decided he would shoot at the man if given another opportunity. As the man approached the cabin door, he had his gun in his right hand, and he reached out his left arm as if to hold open the door or move someone out of the way. Horiuchi, who testified that he could not see through the window on the door, fired, and the man flinched as he disappeared behind the door. He heard a woman scream for approximately thirty seconds. Horiuchi maintains that

he did not know he shot Vicki Weaver, and never intended to do so. Trial Transcript, 6/3/93, at 102-41.

(2) Testimony of Randy and Sara Weaver and Kevin Harris

Randy Weaver told the Subcommittee that he, Sara, and Kevin Harris came out of the cabin around 5:00 p.m. on August 22, 1992 when one of the dogs barked. They walked to the rock outcropping to determine what, if anything, was wrong. When the group saw nothing on the driveway, and the dog had stopped barking, Randy Weaver proceeded to the birthing shed to visit his son's body. (9/6/95 Tr. at 110-12 (R.Weaver)). Harris went to retrieve a battery Sammy kept in a box near the rock outcropping.

Randy Weaver walked around the shed and did not see anything. He shifted his rifle to his left hand and was reaching up to turn the latch to open the shed door when he was shot in the back. Because the shot sounded so loud, Weaver thought the shooter was directly behind him. He turned around, but did not see anything: all was quiet. Weaver maintains that, had they heard a helicopter at this moment, they all would have run back to the cabin immediately. (9/6/95 Tr. at 110-12 (R.Weaver)).

When Randy Weaver was shot, Sara came running around the corner of the shed, and they began to run back toward the cabin, Sara pushing her father ahead of her. Vicki appeared, to

find out what had happened. She shouted for everyone to return. She was holding her baby daughter, Elisheba, in her arms. Vicki then returned to the porch, opened the door, and held it open for everyone. Harris came from the rocks and fell in behind Randy and Sara. Just as Harris stepped in the door, however, Randy heard a shot. Sara was pushed into the cabin, and Kevin fell in behind her. Vicki was lying on the step leading from the cabin to the porch. Harris' testimony at the hearing was consistent with Randy Weaver's. (9/6/95 Tr. at 110-12 (R.Weaver)).

The bullet Horiuchi fired had entered through a pane of glass on the cabin door. Weaver stated that the curtains were open, but hanging loosely at the time of the shot. Sara also claimed that the curtains were open and that she believed Vicki Weaver could have been seen from the other side of the door. (9/6/95 Tr. at 196-99 (Sara Weaver)).

(3) Testimony Regarding the Helicopter

Law enforcement officers at Ruby Ridge had reports that the Weavers or Kevin Harris previously had threatened aircraft operating in the area. For example, after the firefight on August 21, but before they returned down the mountain late that night, the Deputy Marshals reported that they heard gunfire as a plane flew overhead.

HRT Commander Richard Rogers, who did not appear before this Subcommittee, instead invoking his Fifth Amendment right against self-incrimination, did testify in the Weaver/Harris case. In describing the path of the helicopter, he stated that "[t]he helicopter came up, again trying to stay out of the shooting area of this – potential shooting area of this cabin." Trial Transcript, 6/2/93, at 63-64. He further testified that the helicopter was "exposed and had a fairly good view" of the cabin for ten or fifteen seconds. Id.

Helicopter pilot Frank Costanza informed this Subcommittee that he always flew at least two hundred yards away from the perimeter of the compound in an effort to stay out of the line of fire although he sometimes remained within the danger zone. He stated that he flew in a manner that exposed the helicopter in different places for no longer than six-to-twelve seconds. (9/19/95 Tr. at 110-15 (Costanza)). Thus, he spent a total of no more than a minute exposed to potential fire from the Weavers.

Horiuchi's testimony at the Weaver/Harris trial reveals some confusion in his own mind as to whether the helicopter actually was threatened when he took his first shot. He admitted that he was aware at that time that nobody had fired on the helicopter during earlier missions the same day. Trial

Transcript, 6/4/93, at 4-5. In addition, although Horiuchi assumed that Weaver was looking in the direction of the helicopter when he fired, he did not know the exact position of the helicopter throughout the incident. Trial Transcript, 6/3/93, at 69-70; 6/4/93, at 130. It is also unclear whether Horiuchi believed that the helicopter was within rifle range – and therefore in danger – given his lack of knowledge about the helicopter's actual position. Finally, on cross examination, Horiuchi was questioned about a flight he had taken before ascending the ridge. Horiuchi testified that "[i]t wasn't necessarily out of rifle range, a good shot could have hit the helicopter anytime we showed up;" But in previous testimony, Horiuchi also had said that "[w]e stayed well out of range of the cabin during the flight." Trial Transcript, 6/4/93, at 73-75.

(4) Testimony Regarding Position of Curtain

The shot went through the window and the curtain on the cabin door. The set of curtains was hung on the inside of the door, one on each side of the window. The bullet passed through a pane and one of the curtains on the right side of the window, looking at the door from the outside.

At trial, Horiuchi testified that he did not know whether the curtains were open or closed. In an attempt to

resolve the issue, the government called Bruce Wayne Hall, an FBI forensic scientist specializing in soil, glass, and building materials. Hall testified that the "bullet was fired at approximately a right angle to the glass. The curtain was in line with the path of the bullet, the bullet passed through the glass, passed through the curtain, and consequently deposited glass in line." He acknowledged that he could not and did not know the position of the other curtain at the time of the shooting. Trial Transcript, 6/4/93, at 46, 49-50.

On cross-examination, Hall acknowledged that when the curtain was in the position in which he believed it was at the time of the shooting, that he could still see the jury on the other side of the door. Id. at 70. He also admitted that he did not know whether the curtain with the hole was pinned back at the time of the shot; apparently, the hole can line up with the hole in the window even with the curtain pinned back. Id. at 73. He conceded that he did not know whether the curtains were wide open or shut at the time of the shot. Id. at 77.

Horiuchi testified that he could see Weaver's face looking up at the helicopter through his telescopic sight at the time of the first shot. Whether he could see similar detail at the cabin door would seem to depend on the position of the door, whether the curtain was open, the angle at which he was looking,

and the power of his telescopic sight. Law enforcement officials speaking on this subject, however, appear to agree that due to weather conditions and the late hour of day, Horiuchi could not, in fact, see what was happening behind the door. Sara Weaver, however, disagrees. (9/6/95 Tr. at 199, 202 (S. Weaver)).

b. Legality of the First Shot

Under the Supreme Court's reasoning in Tennessee v. Garner, 471 U.S. 1 (1985), and Graham v. Connor, 490 U.S. 386 (1989), Horiuchi's first shot would be constitutional if objectively reasonable. Thus, if Weaver or Harris posed "no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend [them] does not justify the use of deadly force to do so." Garner, 471 U.S. at 11. All FBI reports and the Justice Department Task Force Report concluded that the first shot was objectively reasonable, and therefore, constitutional. Similarly, every FBI and Justice Department witness at the hearings has supported the legality of the first shot. Although we are not prepared to conclude that the first shot was unconstitutional, we are concerned for several reasons that the perception of an imminent threat to the helicopter was not what caused Horiuchi to take the first shot, and that

Horiuchi was influenced in taking the first shot by the Rules of Engagement.

First, as reflected in his direct testimony, Horiuchi's understanding of the Rules of Engagement and his justifications for firing the shots raise a real question as to whether he had properly evaluated the threats faced by the law enforcement officials. On direct examination, Horiuchi testified as follows:

> Q: Could you have shot him?
>
> A: Yes, sir, I could have.
>
> Q: Did you shoot at him?
>
> A: No, sir, I did not.
>
> Q: Why did you not?
>
> A: Sir, again, I was searching this area here with the naked eye, again because of the field of view of the scope was very limited. He surprised me when he came around the corner, because at that time I saw three people come out and three people disappear, so I assume all three of them would stay together. When I saw one individual come around the corner I was not on my rifle scope, and by the time i got to my rifle scope, he was already moving around the corner out of my sight.
>
> Q: Had you been on your rifle scope when you saw what you had, would you have taken a shot?
>
> A: Probably not, sir.
>
> Q: Why not?

A: Well, at that time it would have been a quick shot because by the time I got to my rifle scope he was already moving, and there was no really threatening movement at that time.

(Trial Transcript, 6/3/93, at 86-87).

In his cross examination, Horiuchi further testified:

Q: You said that you assumed that he was trying to get around the birthing shed to perhaps take a shot?

A: Yes, sir.

Q: You thought maybe he was getting ready to take a shot, didn't you?

A: At what time, sir?

Q: At the time you shot him?

A: At the time, I shot him, sir? No, sir.

Q: You didn't think he was getting ready to take a shot then?

A: During that period he was attempting to take a shot, or I assumed he was attempting to take a shot.

Q: Assume he was attempting to take a shot?

A: Yes, sir.

Q: He was not getting ready to take a shot at the time that you took your shot?

A: No, sir.

Q: You also testified it was your assumption that he intended to shoot the helicopter?

A: Yes, sir.

Q: You were wrong about all of those things?

A: No, sir.

. . .

Q: He was no threat to you or the helicopter was he, Mr. Horiuchi?

A: Would you repeat that question.

Q: He wasn't a threat to you or the helicopter?

A: Yes, he was a threat, sir.

Q: You were waiting to kill the people that came out of house, weren't you?

A: If they came out of the house and provided a threat, yes, sir, we were.

Q: You were waiting to kill them irrespective of a threat, weren't you?

A: Based on the Rules of Engagement, sir, we could.

Q: Based on the Rules of Engagement the decision had already been made that he was a threat?

A: Yes, sir, a Marshal had been shot, sir.

(Trial Transcript, 6/4/93, at 78-80).

As is common in adversarial proceedings, parts of Horiuchi's trial testimony can be read to support the view that he fired in response to a perceived threat, while other parts suggest that the Rules of Engagement led him to fire on Randy Weaver and, later, Kevin Harris (when he killed Vicki Weaver)

without particular regard to the current presence of any threat. The Subcommittee respects agent Horiuchi's decision to invoke his constitutional privilege not to testify before us. That means, however, that conclusions about his motivation will have to be drawn from a cold record, rather than the live testimony of a witness whose credibility could be individually assessed by each Subcommittee member.

That said, the Subcommittee is nonetheless left with the impression that Horiuchi's shots, especially the second, might well not have been taken if the FBI's standard deadly force policy, rather than the special Rules of Engagement, was in effect. Significant portions of Horiuchi's testimony – that he did not shoot an individual he saw poking at the ground with a stick because "by the time I got to my rife scope he was already moving," (Trial Transcript, 6/3/93, at 86); that he did not shoot when he reached his scope "because there was no really threatening movement at that time," (Trial Transcript, 6/3/93, at 86-87); and that he did not shoot the three individuals when they first emerged from the cabin "because it was a complete surprise that they came out," (Trial Transcript, 6/3/93, at 78); that "the decision that we were already in danger <u>had already been made for us</u> prior to going up the hill[,]" (Trial Transcript, 6/3/93, at 165 (emphasis added)); and, most particularly, that "[b]ased on

the Rules of Engagement we could ....[kill them irrespective of a threat] (Trial Transcript, 6/4/93, at 30);" — raise concerns for us that, at a minimum, the interplay between the special Rules of Engagement and the longstanding FBI deadly force policy, created ambiguity where there should have been none and may have led to a shot where there was no real present danger.

That Horiuchi may well have fired because of the Rules of Engagement and not because of any particular threat posed by the individuals is also suggested by a section of Horiuchi's grand jury testimony, read by defense counsel at the trial, in which Horiuchi stated that the snipers had agreed that:

> [I]f only one subject came out, we were going to pretty much wait . . . a minute, 30 seconds, maybe more before anyone took the shot to try and eliminate having taken one shot and then the rest of them pretty much all inside. We wanted them all outside if we were going to shoot the two subjects.

Trial Transcript, 6/4/93, at 17. Similarly, in an FBI interview on December 30, 1993, sniper Jerome Barker "recalled generally some kind of discussion on waiting until more than one subject was out of the building before any shots were taken, but [could not] recall the timing or context of the discussion." (Barker 12/30/93 FBI Form 302).

Our concern over the possibility that the Rules of Engagement superseded standard deadly force policy is heightened

by contemporaneous statements from other HRT members. In an August 31, 1992 statement, Horiuchi's partner, Dale Monroe, stated that "we had a 'green light'" to use deadly force against an armed adult male. (Monroe 8/31/92 FBI Form 302). Similarly, sniper Edward Wenger stated that his "understanding of the [Rules of Engagement] was that if I saw an armed adult outside the residence, I was to use deadly force against that individual." (Wenger 10/28/92 FBI Form 302). Sniper Christopher Whitcomb stated that the "Rules of Engagement were that if, before the occupants of the cabin were notified that they were to surrender, the male adult occupants were seen carrying weapons, deadly force could be used." (Whitcomb 8/31/92 FBI Form 302). Finally, sniper Mark Tilton stated that "[w]e were told . . . we should use deadly force if no children were endangered." (Tilton 8/31/92 FBI Form 302). Indeed, as Horiuchi's partner Dale Monroe described his own conduct on Ruby Ridge only ten days after the incident:

> During the entire incident, I was trying to focus on the armed, adult males in order to fire at them but could not get a clear shot because of the vegetation near me and the movement of the subjects.

(Monroe 8/31/92 FBI Form 302).

Second, we are not fully convinced that the helicopter was actually in any danger or that Horiuchi necessarily believed

that it was. Horiuchi testified at the Weaver trial that he did not know exactly where the helicopter was flying. In fact, the helicopter pilot, Frank Costanza, has stated that it is extremely difficult for ground observers to ascertain the location of an airborne helicopter from its engine sounds, particular in settings like Ruby Ridge, "due to echoes and resonance created by surrounding hills, rocky terrain, and, in this case, low cloud cover." (Costanza 9/10/92 FBI Form 302). Indeed, the prosecutor had this exchange with Horiuchi on direct examination:

> Q: When you saw the activity in the house area, could you tell from the sound where the helicopter was at that particular time?
>
> A: Generally, sir, it was either behind me or to my right or to my left.
>
> Q: You couldn't see the helicopter at the time you saw the activity, is that correct?
>
> A: No, sir, once the activity started, I was concentrating on the three individuals that came out of the building, not the helicopter.

Trial Transcript, 6/3/93, at 69-70.

Furthermore, it is not clear that the helicopter was in range of a rifle shot. The HRT helicopter flew six missions near the Weaver cabin on August 22 and never received fire. On cross examination, Horiuchi was questioned about the flight that he took prior to ascending the ridge. Horiuchi first claimed that "[i]t wasn't necessarily out of rifle range, a good shot could

have hit the helicopter anytime we showed up." (Trial Transcript at 7898). Testimony from the helicopter pilot, Frank Costanza, during the hearing did confirm that he had at some point come within rifle shot range of the cabin (9/19/95 Tr. at 110-15 (Costanza)). Here, again, however, the record is ambiguous. During trial, defense counsel then asked Horiuchi to read from a previously made statement. In that statement, Horiuchi said that "[w]e stayed well out of range of the cabin during the flight." Id.

Thus, there is a reasonable basis to conclude that the Rules of Engagement, more than any fear for the safety of the helicopter, prompted Horiuchi to take the first shot. We agree with the Justice Department Task Force Report that the Rules of Engagement created an offensive atmosphere — one in which the snipers/observers were more likely to employ deadly force than had the standard deadly force policy been in effect. Deputy Attorney General Gorelick testified at the hearings that the Rules of Engagement "had to have affected the point of view that [Horiuchi] brought to the incident." (10/18/95 Tr. at 124 (Gorelick)). It seems altogether plausible that the combination of offensively-oriented Rules of Engagement and exaggerated reports of Randy Weaver's dangerousness would lead a sniper/observer to more readily use deadly force than when

operating under the normal deadly force policy and with no heightened sense of dangerousness.

It has been suggested that the helicopter was knowingly used to lure the Weavers out of their home so that they could be shot under what on its face was a shoot to kill policy. Glenn acknowledged this perception when he testified before us. (9/19/95 Tr. at 15 (Glenn)).

The Subcommittee concludes, however, that there is no credible evidence on which to base a judgment of such serious culpability on the part of federal law enforcement persons. All credible evidence suggests that the helicopter was used for legitimate purposes. It had been sent up several times during the day to enable the FBI to understand the terrain that the agents would face as they went up the mountain.

c. Legality of the Second Shot

The Subcommittee believes that the second shot was inconsistent with the FBI's standard deadly force policy and was unconstitutional. It was even inconsistent with the special Rules of Engagement.[1]

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[1] Senator Feinstein dissents from the conclusions that Special Agent Horiuchi's second shot was unconstitutional and outside the Rules of Engagement. The Rules of Engagement clearly said that deadly force can and should be used on armed adult males, which was

We do not believe that there is any credible evidence that the three individuals who were running into the cabin presented a threat of grievous bodily harm or death to Agent Horiuchi or anyone else. The three were running for the cover of the cabin. They had not returned the sniper's fire and, according to Horiuchi's trial testimony, they were running faster than when they emerged from the cabin. (Trial Transcript, 6/3/93, at 105). The FBI had not previously considered the Weavers and Harris a significant threat from within the cabin. The FBI had decided to accept the risks posed by these suspects as they remained in their cabin, in making plans to negotiate with them while they remained inside. The helicopter had taken several flights earlier in the day, and the Weavers had not shot at it from the cabin. The second shot, therefore, was not objectively reasonable. Under Garner and Graham, the use of deadly force was not necessary, and therefore, was not constitutional. The Subcommittee found persuasive the testimony of Justice Department Task Force leader Barbara Berman on this point. (9/22/95 Tr. at 110-11 (Berman)).

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exactly what Horiuchi was doing when he fired the second shot at Kevin Harris. Agent Horiuchi had to make a split-second decision, in dangerous circumstances. Hindsight is often better, but there was no evidence presented to suggest that Horiuchi violated either the deadly force policy or the Rules of Engagement.

Moreover, the Subcommittee questions whether the second shot was justifiable even under the operative Rules of Engagement, which permitted deadly force only "if the shot can be taken without endangering any children." Horiuchi's second shot, which went through the cabin door and killed Vicki Weaver, missed the 10 month old baby in her arms, Elisheba, by less than two feet. Even accepting as true Horiuchi's trial testimony that he could not see into the cabin when he fired that shot, Horiuchi should have known that as he fired "blind" through the cabin door, he was shooting into an area which could well have contained Vicki Weaver and her two younger daughters. We fail to see any reasonable basis for a judgment that a high powered rifle shot through an opaque door into an area that could hold a mother and several children, including an infant, could have been undertaken without endangering the children. In addition, he should have realized that Sara had just run into the house and that there was a possible bottleneck at the doorway.

The Weavers claim, however, that Horiuchi was not shooting "blind;" that he must have known that Vicki Weaver was behind the door because she had come outside after the first shot and because she was visible through the open curtains on the door. Horiuchi denied at trial that he could see beyond the door itself. (Trial Transcript, 6/3/93, at 105). The Subcommittee

recognizes that conditions including the overcast weather, the late time of day and the overhang above the porch which might have created a shadow over the door, may well have made it unlikely that Horiuchi could see what was behind the door.

Moreover, curtains attached to the door window may have also obstructed Horiuchi's view. The testimony at the Weaver/Harris trial with respect to the curtains was not dispositive. The government's expert could not say with certainty whether the curtains were or were not tied back at the time of the shooting. In addition, while testifying at the Weaver trial, the expert admitted that he could see the jury even when the curtains were not tied back because there was a space between the two panels of the curtains. Sara Weaver testified at the hearings that the curtains were tied back. We also note that the curtain ties were observed on the floor of the porch in photographs taken by the FBI after the Weavers surrendered but were not included with the evidence taken from the cabin.

The Subcommittee, however, does not believe that Horiuchi saw Vicki Weaver (or her baby) behind the door or that he knew that they were there. Although the Subcommittee did not hear directly from Horiuchi and therefore had no opportunity to judge his credibility for ourselves, on the basis of his trial

testimony and the physical evidence, we do not believe that Horiuchi intentionally killed Vicki Weaver.

The Subcommittee questioned FBI Director Freeh at length about the propriety of the second shot. In the early part of his testimony, Freeh seemed reluctant to denounce the second shot (10/19/95 Tr. at 27-34 (Freeh)). However, in his later testimony Freeh acknowledged that the second shot should not have been taken, as he put it, "for policy and for constitutional reasons." (10/19/95 Tr. at 183 (Freeh)).

The Subcommittee concludes without reservation that the second shot should not have been taken. We believe that under the circumstances on August 22, as Randy and Sara Weaver and Kevin Harris ran back to their cabin, there was not the kind of immediate or imminent threat of real harm to others that could have justified deadly force. The snipers were concealed and remote. Even if a helicopter was present, it could not have been at risk from individuals fleeing headlong into a cabin after <u>they</u> had been shot at. There was simply no justification then present for the use of deadly force, while there was considerable risk of danger to the Weaver children.

The Subcommittee urges the FBI, indeed all federal law enforcement agencies, to review their own policies, training and procedures to prevent the use of deadly force in circumstances

similar to the Ruby Ridge second shot. Law enforcement officials authorized to use deadly force must be taught to make a critical calculation of the immediacy or imminence of the threatened harm at the time the force is to be used – not in the circumstances that might have been present at some point earlier, or that might hypothetically occur later. Officers must be trained to include the risk to innocent third parties, especially children, as a critical factor in their own decisions over whether to fire their weapons.

The Subcommittee believes an important distinction must be noted. We have no wish to second-guess the many thousands of fine local, state and federal law enforcement officers who put their lives on the line every day to protect our communities. We do not want in any way to hamstring the police officer involved in a hot pursuit or close range confrontation with a dangerous criminal. Those women and men have to make snap judgments every day, and we have no wish to increase their personal risk by requiring undue hesitation before they protect themselves.

But in the case of the snipers on Ruby Ridge, no such personal or immediate danger existed. When Horiuchi fired, he was in a concealed, safe and remote firing position. He had time to think before he shot, time to be briefed before he was deployed, and time to calmly plan his actions. Under those

circumstances, what Horiuchi saw as Weaver, Harris and Sara fled back toward their cabin – where one child (two, as far as law enforcement officers were aware) and one infant were present – gave him insufficient justification to fire his weapon.

It is not our purpose to urge (or to urge against) prosecution or other sanction against Agent Horiuchi. But it is the Subcommittee's firm purpose to make sure that in the future, in similar circumstances, inappropriate and unconstitutional deadly force like the second Ruby Ridge shot will never again be used.

5. Leadership Problems

Special Agent in Charge Eugene Glenn has been criticized and, in fact, disciplined, for his failure to maintain adequate control of the operation at Ruby Ridge, and for excessive deference to the judgment of the HRT commander there, Assistant Special Agent in Charge Dick Rogers. This, in turn, is said to have contributed to an atmosphere that de-emphasized a negotiation strategy in favor of a tactical one. While we believe this criticism is well-placed, we think also that these problems were – in part, at least – beyond Glenn's control: headquarters, not Glenn, made the decision to deploy HRT; and headquarters discussed the Rules of Engagement with Rogers before

he arrived at Ruby Ridge. Thus, headquarters shares some of the blame for unnecessarily overemphasizing Rogers' role and creating this confrontational atmosphere. In addition, it appears that Glenn had not had sufficient crisis management training to equip him to deal with this highly dangerous and volatile situation.

6. New Standard Deadly Force Policy

On October 16, 1995, Louis J. Freeh, as the Director of Investigative Agency Policies, issued Resolution 14 to create a unified Department of Justice deadly force policy. Attorney General Reno approved the Resolution the following day. The Department of the Treasury also has adopted this uniform deadly force policy. As Director of the FBI, Louis Freeh also has ordered that Rules of Engagement never again alter the standard deadly force policy. The Subcommittee commends the Justice Department for these actions.

The new policy consists of a policy statement followed by commentaries that amplify the meaning of the policy. The general rule is as follows:

> 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.

This policy may be interpreted to limit the use of deadly force more than the predecessor FBI deadly force policy which provided:

> Agents are not to utilize deadly force against any person except as necessary in self defense or for the defense of another when they have reason to believe that they or another are in serious danger of death or grievous bodily harm. Where feasible a verbal warning should be given before deadly force is applied.

The new policy has added a requirement of imminence which was not explicitly contained in the predecessor policy, although it may have been implicit in the requirement that the agent or another "are in serious danger of death or grievous bodily harm."

The explicit requirement in the Justice Department policy that the danger of death or serious physical injury to the officer or to another person be imminent derives from the Supreme Court's decisions in Tennessee v. Garner, 471 U.S. 1 (1985), and Graham v. Connor, 490 U.S. 386 (1989). Garner states: "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id. at 396. Similarly, in Graham, the Supreme Court said that a court reviewing a particular use of deadly force must consider several factors, including (1) the severity of the crime committed by the suspect; (2) whether the suspect posed an immediate threat to the

safety of the officers or others; and (3) whether the suspect actively resisted arrest. Id. at 1872.

There is some question of whether the "imminence" of the threatened harm in the new Justice Department policy satisfies the Supreme Court's concept of "immediate" as articulated in Graham. Webster's Ninth New Collegiate Dictionary defines imminent as "ready to take place." Although a narrow use of the word imminent may be consistent with the Supreme Court's concern, as expressed in Garner and Graham, that the threat be immediate, the commentary to the Justice Department policy undercuts the imminence requirement contained in the policy by defining imminence as follows:

> As used in this policy, "imminent" has a broader meaning than "immediate" or "instantaneous." 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.

By stating that the term is "elastic, that is, involving a period of time dependent on the circumstances," the commentary may be interpreted as reading out of the Justice Department policy the

imminence requirement or, at least, causing confusion as to the proper time frame in which to evaluate the threat.

Director Freeh and others have argued that the concept of "immediacy" is not an absolute requirement to the constitutional use of deadly force, and, therefore, the Justice Department policy's limitation of the use of deadly force to situations where the danger is imminent goes beyond constitutional requirements. Whether or not it is an absolute requirement to the use of deadly force, immediacy plays a prominent role in both Supreme Court decisions on this issue. In addition, the new Justice Department policy states that it is more restrictive than the Constitution. In that context, the Justice Department properly added the concept of imminence to its policy. The Subcommittee's concern is that the Justice Department may then have confused the issue by defining imminence in such an open-ended way.

Director Freeh testified that any drafting concerns with the policy will be remedied by comprehensive training. Proper training on the use of deadly force is essential, no matter what the policy or how well-written it is. We ask the FBI to report back to the Subcommittee on the nature of the training done by the FBI on the use of deadly force - for both new and experienced FBI agents.

Another concern of the Subcommittee with the new policy is that it does not give prominent enough consideration to the risk to innocent third parties posed by the officer's use of deadly force. This factor is mentioned only in passing in the commentary to the policy. We note, by contrast, that the Model Penal Code states that the use of deadly force is not justifiable unless "the actor believes that the force employed creates no substantial risk of injury to innocent persons." Art. 3 § 3.07(2)(b)(iii). The tragic events at Ruby Ridge highlight the critical need for officers to consider the risk to innocent people before they shoot. If Agent Horiuchi had considered the risk of his second shot to the innocent people known to be in the Weaver cabin, he might not have taken that shot and Vicki Weaver might be alive today. The Subcommittee urges the Justice Department to state explicitly that the risk to innocent third persons from the use of deadly force is a factor militating against its use.

In view of the importance of the new deadly force policy to all federal law enforcement, the Subcommittee will hold a hearing on the new policy. The Subcommittee will invite a panel of constitutional law scholars to discuss the new policy as well as representatives of various law enforcement agencies.

7. Policy Changes/Reorganization of FBI Crisis Response

The Subcommittee is concerned that Assistant Director Potts had the authority to and, in fact, did deploy the HRT without first consulting higher level officials. Former FBI Director William Sessions knew very little of what was happening at Ruby Ridge at the time. (9/22/95 Tr. at 49-56 (Sessions)). Similarly, the Justice Department was involved in only a very peripheral way with various logistical aspects of the crisis response. We think the Hostage Rescue Team should have been deployed only with approval at the highest levels of both the FBI and the Department of Justice and commend changes implemented in the wake of the Ruby Ridge and Waco tragedies to ensure that this happens in the future.

In 1994, the FBI reorganized the HRT, placing it under the control of a Critical Incident Response Group ("CIRG"), which was formed "to address hostage taking, barricaded situations, terrorist activities, and other incidents of a critical nature which require an emergency response by a diverse group of law enforcement resources." (5/17/94 Letter from FBI Director Freeh to Attorney General Reno). In September of this year, the use of FBI crisis management resources generally was addressed by the Justice Department's Office of Investigative Agency Policies ("OIAP"), and a new policy was approved by Attorney General Janet

Reno. Among the reforms included in this policy is an agreement (Resolution 12) among Justice Department law enforcement agencies that the FBI will take charge of hostage and barricade situations whenever its help is sought – no matter what agency initially is involved with those crises.

Thus, the FBI's internal reorganization and Resolution 12 together have worked to reformulate crisis response where any Justice Department component requires crisis management assistance. The HRT is now part of CIRG's Tactical Support Section. CIRG, in turn, is headed by a Special Agent in Charge ("SAC"), experienced in crisis management, who reports directly to the Director. Negotiators and tactical personnel are under a unified command, and negotiators will, in future crises, always deploy with the Hostage Rescue Team.

Leadership and accountability have been fixed to specific individuals, including the FBI Director. The Hostage Rescue Team will not be deployed, and, absent an imminent threat to hostages or law enforcement personnel, no tactical response will be initiated, without an independent assessment by high level FBI officials of the threat and need. The Director must be personally satisfied that HRT deployment is necessary and appropriate. Director Freeh testified that since he has been in office, he has been asked four times to deploy the HRT but has

approved its deployment only once. He is not sure that he would have deployed the HRT to Ruby Ridge. (10/19/95 Tr. at 83 (Freeh)).

We believe that the requirement that HRT not be deployed without the Director's approval will help avoid future tragedies like Ruby Ridge. We remain concerned, however, that negotiation strategies will again unnecessarily yield to tactical alternatives: HRT and FBI hostage negotiators both were deployed to Ruby Ridge and both were under a unified command, just as they would be in a crisis handled under the current structure. We therefore recommend that Resolution 12 be reviewed to ensure that negotiated resolutions are pursued in every case where feasible.

We also remain concerned that in the transfer of command from one agency to another critical information may be lost, rumor transformed into fact, and facts exaggerated, as occurred at Ruby Ridge. We do not believe that either the CIRG restructuring or the passage of Resolution 12 deals with these problems. The Subcommittee, therefore, also recommends that the Justice Department consider ways to ensure better intelligence communication between and among agencies.

8. Inaccuracy of FBI 302 Forms

FBI agents prepare 302s to record the contents of investigatory interviews after the completion of each interview. They are prepared in all FBI investigations, not just internal ones. The Subcommittee is deeply troubled by testimony we heard that some 302s prepared in relation to the Weaver case and the Ruby Ridge incident did not accurately reflect what witnesses told the FBI agents who interviewed them. Among the disputed 302s were those of Deputy Marshal Cooper, former Marshals Service Director Hudson, and former Marshal Michael Johnson.

- Former Director Hudson's 302 noted that Hudson learned late on August 21 that Sammy Weaver was thought to have been injured during the firefight at the Y. Marshals Service personnel and FBI agents all now say that they had no idea Sammy had been hurt until they discovered his body in an outbuilding on the Weaver property days later. When asked about this discrepancy during the hearings, Hudson informed us that his 302 was inaccurate on this point. (9/12/95 Tr. at 23 (Hudson)).

- Former U.S. Marshal Johnson's 302 did not reflect, according to Johnson, the full scope of his interview. Specifically, Johnson informed FBI agents interviewing him that Former Deputy Attorney General George Terwilliger may have had some involvement with approving the controversial Rules of

Engagement that governed FBI HRT activities at Ruby Ridge through August 26, 1992. (9/12/95 Tr. at 41-45 (Johnson)). His 302 nowhere reflects this discussion, however.

- Most disturbing, perhaps, is the controversy that developed over Deputy United States Marshal Cooper's 302, which was revised because Cooper believed it did not accurately reflect what he told FBI agents. In its first iteration, the 302 noted that Kevin Harris was carrying a weapon with a blue steel barrel during the firefight (he was not; Sammy Weaver was); and that, after the firing was over, Cooper saw Kevin Harris walking up the trail toward the Weavers' residence. In a later version, which Cooper actually dictated, Cooper stated that he saw Kevin falling after he shot his rifle in Kevin's direction, but that he saw Sammy running up the trail after he fired his last bullets. This discrepancy was raised during the Weaver/Harris trial and was used by the defense to discredit Cooper's testimony. (Trial Transcript, 5/26/93, at 211-228 (Venkus); Task Force Report at 473-75).

The testimony of three different witnesses that information in their 302s was inaccurate or missing is sufficient to convince the Subcommittee that, while alterations to witness statements as reflected in 302s related to the Ruby Ridge incident may not have been intentional, some inaccuracies did

occur. The Subcommittee believes that the possibility of such alteration is significant, especially in the course of internal investigations, where pressure and subtle loyalties and friendships may affect the preparation of 302 forms. Accordingly, the Subcommittee believes that the FBI should begin to record witness interviews at least in internal investigations. Tapes of witness interviews will permit FBI agents to more accurately reflect witness statements in 302s and will permit adequate review of the accuracy of the information recorded on 302 forms.

9. Crime Scene Investigation

Much was made by the attorneys who represented Randy Weaver and Kevin Harris at their criminal trial concerning the way evidence was collected around the Y area after the shooting incident. Special Agent Joseph Venkus (now retired) coordinated the search there.

At trial, the Weaver-Harris lawyers emphasized the facts that the Y area was not secured after the shooting incident and that many vehicles were permitted to drive through it before any search was conducted. Special Agent Venkus made no effort to determine how many vehicles or people had been through the area before the search began. In fact, the first agent who arrived

for the search, Special Agent Mark Thundercloud, commented that the dog Striker, who had been killed during the firefight, had been run over by a government vehicle.

Moreover, accepted methods of marking where evidence is located were not employed during the searches. Thus, Special Agent Thundercloud was not able to determine the distance between the northernmost and southernmost bullets that were fired by Marshal Degan before he died. At least one important piece of evidence – a bullet – was removed and then replaced by FBI agents coordinating the search.

During the hearings, Supervisory Special Agent James J. Cadigan acknowledged that the crime scene investigation "was not as organized" as he was accustomed to. (10/13/95 Tr. at 77-78 (Cadigan)). The Marshals argued that their version of the facts about the shootings at the Y could be supported if an adequate search of the area between the Weaver cabin and the Y were conducted, although according to Special Agent Venkus, they personally assisted with searches of the area. (10/13/95 Tr. at 163 (Venkus)).

The Subcommittee agrees that a more careful search and evidence-gathering process would have left us with far fewer questions today.

10. Allegations of Cover-Up

In July 1995, the Justice Department, during its continuing inquiry into government misconduct in connection with the Ruby Ridge incident, uncovered information that E. Michael Kahoe, a former subordinate of Larry Potts, had destroyed documents relating to the conduct of Potts and other high-ranking FBI officials during the August 1992 standoff with Randy Weaver. Louis Freeh soon suspended Kahoe. But unanswered questions about this alleged cover-up, including who might be involved and how far it extends, remain.

On August 11, 1995, four additional FBI officials involved with the Ruby Ridge incident also were suspended, including Larry Potts and Danny Coulson. This occurred one day after a criminal referral to the United States Attorney's Office in the District of Columbia. Due to a reported conflict of interest within that USAO, Michael R. Stiles, the United States Attorney for the Eastern District of Pennsylvania, took over the investigation in Washington. Since then, one additional agent has been suspended. It is unclear what was learned in the intervening month between the Kahoe suspensions and those of Potts, Coulson and the others, that caused the additional administrative action.

When the Subcommittee initiated its investigation into the Ruby Ridge incident, the Justice Department expressed concerns that our actions could interfere with possible future prosecutions related to the alleged cover-up. Although we were unwilling to delay this public airing for an indefinite period until all possible administrative and judicial action had been taken against various people involved with the Ruby Ridge incident and its aftermath, we appreciated the Justice Department's concerns, and therefore carefully avoided any inquiry that might compromise its efforts: we took great pains to avoid using compelled statements of people who may be subject to prosecution, thus permitting their use in future prosecutions under Garrity v. New Jersey, 385 US. 493 (1967); we met several times to confer about the proceedings; and we accepted most of the Department's decisions to withhold documentary evidence that conceivably might impact the investigation. However, a full public airing of this matter must eventually be undertaken, and when the investigation is concluded the Subcommittee will consider additional hearings to deal with the cover-up allegations and related issues.

11. Censure/Promotion/Suspension of Larry Potts

The Subcommittee is troubled by the actions of Director Freeh in the discipline and promotion of Larry A. Potts to the position of Deputy Director of the FBI. We are also concerned about Attorney General Reno's deferring to Director Freeh in approving the promotion of Potts.

a. Promotion of Potts to Acting Deputy Director

On December 6, 1994, Director Freeh announced the promotion of Potts to Acting Deputy Director, effective January 3, 1995. Potts was at the time the Assistant Director of the FBI's Criminal Investigative Division, the position he held at the time of the Ruby Ridge incident.

b. Censure of Potts

By December 27, 1994, Director Freeh had completed his review of the FBI's internal Administrative Review Report regarding Ruby Ridge. Freeh found that Potts was remiss in failing to review the finalized Rules of Engagement, and concluded that Potts failed to fulfill his responsibilities in the Ruby Ridge matter. On January 6, 1995, Freeh publicly announced the discipline of twelve FBI employees for their conduct regarding the Ruby Ridge incident. He recommended that

Potts be issued a letter of censure based on his failure to provide proper oversight with regard to the Rules of Engagement. In so doing, Freeh stated that, "[a]s head of the FBI's Criminal Investigative Division, Potts had overall responsibility for the crisis incident and FBI participation in the subsequent prosecution."

Approximately two months later, Gorelick advised Freeh that she was inclined to increase Potts' proposed punishment from a letter of censure to a 30-day suspension. Such a suspension effectively would have eliminated Potts' chances of assuming the position of Deputy Director on a permanent basis.

In response, on March 7, 1995, Freeh wrote to Gorelick, strongly disagreeing with her proposal to increase Potts' punishment. Among the reasons Freeh expressed in opposing Potts' proposed suspension were the personal effect that would have on Potts, the impact of such a decision on Freeh's own "credibility" as Director of the FBI, and the likelihood that Potts' suspension would result in "profound damage" to the relationship between the Justice Department and the FBI. The Subcommittee is concerned by both the substance and the tone of Freeh's letter, which reflected a lack of objectivity and personal response to Gorelick's proposal. In view of Freeh's long friendship with Potts, the letter had at least the appearance of favoritism.

On April 5, 1995, Gorelick formally accepted Freeh's view that a letter of censure was the appropriate punishment for Potts. In light of Gorelick's testimony to the Subcommittee that she considered Potts' failure to determine what Rules of Engagement were actually in place at Ruby Ridge to be "appalling" and a "major failing" (10/18/95 Tr. at 123, 168 (Gorelick)), that limited discipline seems plainly insufficient. Letters of censure are apparently also issued for comparatively insignificant infractions, as where an FBI employee has lost a cellular phone. (10/19/95 Tr. at 102 (Freeh)).

c. Promotion of Potts to Deputy Director

On April 6, 1995 – one day after Potts was issued a letter of censure for his failures of performance in the Ruby Ridge matter – Freeh recommended the promotion of Potts to the position of Deputy Director. On May 2, 1995, Attorney General Reno personally approved that promotion. In his press release announcing Potts' promotion, Freeh described Potts as "the very best the FBI has." Privately, Freeh wrote to the Attorney General to thank her for her support of Potts' promotion, stating that "[i]t really means a lot to me."

Freeh now acknowledges that his recommendation to promote Potts was a grave error, and that he was "not

sufficiently sensitive to the appearance created by [his] decision to discipline and simultaneously promote Potts." (10/19/95 Tr. at 11, 102 (Freeh)). The Attorney General reviewed and approved Potts' promotion, in consultation with Gorelick. While the Attorney General viewed as "troubling" Potts' failures at Ruby Ridge, she characterized the matter as one appropriate for deference to Freeh. (10/18/95 Tr. at 99 (Gorelick)).

Freeh testified that, in his view, the Attorney General "deferred" to him on the issue of Potts' promotion. (10/19/95 Tr. at 122 (Freeh)). But the judgment of the nation's chief law enforcement officer should not be a rubber stamp. In view of Freeh's personal relationship with Potts, and the tone of his letter to Gorelick, the Attorney General should have made an independent and thorough review of Director Freeh's recommendation. Had she done so, she should have rejected the recommendation. In light of Potts' serious failures of managerial oversight at Ruby Ridge, the promotion was not supportable. In the Subcommittee's view, this nation must have the highest level of confidence that its federal law enforcement officers will act with both professional competence and restraint. The simultaneous discipline and promotion of Potts to the FBI's No. 2 position sent exactly the wrong signal to the American public in this regard.

d. Reassignment and Suspension of Potts

On July 14, 1995, Director Freeh informed Potts that, due to controversy surrounding the Ruby Ridge matter, it had become necessary to assign him on an interim basis from his duties as Deputy Director to the FBI's Training Division at Quantico, Virginia. That action followed the detailed allegations in May 1995 by Special Agent in Charge Eugene Glenn that Potts had approved the Rules of Engagement at Ruby Ridge, and the July 11 suspension of Special Agent in Charge E. Michael Kahoe, as part of the investigation arising from Glenn's charges.

On August 11, 1995, Freeh suspended Potts and three other FBI officials with pay as a result of the continuing investigation into the Ruby Ridge matter. An additional FBI agent has since been suspended. As of this date, Potts remains on suspended status.

12. Suspension of FBI Agents as a Result of Criminal Referral

At the time of the criminal referral, Freeh suspended with pay four FBI agents, including Larry Potts, whose conduct was the subject of the criminal referral. The Subcommittee questioned the basis for the suspension and learned that there is no statutory or regulatory requirement of suspension in the case

of a criminal referral. Freeh testified that he suspended the four agents on the strong recommendation of Michael Shaheen, who heads the Justice Department's Office of Professional Responsibility.

We are concerned that there is no written policy or procedure governing how agents referred for criminal investigation are to be treated. This is especially the case here because the referral was made before the Office of Professional Responsibility had completed its own investigation. Indeed, just two days before the criminal referral, Shaheen had said that it would be weeks or months before he completed his investigation and decided whether there should be a criminal referral.

The United States Attorneys' Office now says that it will be another six to eight months before its investigation is complete. Meanwhile, Potts and the other agents are unable to work and their lives are under a dark cloud. While we do not suggest that the agents should not have been suspended, we do believe the decision to suspend them should have been made on the basis of a specific, written policy that is uniformly applied in all federal law enforcement agencies. The Subcommittee recommends that the Department of Justice adopt a uniform policy

and procedure concerning the treatment of law enforcement agents who are the subject of criminal referrals.

13. The FBI Laboratory

The Subcommittee examined closely various criticisms of the FBI Laboratory reported by sources including the United States Attorney's Office for the District of Idaho, components of the FBI, the United States Marshals Service, local law enforcement agencies, and the trial court in United States v. Weaver. The Subcommittee was particularly concerned by the Department of Justice Task Force conclusion that a "lack of coordination, communication, and coordination" within the FBI and with the United States Attorney's Office had a significant adverse impact on the government's preparation for trial and on the way that the government was perceived by the court and by extension, the public, in the Weaver criminal trial. (Task Force Report at 296, 300).

The Subcommittee recognizes that the investigation and prosecution of complex criminal acts is an inherently difficult task. Recognizing as well that it impossible to legislate human error out of existence, the Subcommittee addressed perceived structural and potentially systemic problems concerning the performance of the FBI Laboratory, including its interaction with

the government's trial team in the prosecution of Randall Weaver and Kevin Harris. Accordingly, the Subcommittee focused its analysis on four areas of concern: (1) the technical performance of the FBI Laboratory in the Weaver case; (2) the appropriate role and functions of the FBI Laboratory; (3) the FBI Laboratory's cooperation with the United States Attorney's Office and other components of the FBI; and (4) oversight of the FBI Laboratory. These areas of inquiry are discussed below.

a. Technical Performance of the FBI Laboratory

The Subcommittee is fully aware of the FBI Laboratory's unparalleled reputation for expertise in the examination and forensic analysis of crime scene evidence. That well-earned reputation is essential to the credibility of every prosecution – state or federal – which relies in any way on the results of examinations performed by the FBI Laboratory. It is of paramount importance that the Department of Justice remain vigilant in maintaining the highest standards of technical expertise and professional competence at the FBI Laboratory; each "minor" error committed by Laboratory personnel reflects poorly not only on the Laboratory, but upon the government's credibility as a whole in the criminal justice system.

The Subcommittee is concerned by two examples of apparent willful inattention or, at best, extreme carelessness in the handling and testing of evidence in the Weaver case. In the first instance, the FBI Laboratory apparently received blood samples from the autopsy of Deputy U.S. Marshal William Degan in late August 1992, shortly after his death. The FBI Laboratory's principal examiner in the Weaver case (Supervisory Special Agent James J. Cadigan of the FBI's Firearms/Toolmarks Unit) stated that, because the Laboratory received no "specific requests as to exactly what the Laboratory was to do with the blood," the Laboratory returned these blood samples to the FBI field office. In returning these samples, the Laboratory placed them in a bulky exhibit which bore no indication that it contained perishable items. Because they were not refrigerated, the blood samples spoiled.

In the second instance, the United States Attorney's Office requested test firings of weapons used at Ruby Ridge by the United States Marshals Service, Kevin Harris and members of the Weaver family. After conducting the relevant tests, the FBI Laboratory mailed the test-fired cartridges in envelopes to the FBI trial team liaison in Boise, Idaho. During shipment, several of the envelopes opened, spilling and commingling their contents. The test firings had to be returned to the FBI Laboratory for re-

grouping by microscopic analysis, with a resultant delay in trial proceedings to the detriment of the prosecution's efforts.

Unfortunately, these examples may not be isolated. A 1994 routine audit of the FBI Laboratory by the Inspector General's Office noted discrepancies in tracking cases and handling test results in some of the thousands of criminal matters the FBI Laboratory handles for local police and state and federal prosecutors. The OIG concluded that "the FBI could provide faster services, strengthen accountability of requests and specimens, [and] enhance quality assurance practices. . ."

Technology can only succeed when it is understood and properly applied. The Subcommittee believes that, in light of the increasing use of sophisticated scientific evidence by prosecutors across the country, including DNA typing of blood samples and hair specimens – and the increasingly sophisticated attacks by defense lawyers on the use of such evidence – the FBI should thoroughly review and where necessary, revise its procedures for the handling and testing of evidence. We note with approval the ongoing investigation of the FBI Laboratory by the Department of Justice's Office of the Inspector General, and we applaud the Attorney General's recent announcement that a five-member panel of internationally recognized forensic

scientists has been assembled to review the FBI Laboratory's policies and procedures.

The Subcommittee looks forward to receiving the results of the Inspector General's inquiry, and reviewing the conclusions of the independent forensic panel regarding the FBI Laboratory. In addition, we commend Director Freeh for directing the FBI Laboratory to apply for accreditation with the American Society of Crime Laboratory Directors. To the extent that individual employees of the FBI Laboratory are eligible for independent certification in their areas of specialization, such certification should also be sought and obtained.

b. Proper Role and Functions of the FBI Laboratory

The FBI Laboratory conducts more than one million evidence examinations per year, and its experts testify in hundreds of state and federal courts annually. Given the FBI Laboratory's crucial role as a tool of effective law enforcement in this country, the Subcommittee felt it important to address the perceived "lack of initiative by the Laboratory in conducting examinations beyond the specific request" (Task Force Report at 298) and the Laboratory's apparent reluctance to provide expert assistance in areas of critical interest to the United States Attorney's Office in the Weaver case.

We take seriously the complaint by the United States Attorney's Office that, at taxpayer expense, prosecutors in the Weaver case were required to seek resources outside the federal law enforcement community because of "institutional inertia" on the part of the FBI Laboratory. (Memorandum to Barbara Berman from Assistant United States Attorneys Ronald A. Howen and Kim Lindquist, dated August 24, 1993). The Subcommittee was particularly concerned by two examples of FBI Laboratory's conduct in this regard. In the first instance, prosecutors in the Weaver case told the FBI early in trial preparation that they required an expert to reconstruct the shootings at the "Y" area on August 21, 1992 in order to confirm the testimony of the Deputy United States Marshals regarding those events. When one of the FBI case agents contacted the FBI Laboratory, he was apparently told that "the Laboratory does not do shooting reconstructions." (Task Force Report at 293). In his testimony before the Subcommittee, SSA Cadigan recalled only that he had been "unsure" in his initial conversations with prosecutors as to whether such a shooting reconstruction could be done. (10/13/95 Tr. at 99 (Cadigan)). The prosecution then easily located a nationally-known private expert in the field of shooting reconstruction, and was required to hire him at significant government expense.

In the second instance, the FBI Laboratory was asked by the prosecution team in the Weaver case to determine the caliber of the bullet which passed through Sammy Weaver's jacket and killed him. The FBI Laboratory initially refused to conduct this examination, asserting that no test recognized by forensic science enables an examiner to determine with any certainty the caliber of the bullet which caused a hole in clothing. Although Agent Cadigan did not specifically recall refusing to perform the requested examination, he admitted that he had stressed to prosecutors "the limits to which I would be prepared to testify as fact" on this subject. (10/13/95 Tr. at 64 (Cadigan)). When the prosecutors again requested that the FBI Laboratory attempt to determine the caliber of the bullet which killed Sammy Weaver, the FBI did conduct such tests, with no "definitive" conclusion. At trial, the prosecution presented a nationally recognized private expert – again, at significant government expense – who testified that Sammy Weaver was killed by a 9-mm bullet.

The Subcommittee recognizes the view held by some that one of the main differences between the FBI Laboratory and private experts is that the FBI Laboratory is "extremely conservative" and that FBI examiners will not testify to results not based on scientific fact. (Cadigan 8/10/93 FBI Form 302 at 11). However, the Subcommittee concurs with the conclusion of

the Department of Justice that, "[i]f the government's cases are to be presented successfully and fairly in the courtroom, the technical expertise of the FBI Laboratory must be available to assist trial teams beyond areas about which Laboratory experts can testify." (Task Force Report at 299).

To the extent that the FBI Laboratory — one of the single most sophisticated elements in the government's arsenal in the ongoing fight against crime — does not recognize that it must serve that effort at all levels, the Subcommittee is concerned. Within the necessary constraints of available manpower and funding, the FBI Laboratory must at all times make itself ready, willing and able to assist local police and state and federal prosecutors in their efforts to combat crime.

c. Cooperation with Other Governmental Actors

The Subcommittee is concerned by evidence that the FBI Laboratory did not respond in a timely fashion to requests by the prosecution team in the Weaver case for tests of certain physical evidence. While budgeting constraints and demands of other cases are to some extent unavoidable, the Subcommittee shares the Department of Justice Task Force concern that, "[i]f the response in this matter is typical of high profile homicide cases involving the death of a federal law enforcement officer and two

citizens, we wonder about the response to matters of less importance." (Task Force Report at 298).

Two incidents in particular were troubling to the Subcommittee. In the first instance, the prosecution on October 28, 1992, requested tests to determine whether holes in Deputy Marshal Degan's backpack and contents had been caused by a bullet. The subsequent FBI Laboratory report, issued on December 23, 1992, contained no response to this request. On January 5, 1993 the prosecution again requested this examination; a response was finally made on January 22, 1993, nearly three months after the initial request.

In the second example, on September 3, 1992, the prosecution asked the FBI Laboratory to examine certain clothing to see whether blood and hair on that clothing could be identified as that of Randy Weaver, Vicki Weaver, Samuel Weaver or Kevin Harris. When FBI case agents reviewed the FBI Laboratory report of December 23, 1992, they discovered that the requested blood and hair examinations had not been performed. The FBI Laboratory then informed the case agents that blood samples for the Weavers and Kevin Harris' hair samples had never been sent to the Laboratory. Blood and hair samples had to be re-acquired and tested in late January 1993.

To the extent that such delays reveal underlying systemic problems, they evidence a need for change. It is obvious to the Subcommittee that any formal prioritization program in place at the FBI Laboratory yielded, at least in the Weaver case, to a situation where only the squeaky wheel got the grease. Indeed, the FBI itself recognized this problem in reviewing the performance of the FBI Laboratory in the Weaver case: "In theory as the items of evidence are received at the Laboratory the case is assigned a priority. These priorities are (1) an FBI case; (2) a violent crime; (3) a property crime and (4) a case in which any judicial proceeding is unlikely. In practice what was found during this inquiry was that the overriding factor determining priority attention are cases in which a trial date has been established and this trial date is closer than other trial dates in other cases." (FBI Administrative Review Report at 215). Agent Cadigan conceded that, as a matter of reality, "priority is given to those cases which are going to trial [and which] have a definite, firm trial date. . ." (10/13/95 Tr. at 91 (Cadigan)).

The Subcommittee is also concerned by the testimony of a representative of the FBI Laboratory that, in the Weaver case, the Laboratory received requests for examinations that fit what they saw as the prosecutors' "theory of the week" and that the

resulting tension between the prosecutors and the case agents adversely affected the coordination necessary between the field and the Laboratory for effective and timely processing of evidence. (10/13/95 Tr. at 68-69 (Cadigan)). Agent Cadigan did also state that the FBI Laboratory was not pressured in the Weaver case to shape its test results or analysis to fit the prosecution's theory of the case, (10/13/95 Tr. at 74 (Cadigan)), and we found no evidence to contradict this.

While we do not expect that harmony will always rule, we believe that -- at a minimum -- the American public is entitled to rely on different units of federal law enforcement to identify and quickly resolve issues of cooperation and coordination before criminal prosecutions are irrevocably impaired. We should be satisfied with nothing less.

d. Oversight of the FBI Laboratory

The Subcommittee has questions about the effectiveness of oversight of the FBI Laboratory by the FBI's own Inspection Division. In August 1992, at about the same time as the Ruby Ridge incident, the Inspection Division inspected the FBI Laboratory and reported that it was operating "efficiently and effectively." Yet, soon after the FBI gave its own Lab a clean bill of health, criticisms started rolling in. First, the

prosecutors in the Weaver/Harris case complained about the Lab. Then, in June 1994, the Justice Department's Task Force criticized the Lab, and the Justice Department's Inspector General raised serious questions about the Lab in an audit report. It seems that a more thorough inspection would have noted some of these same problems.

14. The FBI's Failure to Comply with Discovery Obligations

The Subcommittee closely examined perceived problems with the FBI's participation and cooperation in the discovery process in the Weaver/Harris criminal trial. In so doing, we were particularly troubled by the contempt sanctions imposed on the government based on a finding by the trial judge that the FBI "obstruct[ed] the administration of justice" and "evidence[d] a callous disregard for the rights of the defendants and the interests of justice." In addition, both the United States Attorney's Office in Idaho and the Department of Justice Task Force Report were also extremely critical of high-level FBI officials' persistent intransigence and failure to cooperate in the Weaver/Harris criminal prosecution.

The Subcommittee concurs in the view that the FBI failed to comply with its discovery obligations in the Weaver/Harris case. This was not a case of innocent mistake or

even excusable negligence; rather, the FBI willfully and repeatedly failed to abide by discovery rules and irreparably damaged the government's presentation of evidence at the criminal trial. Where, as here, the FBI assumes "the role of an adversary" to the USAO, rather than a partner in the prosecution of criminal charges (Task Force Report at 407), something has gone terribly wrong.

a. Failure to Produce Relevant Documents

During the course of the Subcommittee hearings, it became clear that the FBI had never provided several crucial documents to either the USAO or defense counsel for Randy Weaver and Kevin Harris. For example, the FBI never produced its After Action Report, the handwritten or typed versions of Assistant Director Potts' notes regarding the Rules of Engagement, or the handwritten notes of Deputy Assistant Director Coulson concerning the strength of the allegations against Randy Weaver. Indeed, it is possible that had Weaver and Harris been convicted at trial, the non-disclosure of some of these materials could have resulted in a reversal on appeal.

In light of the USAO's position that in the interest of justice it would permit modified "open file" discovery in the Weaver/Harris case (9/15/95 Tr. at 160 (Ellsworth)), denial of

these materials to the defendants was not a matter for the FBI to determine unilaterally. Such disclosure may well have been mandated by decisions of the United States Supreme Court (e.g. Brady v. Maryland, 373 U.S. 80 (1963)), by express federal statute, 18 U.S.C. §3500 (the "Jencks Act"), and by the Federal Rules of Criminal Procedure (Rule 16). The Subcommittee finds the FBI's failure to produce the above-noted materials inexcusable.

The Subcommittee is concerned that, even today, officials of the FBI may not be fully cognizant of their constitutional and statutory obligations with regard to criminal discovery. In his testimony to the Subcommittee, one FBI agent asserted his view that the FBI's written critique of the U.S. Marshals Service's actions at Ruby Ridge was not subject to discovery because only "one or two" copies existed, because it constituted "simply opinions," and because the document was not an "official" document since it "was not placed in a file." (10/31/95 Tr. at 170-74 (Dillon)). Those interpretations of law are simply wrong. We expect the FBI to improve the education of its agents in this regard. We further expect that such training will include the reminder that, while the FBI remains free to make recommendations concerning the production of sensitive materials, the ultimate determination of whether such materials

must be produced rests with the Office of the United States Attorney.

b. Delay in Producing Relevant Documents

Several documents clearly relevant to the charges in the criminal trial against Randy Weaver and Kevin Harris were not produced by the FBI until well after the trial had commenced, and only then arrived via fourth-class U.S. mail. These documents included materials related to the FBI Shooting Incident Review Report, and in particular notes of interviews of the Hostage Rescue Team and two drawings by Agent Horiuchi concerning the circumstances of the shots taken by him at Ruby Ridge.

The FBI agent responsible for facilitating document requests between the USAO and FBI Headquarters testified that the prosecutors and FBI case agents were surprised by the production of these documents during trial, since they had "simply forgotten" that defense attorneys had requested such documents by a subpoena nearly two months before. (10/13/95 Tr. at 110 (Dillon)). The FBI Headquarters agent responsible for gathering and producing these documents testified that he first learned about the subpoena on or about April 14, 1993, requested that the documents be gathered some two weeks later, received them eleven days later, took ten days to review them, and then had them

mailed to the prosecution team in Idaho, where they were received on June 4, 1993. (10/13/95 Tr. at 122-25 (Callihan)). As a result of the government's delayed production of these documents, the court imposed sanctions on the prosecution, and Agent Horiuchi was required to re-appear for testimony at trial, weakening the government's case by further highlighting the government's conduct in causing the tragic death of Vicki Weaver.

Despite repeated requests by the USAO over a period of several months, FBI Headquarters also actively resisted turning over several documents to the prosecution team on the ground that they were "internal documents" of the FBI. (10/12/95 Tr. at 113-14 (Dillon), 126 (Callihan), 166 (Reynolds)). Agent T. Michael Dillon testified "The U.S. Attorney's Office wanted these documents and we facilitated – forwarded their repeated requests for the documents. FBI Headquarters had another view. The people in FBI Headquarters believed that they weren't necessary." (10/13/95 Tr. at 114 (Dillon)). These documents, including the Shooting Incident Review Report, the FBI's critique of the Marshals Service's actions, and the FBI operations plan for Ruby Ridge, were released by the FBI only after the Department of Justice interceded and directed their release. (10/13/95 Tr. at 127-28, 133 (Dillon), 138-42 (Reynolds)). There is no question that this resistance came in large part from Headquarters and the

Section of the FBI headed by Potts and Coulson, high-ranking officials of the FBI who were themselves intimately involved in the FBI's conduct at Ruby Ridge.

The FBI's failure to timely produce discoverable material substantially prejudiced the government's case, resulted in court-imposed penalties, and heightened the public perception that the government was playing fast-and-loose with the truth at Ruby Ridge. The Subcommittee asks the FBI to institute programs to improve the quality of its response to criminal discovery demands, including attention to the organization, coordination and monitoring of discovery requests and responses. The Subcommittee understands that the FBI has already begun this process, by, for example, forming a new Discovery Unit reporting to the General Counsel.

c. Adversarial Relationship with USAO

Both the FBI's withholding of clearly discoverable materials and inexcusable delay in producing such materials are symptomatic of what Assistant Director Potts admitted was a "clear breakdown in the relationship" between the FBI and the USAO. (9/21/95 Tr. at 111 (Potts)). Maurice O. Ellsworth, the United States Attorney in Idaho at the time of the Ruby Ridge incident, has himself severely criticized the FBI for its

complete failure of cooperation in the discovery process. (9/15/95 Tr. at 136-38, 148-50 (Ellsworth)). Indeed, Ellsworth informed the Subcommittee of his conclusion that the FBI had delayed or refused to produce relevant information because they "feared that it would embarrass the FBI." (Id. at 165).

It is clear that this adversarial relationship between the FBI and the USAO was extraordinary. Director Freeh testified that he has never encountered a situation where the relationship was as "chronically bad and abrasive" as that between the FBI and government prosecutors in this case. (10/19/95 Tr. at 114-15 (Freeh)). This problem was in large part created by FBI Headquarters personnel. In this regard, the Subcommittee concurs with the conclusion of the Task Force Report that "primary responsibility in this case must rest on the doorstep of FBI headquarters." (Task Force Report at 409).

The Subcommittee is concerned that there be no repetition of this situation. "Turf battles" all too often interfere with the efforts of federal, state and local law enforcement to coordinate the battle against crime. When they occur between the prosecutorial and investigative arms of the same federal government agency, they are inexcusable. We ask the Department of Justice to make every effort to ensure consultation and cooperation between the FBI and the Offices of the United

States Attorneys across the nation, and to take swift action at the highest levels to resolve any disputes which may arise between them.

15. Ability of FBI to Investigate Itself

The incidents at Ruby Ridge have been the subject of five FBI reports: the Shooting Incident Review Team Report; the Shooting Incident Review Group Report; the After Action Report; the FBI Inspection Division's Report of its Official Inquiry (also known as the "Walsh Report"); and the Administrative Review Report (also known as the "Mathews Report"). The Shooting Incident Review Team was formed almost immediately after the FBI learned of Vicki Weaver's death. The Team was dispatched to Idaho while the siege was ongoing to collect information. It finished its report on September 30, 1992 and submitted it to the Shooting Incident Review Group headed by E. Michael Kahoe of the FBI's Criminal Investigation Division. The Shooting Incident Review Group then completed its report on November 9, 1992, concluding that no administrative action should be taken against any FBI employee as a result of the incident.

The After Action Report was prepared sometime after the incidents at Ruby Ridge. Because this Report is an important element in the U.S. Attorney's ongoing criminal investigation,

the Subcommittee has only been able to obtain the "Executive Summary" section, and not been able to learn when the Report was prepared and by whom.

The Walsh Report was completed on January 19, 1994. It was prepared for submission to the Department of Justice's Task Force looking into Ruby Ridge. The Task Force, headed by Justice Department attorney Barbara Berman, initiated its investigation after the Department of Justice received several complaints about governmental misconduct in the Ruby Ridge matter. The Task Force used FBI inspectors and assistant inspectors from the FBI's Inspection Division to conduct its inquiry.

Finally, the Mathews Report was completed on December 16, 1994. It took the conclusions of the Task Force Report (also known as the "Berman Report") and recommended any internal discipline or administrative action that needed to be taken against FBI employees. Twelve FBI employees were disciplined based on the Mathews Report.

There are also several reports prepared outside of the FBI. The Task Force Report was issued on June 10, 1994. As a result of its conclusions, the Civil Rights Division of the Department of Justice prepared a more detailed report on the issue of whether Agent Horiuchi's second shot should be the subject of criminal prosecution.

The five FBI reports are variously contradictory, inaccurate, and biased. They demonstrate a reluctance on the part of the FBI initially to take the incidents at Ruby Ridge seriously, and to investigate itself with the same degree of thoroughness and skepticism that the FBI brings to its other investigations.

The Subcommittee does not doubt that the FBI is genuine in its desire to dispassionately and objectively investigate itself. No matter how sincere its wishes are, however, the FBI has not always carried them out. We conclude that the process of internal investigation needs to be reformed. We do not believe, however, that the FBI should have no role in investigating itself.

The reports reveal three major problems with the way the FBI reviews its own conduct: first, the reports show an institutional bias against subjecting FBI agents to the same degree of searching and skeptical scrutiny that others investigated by the FBI are subjected to; second, the FBI agents conducting the internal reviews are not appropriately insulated from the subjects of the review; and, third, the goals of and procedures for internal reviews are not clearly defined.

a. Institutional Bias

Throughout the course of its many reports, the FBI accorded its own agents undue deference. Their stories were accepted at face value and were only rarely the subject of probing inquiry. FBI agents conducting the reviews vigorously pursued exculpatory leads while passing over inculpatory evidence. For example, members of the Shooting Incident Review Team headed by Agent Thomas Miller failed to press various sniper-observers of the Hostage Rescue Team about the Rules of Engagement they were acting under and the circumstances under which Agent Lon Horiuchi fired his two shots. Instead, the Review Team simply accepted the Rules of Engagement without questioning their propriety or legality and without inquiring whether the Rules may have had some impact upon the snipers. When asked why the Team did not look into the Rules of Engagement, Agent Miller replied that inquiry into the Rules was not part of his job. (Miller Testimony at 153). Likewise, the Shooting Incident Review Group brushed off any critical evaluation of the Rules of Engagement and their impact on the events at Ruby Ridge. However, any thorough and conscientious inquiry into the circumstances surrounding the shooting death of an innocent civilian must look into the Rules an agent is

operating under and his state of mind when firing a shot. The failure to do so regarding Agent Horiuchi is inexcusable.

In contrast to the objective scrutiny we expect from the FBI, the Shooting Incident Review Team did a haphazard job collecting the evidence and analyzing the legal issues. For example, the Report refers to Vicki Weaver as "Vicki Harris" on several occasions. The author of the report dismissed this error as typographic, but it obviously was more than that: it manifests a critical inattention to detail. In addition to the factual errors, the Report reveals a serious misunderstanding of the rules of deadly force. In analyzing the shooting of Vicki Weaver, the Review Team concluded that "the use of deadly force was justified in that she willfully placed herself in harm's way by attempting to assist Harris, and in so doing, overtly contributed to the immediate threat which continued to exist against the helicopter crew and approaching HRT personnel." In fact, there is no evidence to suggest that Vicki Weaver was attempting to assist Kevin Harris in any hostile action. There is no reason to conclude that holding the door open for a retreating subject is any kind of a contribution to an immediate threat. And even more troubling is the Team's conclusion that an innocent party who "place[s] herself in harm's way" can be the subject of deadly force. That conclusion is frighteningly wrong.

The FBI Inspection Division's Report of its Official Inquiry, prepared under the supervision of Inspector Robert Walsh, also demonstrates many of the same failings. Inspector Walsh's team was asked simply to collect the facts and then to present a detailed factual summary to the Department of Justice Task Force reviewing the Ruby Ridge matter. The Task Force, headed by Barbara Berman, was then charged with analyzing the facts gathered by Inspector Walsh's team and drawing conclusions. However, rather than complying with their mandate, members of the Walsh team went out of their way to solicit legal and forensic opinions supporting the FBI's actions at Ruby Ridge. The Walsh team's decision to flout an explicit order from the Justice Department exposes the FBI's defensive attitude toward criticism.

Likewise, during the course of the Administrative Review headed by Agent Charles Mathews, FBI agents failed to probe adequately into the question of who approved the Rules of Engagement. Agent Eugene Glenn, the on-scene commander at Ruby Ridge and a central participant in the approval of the Rules of Engagement, told our Subcommittee that in the Mathews review he never was even asked who approved those Rules. (9/19/95 Tr. at 15-16 (Glenn)). Members of the Mathews team simply accepted Assistant Director Larry Potts' assertion that he had not approved the Rules of Engagement. Rather than attempting to

uncover and resolve any discrepancies, FBI agents avoided uncomfortable facts.

Perhaps the most disturbing demonstration of this approach to the Ruby Ridge investigation involves former Assistant Director Larry Potts' notes on the Rules of Engagement. During the Task Force investigation, Potts told his interviewers that he had taken contemporaneous notes during his Ruby Ridge involvement. But he told them that the notes had been turned over to the Violent Crimes/Major Offenders Section of the FBI's Criminal Investigative Division. The Task Force requested the notes but never received them. (Task Force Report at 158 n. 537). The Mathews team does not seem to have made any effort to find the notes. These notes were critically important as one of the few pieces of documentary evidence to shed light on who approved the Rules of Engagement. The failure of the FBI to find and turn these notes over to the Berman Task Force is as disturbing as it is inexplicable. So is the failure of the FBI to track them down until a criminal investigation and a Senate investigation were underway.

Finally, one need look no further than the After Action Report for a demonstration of the protective attitude of FBI agents asked to review their agency's conduct. The After Action Report concluded that Ruby Ridge was a "success" and directly

attributable to the FBI's actions. In contrast, an FBI agent wrote a harshly critical report of the U.S. Marshals Service after the Ruby Ridge siege ended. The difference between the critical tone of this so-called Marshals' Critique and the self-congratulatory tone of the After Action Report is instructive. The FBI was coddled; other agencies were analyzed and criticized.

The many FBI reports reveal a reluctance on the part of FBI agents to approach a situation like Ruby Ridge with an open mind. Instead, Ruby Ridge seems to have been approached with an unwillingness to find improper conduct on the part of other FBI agents. This aversion is certainly understandable: the FBI is composed of many exceedingly loyal agents, and their loyalty to the organization does the FBI credit and undoubtedly makes it a stronger agency. But the very quality of allegiance which contributes to the rarity of misconduct in the FBI perversely made it more difficult for the FBI to scrutinize itself objectively for misbehavior at Ruby Ridge. Few agents eagerly uncover wrongdoing in their own organization. They do not want to dishonor the FBI. This sympathy is understandable, but it is also unacceptable.

Obviously, not all FBI agents may have this kind of reluctance, and the Department of Justice Office of Professional

Responsibility has through its experience identified individual agents who it believes can be relied upon to vigorously investigate their own agency. But the Subcommittee does not believe that successful investigations of the FBI ultimately should turn on whether a DOJ-OPR attorney is able to hand-pick specific FBI agents who can be relied upon. We believe any attorney at the Justice Department should be able to call upon any FBI agent to objectively investigate the agency.

The Subcommittee notes that the FBI has done an admirable job investigating itself on many prior occasions. And the Subcommittee has faith in the FBI's continuing ability to investigate and discipline its agents. But adequate and independent oversight of the FBI is crucial to avoid, at a minimum, the appearance of institutional bias within the FBI. Such oversight is particularly important in cases like Ruby Ridge, which involve deep-rooted and systemic problems and large numbers of agents from all echelons of the FBI. However, it notes that the problem of institutional bias is particularly acute in cases like Ruby Ridge which involve deep-rooted and systemic problems and large numbers of agents drawn from the highest to the lowest echelons of the FBI -- rather than cases which involve isolated agents violating discrete laws.

b. Inadequate Insulation From Subjects Of Review

Many of the FBI agents conducting the internal reviews were not adequately insulated from the subjects of their reviews. The FBI has an Inspection Division and an Office of Professional Responsibility ("FBI-OPR") within that division. FBI agents are assigned to the Inspection Division as part of their career rotation. Thus, agents come into the Division as inspectors or assistant inspectors for a specified period of time and then return to other divisions of the FBI after their tour of duty. These inspectors are required to investigate the FBI's own conduct.

The various Ruby Ridge reports reveal several instances of friends reviewing friends' conduct and the subjects of the reviews later sitting on the promotion boards of the very agents who reviewed their conduct. This has created the impression that a small group of insiders review the conduct of the FBI, punishing lower-level, "outsider" FBI agents and protecting higher-level, inside-track FBI agents. Whether the impression is correct or not, the FBI has allowed it to form, thereby harming its own credibility.

For example, Inspector Walsh testified that he considered Assistant Director Potts a friend, while Potts acknowledged that he had a close relationship with Walsh.

(9/21/95 Tr. at 100 (Walsh)); (9/21/95 Tr. at 94-95 (Potts)). Walsh considered this friendship strong enough to tell his supervisor, Assistant Director David G. Binney, about the relationship. However, Binney told him that it would not be a problem. In addition, Potts sat on Agent Mathews' promotion board after the Mathews Report was completed, and Coulson acknowledged that he considered Mathews – who had been his subordinate for several years – to be a friend of long standing. (9/21/95 Tr. at 93 (Coulson)). Director Freeh had a close relationship with Potts as well. (10/19/95 Tr. at 40 (Freeh)). The Subcommittee does not mean to suggest that simply knowing the subject of an inquiry disqualifies an investigator. However, all of these relationships with Potts went beyond mere acquaintance, raised an appearance of partiality, and ultimately may have contributed to the skewed perspective of the reports.

Moreover, the Subcommittee has reservations about the way that the Inspection Division is structured. It believes that agent-inspectors do the best job that they can and that they are not consciously biased. However, the practice of letting agent-inspectors review the conduct of friends and colleagues is suspect, and the Subcommittee is pleased to see that the FBI has recently implemented a strict refusal policy. It notes, however, that the operation of the refusal process remains to be

evaluated. In addition, the FBI should consider whether the practice of rotating agents in and out of the Inspection Division over a short period of time contributes to the appearance of partiality. Agent-inspectors who know that they may shortly have to work with the subjects of their inspections or that the subjects may later sit on their promotion boards are not sufficiently insulated to assure objectivity.

c. Ill-Defined Goals and Procedures

Many of the previous problems could have been handled with a clear set of goals, priorities and procedures for the various reports.

For example, prior to August 1995, the FBI did not have a systematic and clear policy for reviewing shooting incidents. The Shooting Incident Review Team did not have a clear understanding of the scope of its inquiry or a clear mandate to conduct a thorough investigation. Likewise, the Walsh team felt free to act on its own and create its own investigative priorities because its relationship with the Department of Justice's Office of Professional Responsibility was poorly defined.

The Subcommittee also was disturbed that no FBI official who testified before us admitted to reading, or being

briefed about the conclusions of, the After-Action report. This was a report that dealt with a major operation of the FBI, the purpose of which was to summarize what went wrong and what was done right. It should be incumbent upon senior FBI officials to review the FBI's own internal reviews of its operations, in order to learn from the agency's prior mistakes.

Finally, the Administrative Review headed by Agent Mathews felt free to ignore or evade many of the conclusions of the Berman Task Force. Beyond the Mathews team's failure to look into the approval of the Rules of Engagement, that team demonstrated its disregard for the Task Force Report in several other ways. For example, the Task Force Report was highly critical of the FBI's emphasis on a tactical response to the situation at Ruby Ridge rather than a negotiated surrender. (Task Force Report at 263-66). However, the Administrative Review under Agent Mathews ignored the criticism by concluding – astonishingly – that the tactical plans at Ruby Ridge were essentially subordinate to and in support of the negotiations plan. (Admin Report at 127-28). The Subcommittee cannot agree, and notes that the Hostage Rescue Team has been reorganized in the wake of Ruby Ridge and Waco in an effort to assure that negotiations are given the highest priority -- exactly what the Task Force recommended. Likewise, the Task Force Report was

critical of the intelligence gathering of the FBI on site. (Task Force Report at 151-54). The Administrative Review spurned that conclusion. (Mathews Report at 38).

The relationship between the Administrative Review process and the DOJ-OPR remains unclear. According to Barbara Berman, the Administrative Review should have accepted the conclusions of her Task Force's Report and, based upon them, recommended appropriate internal discipline. However, the FBI clearly felt free to reject several of the conclusions and decline discipline.

The FBI has made concerted efforts to solve many of these structural problems. The entire process of reviewing shooting incidents has been revamped. The Subcommittee is hopeful that these changes will make a difference in the future, but remains to be fully convinced. However, the Subcommittee continues to be concerned about the Administrative Review process, as it was conducted by Agent Mathews, and believes that the FBI and the Department of Justice need to further clarify the extent to which the FBI may reject the Justice Department's conclusions and decline to discipline agents. Under new guidelines, a DOJ-OPR Report recommending discipline must now indicate the specific agents it believes should be disciplined and what it considers to be an appropriate punishment. The FBI

may still reject that conclusion, but must inform the Deputy Attorney General who can then express his or her opinion on the matter. We hope that this will limit the types of evasions the Mathews report engaged in. The Subcommittee believes the new procedure is an improvement.

Despite our concerns about the FBI investigating itself, the Subcommittee does not believe that the FBI should be relieved of all responsibility for internal investigation and discipline. Director Freeh testified that he believed that the process of investigation and discipline should still rest within the FBI -- at least initially. He believes that "it is critical for the agency to be responsible, at least in the first instance, for its own integrity." (10/19/95 Tr. at 41 (Freeh)). We agree. We believe it is preferable for the FBI to foster its own sense of responsibility and integrity from within rather than have it imposed from outside. In addition, the Director of the FBI, in consultation with the Department of Justice, should have the ultimate responsibility for administering internal discipline of agents.

However, the FBI should not have the exclusive authority to investigate itself. Indeed, the FBI never has had sole authority. At the time of Ruby Ridge, serious allegations of agent misconduct could be reviewed by the Department of

Justice's Office of Professional Responsibility. Unfortunately, the process by which the DOJ-OPR obtained jurisdiction over such allegations was unclear. In the case of Ruby Ridge, the FBI regarded its internal review process as satisfied by the Shooting Incident Reports and the After Action Report. Only complaints directly to the Justice Department by Mr. Weaver's attorneys and others appear to have triggered the first in-depth and critical investigation of the Ruby Ridge incident, the Task Force investigation headed by Barbara Berman. A later DOJ-OPR investigation resulting in the criminal referral to the U.S. Attorney for the District of Columbia on obstruction of justice charges and the suspension of six agents was triggered by a letter from Special Agent Eugene Glenn, and by the calls for a full investigation from members of this Subcommittee. In both instances, the channels used to inform DOJ of a need to investigate were random. It is simply fortuitous that people approached DOJ-OPR and that DOJ-OPR took their allegations seriously. As far as the FBI was concerned the matter had been laid to rest.

The Justice Department has recently issued new guidelines to standardize the process by which external, Justice Department-led investigations of the FBI are initiated. These new rules also apply to the Drug Enforcement Agency. The FBI is

now required to notify the Inspector General of the Department of Justice and its Office of Professional Responsibility of all investigations of agents accused of misconduct. Either of these Justice Department offices may then request responsibility for an investigation that it believes should not be handled internally. However, this new referral system still relies on the FBI to take allegations of misconduct seriously in the first place and initiate an investigation. Only then do the Inspector General and DOJ-OPR learn of potential misconduct. Even had this system been in place at the time of Ruby Ridge, the Subcommittee notes that it would not have resulted in a Justice Department-led investigation. There was no internal FBI investigation of misconduct at Ruby Ridge to refer to the Office of the Inspector General or DOJ-OPR. As Ruby Ridge demonstrates, the FBI did not do a good job of either identifying misconduct on its own or of responding to external criticism. This new referral system will not work unless the FBI is sensitive to allegations of misconduct in the first instance.

The Attorney General has given the Office of the Inspector General authority to request responsibility for any investigation that the Inspector General believes should not be handled internally by the Drug Enforcement Administration or the FBI. To carry out this responsibility, the Inspector General

must be given the necessary information, including the names of the agents subject to investigation, status reports, information on how long an investigation has been ongoing, what the resolution of the investigation is, whether any penalty was meted out and what that penalty was. The Subcommittee is pleased that apparently an agreement has recently been reached on the information to be provided to the Inspector General. (Deputy Attorney General Gorelick's answers to Senator Leahy's Ruby Ridge questions, Answer to Question 3, 11/14/95). To insure that this new process is fully operational, the Subcommittee requests that the Inspector General submit a letter in six months addressing how well this agreement is working.

The Subcommittee also believes that the FBI needs to improve its responsiveness to citizen complaints. Currently, the FBI does have a system of responding to citizen complaints. Citizens may call either their local FBI office or FBI Headquarters in Washington, D.C. Their calls or letters are then routed to FBI-OPR for consideration. The Subcommittee has no complaint with this process. But the FBI should consider ways to improve its responsiveness to public concerns.

The Subcommittee also believes that the President should consider establishing an oversight board similar to the President's Intelligence Oversight Board that has such

responsibility for our intelligence agencies. Such an oversight board would be capable of objective criticism of the activities of federal law enforcement and receptive to external criticism. But it would also be dedicated to strong and effective federal law enforcement.

E. MULTIPLE REPRESENTATION OF WITNESSES

Five witnesses called to testify at our hearings invoked their Fifth Amendment right against self-incrimination. Although we could have granted these witnesses immunity and thus compelled them to speak, we did not do so because we did not want to interfere with the ongoing criminal investigations of the Ruby Ridge incident.

Brendan Sullivan of the Williams and Connolly law firm in Washington, D.C., represented four of the five witnesses who took the fifth amendment: Assistant Special Agent in Charge Richard Rogers, who commanded the Hostage Rescue Team at Ruby Ridge; Supervisory Special Agent Stephen P. McGavin, who was second in command to Rogers; Special Agent Lester B. Hazen, who coordinated the sniper/observers there; and Special Agent in Charge William D. Gore.

The Subcommittee believes that Rogers, McGavin, Hazen, and Gore had varying degrees of involvement in conduct

potentially subject to criminal sanctions. For example, Commander Rogers was involved in the drafting and approval of the Rules of Engagement and the deployment of the sniper/observers; whereas, Special Agent Gore does not appear to have been involved in any controversial decisions.

Although we respect the right of each of these individuals to invoke the Fifth Amendment, we are concerned that the advice given by Mr. Sullivan to some of these individuals may appear to have been influenced by his representation of others. Such a possibility is especially troublesome when the individuals are high level FBI agents asked to testify at a congressional hearing. The Subcommittee expressed these concerns to Mr. Sullivan who rejected them. We believe that Mr. Sullivan acted inappropriately in representing all four witnesses. Although the Subcommittee could have litigated this issue, it did not do so because it did not believe that success in the litigation would have brought any substantive change in the Subcommittee's findings.

CONCLUSION

Ruby Ridge, the remote mountain top in northern Idaho where Randy Weaver built his cabin, has entered our lexicon as a symbol of human tragedy – the tragedy of the pointless deaths of

Sammy and Vicki Weaver, and United States Marshal William Degan. The road from Randy Weaver's sale of two sawed-off shotguns to an ATF informant in October 1989, to the shootings of August, 1992 was a road filled with miscalculation, misinformation and misjudgment.

Responsibility for the tragedy must begin with Randy Weaver, and his unjustifiable decisions to sell illegal weapons, and to refuse to appear for trial. But the chain of mistakes that lead to those three deaths involves substantial failures by the very agencies of the United States government whose basic mission should be to save lives and enforce the laws.

The events at Ruby Ridge have helped to weaken the bond of trust that must exist between ordinary Americans and our law enforcement agencies. Those bonds must be reestablished – and that healing must begin with an honest accounting by those in government whose actions and inactions caused the deaths on Ruby Ridge.

It has been the Subcommittee's overriding purpose to demand such accountability – and, in so demanding, to help reestablish the principle that under our constitutional system of government no one is above the law. The reaffirmation of that principle is the means to avoid future Ruby Ridges.

SEPARATE VIEWS OF SENATOR DIANNE FEINSTEIN

I write separately to make two recommendations, which would have helped to prevent the tragedies at Ruby Ridge:

1. Whenever the Hostage Rescue Team is deployed, the Assistant Director of the FBI for the Criminal Investigative Division or the Deputy Assistant Director of that Division, who are number one and number two in the Division, should go to the site. The HRT is, and should be, only rarely deployed for major crisis situations. In these circumstances, the leaders in charge of the Criminal Investigative Division, who are responsible for the Division's performance (including that of the HRT), need to know first-hand what is going on, and should not be able to distance themselves from the actions of the agents in the field. This would help to ensure their accountability.

2. Domestic law enforcement officers should wear clearly identifiable markings on their clothing. These need not be glaring identifiers, but they should be sufficient to alert anyone who sees the officer in plain view that they are dealing with a law enforcement officer. This would help to eliminate confusion that can arise when a United States citizen encounters armed men and women in camouflage.