

the site.⁵⁵⁶ Rogers considered armored personnel carriers necessary protection for his agents. He saw no alternative to taking a phone to the cabin in the carrier because of the offensive posture the Weavers and Harris had taken.⁵⁵⁷

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By Saturday afternoon, a plan had evolved to place sniper/observers around the cabin. These sniper/observers would

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⁵⁵⁶ Id. at 47-48.

⁵⁵⁷ Id. at 48.

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be responsible for reporting movement at the cabin and providing protection if people left the cabin to shoot at the personnel carriers. [

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When the HRT is activated, a proposed operation plan is written for resolving the situation. According to Rogers, when the HRT faces "a hostage situation or a barricaded subject situation, such as at Ruby Ridge," the plan includes "a proposed tactical resolution" that includes an "assault" or "a plan to send people inside the building to effect an arrest."⁵⁶²

Any deliberate assaults must be approved by FBI Headquarters. The plan for such an assault is contained in an operations plan. [

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Glenn, with the understanding that the situation was "extremely dangerous and highly volatile," approved the following Rules of Engagement in the plan before sending the plan to FBI Headquarters for approval:

1. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children.
2. 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.

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⁵⁶² Rogers Trial Testimony, June 2 1993, at 99-100. See Trial Exhibit No. 41-4.

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- 3. If compromised by any animal, particularly the dogs, that animal should be eliminated.
- 4. 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 oneself or that of another.⁵⁶⁴

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] on August 22, an operations plan, which included the rules of Engagement, was sent by facsimile to FBI Headquarters and the Marshals Service for review. The Rules in the operations plan as submitted to the Bureau for review stated:

If any adult in the compound is observed with a weapon after the surrender announcement is made, deadly force can and should be employed to neutralize this individual. If any adult male is observed with a weapon prior to the announcement, deadly force can and should be employed, if the shot can be taken without endangering any children. [Emphasis added.]⁵⁷⁰

FBI Deputy Assistant Director Coulson received the operations plan at the FBI Headquarters' Strategic Information and Operations Center; he did not approve the draft plan because it lacked a negotiations option. Coulson stopped reviewing the plan once he realized a negotiation option was absent. Thus, he never saw or reviewed the Rules of Engagement in the plan which appeared after the section in which a negotiations strategy should have appeared.⁵⁷¹

After completing his partial review of the operations plan, Coulson made certain observations and raised certain questions in a facsimile to Glenn:

1. [No mention is made of Sniper Observer deployment as of 5:30 p.m. EST 2:30 PST (sic).]
2. []
3. There is no mention of a negotiation strategy to secure release of individuals at the crisis point.

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- 4. These is no mention of any attempt to negotiate at all.
- 5. SAC Salt Lake is requested to consider negotiation strategy and advise FBIHQ

Coulson informed Glenn that Headquarters was "not prepared to approve the plan as submitted."

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When the operations plan was rejected, []
 [] was asked to write a negotiation
 addendum. []

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This addendum was sent to FBI headquarters and received the following response:

FBIHQ agrees with negotiation annex as submitted. Salt Lake should proceed with this negotiation plan on his [sic] own initiative.⁵⁷⁸

The Rules of Engagement remained in effect until they were replaced by the FBI standard deadly force policy on August 26, 1992. Although Rogers testified that the operations plan was modified in the ensuing days and submitted to FBI Headquarters, he stated that it was never approved and never implemented.⁵⁸²

c. Interpretation of Rules of Engagement by Law Enforcement Personnel

Both Assistant Director Larry Potts and former Deputy Assistant Director Danny O. Coulson have stated that the Rules of

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⁵⁷⁹ The FBI conducted an internal administrative inquiry into the circumstances surrounding the two HRT rifle shots on August 22, 1992. For a discussion of the results of that inquiry see Section IV(G), infra.

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⁵⁸² Rogers Trial Testimony, June 2, 1993, at 102.

Engagement were merely a means of identifying the level of risk presented by the situation and were not intended to change or modify the FBI's Standard Deadly Force Policy.]

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HRT Commander Richard Rogers acknowledged that neither he nor any member of the HRT during his tenure had ever operated under Rules of Engagement such as those employed during the Ruby Ridge crisis.⁵⁹⁷ He testified that under the standard FBI policy on the use of deadly force the FBI "ask[s] our agents for more -- we're asking that they wait a little longer to ensure that these individuals basically are going to employ some kind of deadly force against them."⁵⁹⁸ At Ruby Ridge, he said, "we already know that the subject -- in this case, the males from the Weaver compound -- had already employed deadly force against the law enforcement officers, so they had clearly crossed that threshold in killing an officer already."⁵⁹⁹ Rogers explained that the Ruby Ridge Rules told the HRT sniper/observers that they could wait a little less before employing deadly force. According to Rogers, the determination of how long to wait is left to the individual's discretion.⁶⁰⁰

By the phrase, "can and should," Rogers meant that the sniper/observers had the authority to utilize deadly force and should utilize it, if an opportunity presented itself. The Rules did not refer to the agents' judgment because judgment "is understood by every FBI agent, and clearly understood by every member of HRT. . . . [T]hey should use deadly force in order to protect themselves or other individuals."⁶⁰¹ He testified that he did not explain his understanding of the phrase "can and should" to the HRT snipers because:

[T]hey understood what I was talking about . . . [and] I trained with them every day, and we discussed -- I mean, an FBI agent, from the time he goes through training at Quantico, has the standard rules of engagement drilled into his head. . . . I also have a sign with the standard FBI rules printed on it, hanging in the classroom at the hostage rescue team.⁶⁰²

HRT supervisor, Stephen McGavin, drafted the Rules of Engagement based on his understanding of the Rules as described by Rogers. [

⁵⁹⁷ Id. at 69.

⁵⁹⁸ Rogers Trial Testimony, June 3, 1993, at 66.

⁵⁹⁹ Id. at 67.

⁶⁰⁰ Id.

⁶⁰¹ Id. at 68.

⁶⁰² Id. at 68-69.

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Most significant is the testimony of Lon Horiuchi, the sniper/observer who eventually fired at members of the Weaver/Harris group. Horiuchi conceded that the Rules were different from those in the FBI manual and the Rules under which the HRT usually operated. He had never before been asked to operate under such Rules, which differed from the standard deadly force policy in that "the decision that we were already in danger had already been made for us prior to going on the hill."⁶¹⁹ Horiuchi testified that this was the first time he had been asked to apply Rules that differed from the standard deadly force policy. Under the latter, he could not shoot a person, unless that person posed a threat to his or another person's safety, and the decision as to whether a person posed a threat was left to Horiuchi. Under the new Rules, the decision that there was a threat had already been made.⁶²⁰ Horiuchi acknowledged that,

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⁶¹⁹ Trial Testimony of Lon Horiuchi, June 3, 1993, at 164-65.

⁶²⁰ Id. at 166-67.

under the Rules, he could and should shoot any adult male, if he had an opportunity.⁶²¹

The following exchange during cross-examination summarizes Horiuchi's perception of the Rules:

Q: Were you advised that the folks there had a habit of coming out of the house with the weapons?

A: Yes sir, I believe that was one of the briefings.

Q: So you knew that sometimes they came out, the dogs barked, they came out with their weapons, you knew that, didn't you?

A: Yes, sir.

Q: Under your rules of engagement, you could then and should, if they came out of the house, you could and should use deadly force?

A: Yes sir, it is true.⁶²²

d. Deployment of FBI HRT, SWAT and U.S. Marshals Service SOG Personnel at Ruby Ridge.

⁶²¹ Id. at 172-73. He emphasized that all the snipers were present when the Rules of Engagement were discussed:

The individuals that went up on the hill were pre-briefed by me and Mr. Love, the other team leader, to ensure that the individuals that we had under our control were well-briefed on the rules of engagement.

Id. at 178.

⁶²² Id. at 193.

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Before the Rules of Engagement were given to the teams, McGavin, second in command of the HRT, brought the typed Rules to Rogers at the command trailer. When Rogers returned later with word that they had been approved by FBI Headquarters, the HRT and U.S. Marshals Service SOG sniper/observers were briefed on the Rules of Engagement.⁶²⁶

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SOG personnel were deployed behind the HRT personnel to protect the

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HRT sniper/observers from hostile action from the rear.⁶²⁸ [

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The sniper/observers were deployed to the mountainside overlooking the Weaver cabin to provide security for tactical units which, after the sniper/observers were in position, would form an inner perimeter around the Weaver compound. The sniper/observers were also deployed to be used to safeguard law enforcement officers attempting to establish communications with the cabin. Additionally, they were to be used to gather information about the terrain, armaments, and fortifications, along with information about those present at the crisis site.⁶³⁰

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The sniper/observers took several hours to work their way up the mountain to the observation posts. At 3:45 p.m. (PDT), during a reconnaissance flight, someone in the HRT helicopter warned the sniper/observers by radio of movement outside the Weaver cabin and in the compound area. The sniper/observer group halted until it was reported that the individuals had returned to the cabin. The group then continued up the hill.⁶³³

e. Use of the Helicopter

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the flights was to afford FBI, Marshals Service, and U.S. Attorney's Office personnel the opportunity to assess the area and the terrain around the Weaver residence.

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⁶³³ Horiuchi Trial Testimony, June 3, 1993, at 32.

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f. Placement of HRT Sniper/Observers in Area Surrounding the Weaver Cabin

Because of the rugged terrain and deteriorating weather conditions, HRT sniper/observers began arriving at positions on the ridge overlooking the Weaver cabin approximately two to two and one half hours after setting out from the command post/staging area.⁶³⁷

At 5:07 p.m., the HRT sniper/observer team [] arrived at its position. This team consisted of Lon Horiuchi and []

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Horiuchi's [] position was the closest of the four positions, (almost due north of the cabin in a line almost parallel to the front wall. He was at a slight angle above the cabin, approximately 646 feet from the front door and approximately 579 feet from the outbuilding known as the "birthing shed." There was a ravine between Horiuchi and the cabin.⁶³⁹ Horiuchi could see the top of the front porch of the cabin and straight through the porch. He could see the front of the door as it opened and when it was in an open position. Horiuchi could not see the front door when it was closed, nor

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⁶³⁹ Upon arrival at his position, Horiuchi took out his rain jacket because it had begun to rain. He positioned his rifle through the limbs of a small pine tree. His weapon was a Remington, Model 700 rifle which has a fixed Unertl, ten power telescopic sight. The weapon fires a .308 calibre, match grade 168 grain bullet.

could he see into the cabin. He could also see the deck at the back of the cabin.⁶⁴⁰

g. Circumstances Involving the Two Rifle Shots Taken by HRT Member Lon Horiuchi.

(1) The First Shot

At approximately 5:45 p.m., Horiuchi saw an unarmed, young female, slight of build, with a ponytail, run from the front of the Weaver cabin toward a rocky outcropping. [

Horiuchi is unclear about the length of time the female was outside the cabin.⁶⁴²]

After viewing this female with the naked eye, Horiuchi observed her through his rifle scope and determined that she was a child. Although he could have fired at her, he did not because "the female was not armed at that time and [he] was assuming she was a child because of the size of the stature."⁶⁴³ Horiuchi could not recall whether the front door was open when the child was outside the cabin, but after she returned to the cabin, the door was closed.⁶⁴⁴

Within a minute after the girl returned to the cabin, Horiuchi observed an unarmed male on the back deck. The man moved to the back corner of the deck where ponchos or blankets were hanging on a string. "It seemed like he just felt them to see if they were dry and then he went back in."⁶⁴⁵ The man was in Horiuchi's vision for perhaps ten seconds, and, although Horiuchi could have both fired and hit the person, he did not

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b6] At trial, he said that the female stayed outside the cabin "two or three minutes, I'm not sure." Horiuchi Trial Testimony, June 3, 1993, at 63-64.

⁶⁴³ Id. at 64.

⁶⁴⁴ Id. at 64-65.

⁶⁴⁵ Id. at 66.

because "the individual did not appear to be armed, there was nothing in his hand, and I did not see any weapons around or on his person."⁶⁴⁶]

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At 5:57 p.m., the HRT helicopter took off⁶⁴⁸ HRT Commander Rogers, Marshals Service Deputy Director Smith, Marshals Service SOG Commander Haynes, and HRT pilot Frank Costanza were aboard.⁶⁴⁹

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Rogers and Smith recall that someone aboard the helicopter⁶⁵⁰ reported seeing two persons outside the cabin, armed with rifles,⁶⁵¹]

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Horiuchi heard the helicopter and the armored personnel carriers start their engines, and he saw the helicopter take off from the command post to the left of the Weaver cabin, circle to his left and out of his sight.⁶⁵³ Within five to ten seconds after the helicopter engine started, Horiuchi saw two males and the female he had seen earlier come out of the front door of the cabin and run toward the "rocky outcropping," a defensive

⁶⁴⁶ Id. at 66-67.

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⁶⁴⁹ Testimony, June 2, 1993, at 60-61.

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⁶⁵¹ Trial Testimony, June 2, 1993, at 63-65.

] Rogers

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⁶⁵³ Horiuchi Trial Testimony, June 3, 1993, at 67-69.

position near the front of the cabin.⁶⁵⁴ [

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however, Horiuchi saw [

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] a male [

⁶⁵⁶] was carrying a long gun,

in a "high port carry, both hands on the weapon and across his body" ⁶⁵⁷

Horiuchi saw the three people run behind the "birthing shed," a wooden building close to the cabin and disappear from his view. Horiuchi focused on the person he believed to be Harris because he was carrying a "shoulder weapon" at "port arms." ⁶⁵⁸ Horiuchi did not shoot [

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⁶⁵⁹] because the person was not making any threatening movement. ⁶⁶⁰]

Horiuchi continued to focus on the armed male as he rounded the rear corner of the birthing shed and again came into Horiuchi's field of view. [

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⁶⁵⁴ Id. at 81. Horiuchi assumed that the female was the same person he had seen earlier because of her small stature. Id. at 74.

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⁶⁵⁷ Horiuchi Trial Testimony, June 3, 1993, at 70-72.

⁶⁵⁸ "Port arms" is a military term which describes a weapon being carried across the chest with both hands in a slanting direction with the barrel near the left shoulder.

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⁶⁶⁰ Horiuchi Trial Testimony, June 3, 1993, at 86-87.

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Horiuchi continued to concentrate on the person who had rounded the rear corner of the birthing shed. As he came back into view, Horiuchi believed that the man was the armed individual he had initially seen running from the cabin.⁶⁶⁵

The man picked up a stick and appeared to be poking at the ground and looking up above and to the right of Horiuchi where Horiuchi sensed that the helicopter was flying.⁶⁶⁶

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When the person reappeared at the side of the shed from which he had disappeared, he held his weapon at high port and scanned above and behind Horiuchi's position. He seemed to be

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⁶⁶⁵ Horiuchi Trial Testimony, June 3, 1993, at 81-82.

⁶⁶⁶ Id. at 82.

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looking for the helicopter. The person was "watching the helicopter, and at times he would kind of bring his weapon up and [Horiuchi] perceiv[ed] that perhaps he was trying to get a shot off."⁶⁶⁸

Holding his weapon high, the person moved along the side of the birthing shed. He turned his back to Horiuchi. It appeared to Horiuchi that the person had seen the helicopter and was attempting to get back to the other side of the birthing shed. Horiuchi believed that the person was getting ready to shoot at the helicopter with his rifle, which had a scope.⁶⁶⁹ Horiuchi fired one shot, just as the man suddenly moved along the side of the birthing shed out of sight.

When Horiuchi shot, the man was at the corner of the shed, with his back toward Horiuchi. Horiuchi's "sight picture" showed the man as jumping or moving to a lower position, behind the birthing shed. [

⁶⁷⁰] Horiuchi "assumed that he was raising [his arm] to grab inside the building to spin himself around the corner."⁶⁷¹ Horiuchi acknowledged that when he shot he was aiming at the man's back.⁶⁷²

Horiuchi assumed that he had hit the man or the edge of the birthing shed.⁶⁷³ After he fired, the person "continued to move around the corner of the birthing shed, so -- without any effect, it didn't seem like he was hit at all, so that's why my assumption was that I had missed."⁶⁷⁴

⁶⁶⁸ Horiuchi Trial Testimony, June 3, 1993, at 88, 90.

⁶⁶⁹ Id. at 93; [

] Horiuchi conceded that, although it may not have been effective, he could have yelled to Weaver and Harris to drop their weapons before he fired his first shot. Horiuchi Trial Testimony, June 3, 1993, at 169.

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⁶⁷¹ Horiuchi Trial Testimony, June 4, 1993, at 40-41.

⁶⁷² Id. at 42.

⁶⁷³ Id., June 3, 1993, at 93.

⁶⁷⁴ Id. at 94. However, Horiuchi acknowledged that he knew that the man had been hit "in the back up towards the fleshy part of his arm." Id. at 37.

Horiuchi assumed that the person at whom he had fired was Kevin Harris.⁶⁷⁵ In fact, Horiuchi shot Randy Weaver. After the first shot, Horiuchi decided that he would shoot at this person again, if he got the opportunity.⁶⁷⁶

(2) The Second Shot

According to Horiuchi, after ten to twenty seconds, the man he thought he had initially shot at came back into his view, joined by the other male and the female. Horiuchi observed the male and female run toward the cabin trailed by nine steps by the man Horiuchi thought had been the target of his first shot.

The first two people disappeared behind the open door and, Horiuchi assumed, went inside the cabin. Horiuchi had determined after the first shot that he "was going to shoot at that individual again" because:

⁶⁷⁵ Id. at 103.

⁶⁷⁶ Id., June 3, 1993, at 90-94.

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I believed he was the same individual that had attempted to shoot . . . at the helicopter, and therefore, I assumed that he was moving back to the house to get a more protected location inside the house and I didn't want him back in the house. . . . [K]nowing that the children were inside the house, that would have been my last opportunity to shoot him before he got into the house because I probably would not have shot at anyone inside the house for fear of shooting the children. . . . [H]e would have been more protected inside the house and he could have shot at either me or my fellow agents or the helicopter still flying around at that location, probably knowing that we couldn't shoot back in there without harming some of the children.⁶⁷⁹

Horiuchi fired as Harris approached the porch. Harris was reaching out with his left hand toward the door and taking a last step to the doorway, appearing to be holding the door open or moving someone out of the way. [

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Horiuchi was leading the running target, that is, aiming slightly in front of him as he ran, so that the target subject would, in effect, run into the bullet. The cross hairs of the rifle's scope were on the edge of the door or just on the wood portion of the door.⁶⁸¹ The door was fully open, and Horiuchi could see the entire front face of the door, except for the bottom portion. At the time of the shot, the target had his weapon in his right hand and was reaching out with his left hand.⁶⁸²

Horiuchi saw the individual flinch as if he had been hit and disappear into the doorway. The man reacted like he had been "punched" or hit on the side; he fell behind the door.⁶⁸³

⁶⁷⁹ Horiuchi Trial Testimony, June 3, 1993, at 110-11.

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⁶⁸¹ Horiuchi Trial Testimony, June 3, 1993, at 113 and June 4, 1993, at 12-14.

⁶⁸² Id., June 3, 1993, at 111-15. Horiuchi testified that he could not see through the window in the door.

⁶⁸³ Id. at 126.

Afterwards, Horiuchi heard a female scream for about 30 seconds.⁶⁸⁴ He assumed that the female was screaming because Harris had been hit.⁶⁸⁵ In fact, Vicki Weaver had been fatally shot.

Horiuchi assumed that the individuals preceding the person at whom he shot had gone inside the cabin. He has testified that he did not see anyone standing behind the door when he shot and that he did not intend to shoot Vicki Weaver.⁶⁸⁶

In connection with the 1992 internal FBI shooting incident review, Horiuchi prepared a rough sketch describing the positions of the two people -- Randy and Sara Weaver -- who entered the cabin just before the second shot. The sketch was intended to approximate their positions in relation to the cabin door based on their speed and movement. Horiuchi testified that he could not see them when he fired. Both the sketch and Horiuchi's testimony reflect he believed that Randy and Sara Weaver would have been crouched down behind the door with their heads approximately at the level of Harris' chest at the time of the shot.⁶⁸⁷

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⁶⁸⁴ Id.⁶⁸⁵ Id. at 127.

⁶⁸⁶ Horiuchi Trial Testimony, June 4, 1993, at 62. Horiuchi also testified that at the time Harris was reentering the cabin Horiuchi "knew that [Harris] was trying to move somebody out of the way when [he] shot, and that [Horiuchi] knew somebody was behind [the] door." Horiuchi emphasized that, "[he] wasn't shooting at the individual behind the door, [he] was shooting at Mr. Harris." Id. at 61-62.

⁶⁸⁷ Horiuchi Trial Testimony, June 9, 1993, at 21-22. For a discussion of the discovery issues surrounding the Horiuchi Shooting Incident Review sketch, see Section IV(M)(2), infra.

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h. Initial Surrender Announcement

Following the shots, the helicopter landed at the command post. HRT Commander Rogers ran to the Tactical Operations Center and received confirmation that Horiuchi had fired.⁶⁹³

Rogers and FBI Special Agent In Charge Eugene Glenn agreed to deploy the armored personnel carriers to establish communications with the Weaver cabin.⁶⁹⁴ The hostage telephone, telephone wire, and other necessary equipment were on the

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⁶⁹³ Rogers Trial Testimony, June 2, 1993. at 66-67.

⁶⁹⁴ Id. at 67.

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carriers. At approximately 6:15 p.m., the two carriers were driven to the cabin area[

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Once they arrived at the cabin area, [] gave the prearranged surrender announcement. He told the cabin's occupants about the arrest warrants for Weaver and Harris and asked Weaver to accept the telephone so that negotiations for his surrender could proceed. 696 [

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] There was no response from the cabin.

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3. Discussion

a. FBI Rules of Engagement

(1) Factors Considered in the Formulation of the Rules of Engagement

In our view, the information available to FBI supervisors justified their apprehension and their anticipation of extreme danger during the initial stages of the FBI response to the crisis at Ruby Ridge. [

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] HRT Commander Rogers testified that the HRT did not know for certain that the Weaver/Harris group was inside the cabin when the snipers were deployed. Nor did he know whether Weaver knew of the presence of law enforcement or of the withdrawal of the

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marshals.⁶⁹⁸ In crafting the Rules of Engagement, Rogers had to consider the possibility that the subjects were in firing position and that they were scattered around the area.

Rogers believed that the fact that the marshals had been rescued and that Degan's body had been taken off the mountain did not alter the potential danger. He found no evidence that the mind-set of the people who had killed Degan had changed. They had not surrendered or attempted any explanation for the death, and Rogers had no reason to believe that Degan's death had been accidental. As far as he knew, the Weaver/Harris group was prepared to kill other law enforcement officers.⁶⁹⁹

Vicki Weaver's diary reflect their knowledge that the gunfight at the "Y" was with law enforcement.⁷⁰¹

(2) Approval of the Rules of Engagement

⁶⁹⁸ Rogers Trial Testimony, June 3, 1993, at 64.

⁶⁹⁹ Rogers Trial Testimony, June 2, 1993, at 30.

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⁷⁰¹ For example, Vicki Weaver described the dog chasing "servants of the New World Order" down Farnsworth Road. Diary Entry, August 21, 1992.

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The Rules of Engagement were initially formulated while Commander Rogers was en route to Idaho. Rogers testified that FBI Assistant Director Larry Potts approved the Rules of Engagement during that flight before Rogers landed in Idaho. The three people, who discussed the Rules of Engagement that evening, recall the proposed Rules differently.

Potts recalled approving the following Rules:

1. [A]ny adult with a weapon who was observed in the vicinity of Randy Weaver's cabin or the firefight area, could be the subject of deadly force.
2. [A]ll efforts be made to avoid any confrontation with the children, but if such a confrontation became unavoidable, that faced with the threat of death or grievous bodily harm, the standard FBI use of Deadly Force Policy would be in effect.

Potts claimed that he had approved these Rules of Engagement, that they were consistent with the FBI's deadly force policy⁷⁰²]

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]Potts was made aware that before the deployment Glenn and Rogers modified the Rules of Engagement by changing the words "any adult" to "any adult male."⁷⁰³[

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Potts [] did not realize the Rules had been changed from deadly force "could" be employed to deadly force "can and should" be employed until after the crisis was resolved. However, he believes that "should" does not mean "must" and that it only serves to heighten the awareness of the threatening situation at hand.⁷⁰⁴

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Danny Coulson, Deputy Assistant Director of the FBI at the time, also recalled the Rules as formulated as using the term "could" as opposed to "can and should." He too was unaware that the proposed operations plan contained Rules of Engagement that used the term "deadly force can and should be employed".⁷⁰⁵

A lack of documentation in the FBI files made our review of the approval of the Rules of Engagement very difficult [

[there are no notes or records of Potts' and Coulson's initial approval of the Rules. Moreover, We find this lack of documentation significant and serious.]

The failure to record and preserve significant events, meetings, and discussions should be corrected.

On Saturday, August 22, written Rules of Engagement were approved by Glenn, and sent by facsimile to FBI Headquarters as part of an operations plan sometime between 2:30 and 3:00 p.m. (PDT). Glenn approved the written Rules in the morning in their original form and again in the afternoon, as modified to cover only armed adult males as subjects of deadly force before a surrender announcement. That plan was not approved. A negotiations strategy was requested [

Coulson reviewed the plan up to the point where a negotiation strategy should have been detailed. Finding none, he decided not to approve the plan and notified Potts of his decision.⁷⁰⁶ [

Before briefing the sniper/observers on the Rules of Engagement, Rogers asked Glenn if FBI Headquarters had approved

[Having spent the previous evening at Headquarters, Potts was at home when the operations plan arrived.]

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It is our conclusion that Rogers justifiably believed that the Rules of Engagement provided to the HRT and SOG personnel were fully authorized. On the trip to Idaho, Rogers had received oral authorization for the use of special Rules from Potts and Coulson.⁷⁰⁹ Finally, before the snipers were briefed on the Rules and deployed, Rogers secured Glenn's acknowledgement that FBI Headquarters had approved the final version of the Rules.

Although we found no written record reflecting approval of the Rules of Engagement, Potts acknowledged that he approved a version of the Rules early in the crisis without the word "should" and with the understanding that Glenn had authority to limit the Rules to "adult males" without Potts' approval. [

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(3) The FBI Standard Policy on the Use of Deadly Force and the Constitutionality of the Rules of Engagement

The FBI's Standard Deadly Force Policy states that:

Agents are not to use deadly force against any person except as necessary in self-defense or the defense of another, when they have reason to believe they or another are in danger of death or grievous bodily harm. Whenever feasible, verbal warnings should be given before deadly force is applied.⁷¹¹

The purpose of the policy is to inform agents of circumstances when the use of deadly force in the line of duty is appropriate and to prohibit the use of deadly force in other circumstances. According to the FBI's training materials, the policy's importance is its uniformity of instruction, utilization, and administrative review. Such uniformity eliminates uncertainty and confusion.⁷¹²

"Deadly force" is defined in the policy as force likely to cause death or serious bodily injury. Under FBI policy, deadly force is justified, if the subject is likely to cause death or

⁷¹⁰(...continued)

⁷¹¹ FBI Deadly Force Policy, November 1992, at 1.

⁷¹² Training Materials on the FBI Deadly Force Policy, November 1992, at 1.

serious bodily injury if not controlled and deadly force is necessary to achieve control safely. When deadly force is permissible, agents are instructed to utilize the amount of force reasonably necessary to eliminate the threat they face. When feasible, verbal warnings should be given before deadly force is applied, and, when a subject may be granted an opportunity to surrender without exposing agents or the public to unreasonable danger, the policy requires that the opportunity be given.⁷¹³

The FBI's standard deadly force policy comports with the constitutional standards enunciated by the U.S. Supreme Court in Tennessee v. Garner, 471 U.S. 1 (1985), and Graham v. Connor, 490 U.S. 386 (1989). Garner requires that the officer have probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, before using deadly force to prevent escape. The standards for objective reasonableness set forth in Graham are considerably more explicit than those in Garner and also require consideration of whether the suspect poses an immediate threat to the safety of the officers or others.⁷¹⁴ The preconditions in the FBI's deadly force policy for the use of deadly force are essentially the same as those stated in Garner, that is, that deadly force may be used to protect oneself or others against death or grievous bodily harm. The FBI's deadly force policy also includes a provision for giving warnings, when feasible, as mandated by Garner.

We are considerably less sure about the constitutionality of the Rules of Engagement in effect on August 22, 1992 than we are about the FBI's standard deadly force policy. The Rules provided:

1. If any adult in the area around the cabin is observed with a weapon after the surrender announcement had been made, deadly force could and should be used to neutralize the individual.
2. If any adult male is observed with a weapon prior to the announcement deadly force can and should be employed if the shot could be taken without endangering any children.
3. If compromised by any dog the dog can be taken out.

⁷¹³ Id. at 2-3.

⁷¹⁴ The provision for warnings found in Garner, which is also part of the FBI Standard Deadly Force Policy, is absent in Graham.

4. Any subjects other than Randy Weaver, Vicki Weaver, Kevin Harris presenting threat of death or grievous bodily harm FBI rules of deadly force apply.

We believe that these Rules contain serious constitutional infirmities. [

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]these Rules of Engagement created an atmosphere in which the sniper/observers were more likely to employ deadly force than had the FBI standard deadly force policy been in effect.

In addition to the aforementioned problems, we must conclude that the Rules of Engagement were defective for three other reasons. First, they were imprecise. [

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Our second objection to the Rules relates to the impact the Rules had upon the HRT during its deployment on August 22. The Rules seem to have created an atmosphere [a "more offensive mode." [

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Our final objection to the Rules is that they were an unconstitutional departure from the FBI's standard deadly force policy. [

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]we must conclude that the Rules in effect were unconstitutional. [

b. Initial Deployment of Law Enforcement Personnel to Ruby Ridge.

The FBI viewed the situation at Ruby Ridge as extremely dangerous. Potts, the Assistant Director of the Criminal Investigative Division of the FBI, feared that casualties would be sustained in the attempt to establish a perimeter at the crisis site. He characterized the situation at Ruby Ridge as "the most dangerous situation the HRT has ever gone into."⁷¹⁷ Similarly, Coulson, the Deputy Assistant Director of the Criminal Investigative Division of the FBI at the time, assessed the situation as posing an extreme risk to law enforcement personnel.

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]we have concluded that Morrison's decision not to shoot the two armed males on sight is probably a testament to his training, given the Rules on which he had been briefed at least three times that day. [

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The first priority of the FBI at Ruby Ridge was to secure and control a perimeter around the Weaver cabin to ensure the safety of law enforcement personnel and to prevent the escape of those who may have been involved in the exchange of gunfire the previous day. In addition, the FBI wanted to obtain information about the situation based upon firsthand observation rather than having to continue to rely upon the reports from other law enforcement agencies.

We agree that the deployment of tactical personnel at Ruby Ridge to establish a perimeter around the Weaver cabin was a sound decision. [

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strategic step by the FBI to deploy HRT sniper/]the initial
members of the Marshals Service SOG around the cabin was
appropriate.
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c. The HRT Rifle Shots Fired on August 22, 1992

(1) The Applicable Standard for Review

The Fourth Amendment provides persons with the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and this right extends to those persons suspected of actual or anticipated criminal wrongdoing. When police officers arrest a criminal suspect, they make a seizure, thereby bringing their conduct within the protection of the Fourth Amendment. The Fourth Amendment and the case law emanating from it provide that, while there are important governmental interests in effective law enforcement,

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Horiuchi acknowledged at trial that he could have stood up and told Weaver and Harris to drop their weapons. However, he also testified that "yelling may not have been effective" and that he "didn't have the time or the distance or probably the voice loud enough to yell at either Weaver or Harris to drop the weapon." Horiuchi Trial Testimony, June 3, 1993, at 169.