

Thus, all factors considered, we acknowledge that the Marshals Service had no option but to respond.

Because the Marshals Service had no option but to pursue Weaver's arrest and because that arrest posed possible injury to law enforcement and to the Weavers, it was incumbent on other law enforcement agencies and the court to assist the Marshals Service in resolving the impasse. As we note below, the Marshals Service received little practical assistance from the U.S. Attorney's Office, which also hindered communications with the court.

b. Consideration by Marshals Service of Alternatives to Secure the Arrest of Weaver

The Marshals Service explored many different options for securing Weaver's arrest before settling on a plan in May 1992. The record is replete with discussions of proposals made by different components of the Marshals Service. Its approach was extraordinarily cautious.

Common to each strategy the Service considered was a concern for the safety of the Weaver children and the arresting marshals. For this reason, a tactical approach, that is, an armed raid on the residence, was considered unrealistic by the Idaho marshals as early as March 1991.

In March 1992, Director Hudson ruled out any "tactical" or "operational" strategy that did not eliminate the possibility of harm to Vicki Weaver or her children.

262 (...continued)

263
264

b5 [

b6

b7/b7c
b6

b6
b7c

264]

[
b5/
b7c
b6

b5/b7c
b6
b6
b7c

]]]

]

**Page 86 of Report
has been withheld
in its entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)**

[We found no countervailing evidence that Weaver would surrender peacefully. Accordingly, we believe that the wariness of the Marshals Service was justified.

[In addition, we believe that the caution of the Marshals Service also stemmed from its experience with Gordon Kahl, the head of Posse Comitatus. When the Marshals Service attempted to arrest Kahl in 1983, a firefight erupted in which two marshals were killed and Kahl [wounded. ²⁷¹]

[Both the Special Operations Group and Director Hudson asked U.S. Attorney Ellsworth to dismiss the indictment against Weaver and to re-issue it under seal to reduce the pressure to arrest Weaver and to trick him into leaving his property so that he could be arrested without risk to the children. Ellsworth [refused Hudson's request. ²⁷⁴]

²⁷¹ [Kahl evaded arrest and was killed in a second confrontation. A local sheriff was also killed in that conflict. "Radical Tax Protester's Legacy Lives," UPI, July 9, 1983; Untitled article by Gordon Hanson, Associated Press, February 14, 1983.]

²⁷² [

²⁷³ [

²⁷⁴ [

(continued...)

b5

b5/
b7C
b6

b5/
b7C
b6

b6
b7C

b5/
b7C
b6

b6
b7C

b5/
b7C
b6

b5
b6
b7c

213]

b6
b7c
b6
b7c
b7c
b7c
b7c

Beginning in October 1991 [] initiated a series of communications with Randy Weaver through various intermediaries, []

The marshals and Weaver also exchanged surrender terms. However, [] ended these discussions in October 1992, directing that all communication with Weaver be through his counsel.

The "non-tactical" arrest plan that Director Hudson finally approved in the Summer of 1992 was passive almost in the extreme. Indeed, the marshals were willing to wait up to a year for an undercover marshal to gain Weaver's trust. Under this plan, "cover" teams of marshals would arrest Weaver only if he could be taken into custody without harm to his family.²⁷⁶

We do not believe that the Marshals Service acted precipitously or unreasonably in developing its plan to arrest Weaver. The Marshals Service examined many alternatives in devising its course of action. Some options were foreclosed by other agencies; others were thought to be too dangerous. The Marshals Service eventually decided to pursue a non-tactical arrest which posed the least threat of physical violence. However, the Marshals Service recognized that with any plan that it considered, a potential risk of violence existed considering Weaver's threats to resist arrest violently.

c. Pressure Exerted on Marshals Service to Arrest Weaver

This investigation also examined whether the manner in which the Marshals Service treated the charges against Weaver was affected by improper, external influences.

274 (...continued)

b5
b7c
b6
b5

275 []

276 []

b5
b7c
b6

]

(1) The Court

Judge Ryan issued a bench warrant for Weaver's arrest following his failure to appear for trial. When he learned a week later that Pretrial Services had sent Weaver a letter bearing an incorrect trial date, Judge Ryan declined to withdraw the warrant. [

b6
b7C

.277]

[

b5/
b7C
b6

.278]

b6
b7C

[Do not believe that the Court exerted undue pressure on the Service,²⁷⁹ and we have found little or no evidence to the contrary.]

b6
b7C

277 [

]

278 [

b5/
b7C
b6

b6
b7C

279 [

]

]

(2) The Media

[

b5/
b7C
b6

280]

In March 1992, an article appeared in the Spokesman Review, a newspaper in nearby Spokane, Washington, marking the one-year anniversary of the bench warrant. The Chicago Tribune published a similar article on the same day, which described Weaver as a "folk hero" holding the Marshals Service at bay.²⁸¹]

b5/
b7C
b6

280 [

b5/
b7C
b6

²⁸¹ One week later, the story was picked up by the Associated Press and articles appeared in the New York Times (March 12, 1992) and the San Francisco Chronicle (March 13, 1992). On March 27, 1992, the San Francisco Examiner ran the Chicago Tribune article.]

b6
b7C

281 []

b6
b7C

281 []

]]

(3) The U.S. Attorney's Office

The USAO, in particular U.S. Attorney Ellsworth and [] played a large role in shaping the Marshals Service's approach to arresting Weaver. []

(i) Halting Negotiations

In October 1991, [] began a series of communications with Weaver through intermediaries and exchanged terms of surrender with him. [] directed the marshals to discontinue contact with Weaver because he was represented by counsel, thus, effectively foreclosing communication. Although we are not convinced that these negotiations would have been successful if pursued, []

[] Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct, provide that an attorney shall not communicate with a party represented by counsel, unless the attorney has the consent of counsel or is "authorized by law."²⁸⁴ The disciplinary rules have long recognized exceptions to the general prohibition against contacts with represented persons such as to determine if the person is in fact represented by counsel or when counsel has been given prior notice of the communication and consents.²⁸⁵

[] It was apparent by the Autumn of 1991 that Weaver was not cooperating with his appointed counsel who nine months earlier had told Judge Ryan

²⁸⁴ This limitation includes communications made through third parties. See ABA Model Rule 8.4(1).

²⁸⁵ The Department of Justice has historically authorized limited contacts to determine whether a person believes counsel is representing his or her interests. See Memorandum from Attorney General Dick Thornburgh, "Communication with Persons Represented By Counsel", June 9, 1989.

that he was unsuccessful in contacting Weaver.²⁸⁶ [

b5/
b7C
b6

287]

[

b3
6(e)

b5/
b7C
b6

]

b6
b7C

²⁸⁶ Hearing Transcript, February 20, 1991, at 2-6; [.] Hofmeister had sent four letters to Weaver's post office box advising him of the February 20 trial date and requesting a meeting. Hofmeister did not receive a reply and the letters were not returned. Hearing Transcript at, 2-6. []

b6
b7C

²⁸⁷ Letter from Everett Hofmeister, Esq., to Mr. & Mrs. Randy Weaver, July 10, 1991, at 2. This letter was found in the Weaver cabin, with notations, during a search in September 1992.

b5/b7C/b6

288 []

b3
6(e)

289 []

b5/
b7C
b6

290 []

b5/
b7C
b6

291 []

b5/b7C
b6

]

[

b5/
b7C
b6

(ii) Other Actions

[

b5/
b7C
b6

In March 1992, Director Hudson asked Ellsworth to consider dismissing the warrant against Weaver and reissuing it under seal. Hudson explained that the marshals thought an

b6
b7C

292 []
293 []

b5/
b7C
b6

294 []

b6
b7C

b6
b7C

295 []

]

]

]

assault on the Weaver residence would pose unacceptable risk of injury to the Weaver children and Marshals Service personnel. Ellsworth [] refused to dismiss the indictment, citing Judge Ryan's call for the arrest of Weaver. When Hudson offered to speak to Judge Ryan, Ellsworth did not respond to the offer.

b6
b7c

[

b5/
b7c
b6

]

[

b5/
b7c
b6

[] we conclude that the delay occasioned by Hudson's confirmation did not cause the need for additional surveillance but rather, at the most, altered the timing of surveillance that would have been necessary to conduct in any event.

b6
b7c
b6
b7c
b6
b7c

296 []
297 []
298 []

]

]]

4. Conclusion

The Marshals Service is required by statute to execute arrest warrants. Consequently, once a warrant was issued for Randy Weaver's arrest, the Marshals Service had no choice but to undertake efforts to apprehend Weaver. Faced with Weaver's repeated threats to violently resist arrest, the Marshals Service explored many alternative plans designed to capture Weaver, but to do so without harming Weaver, his family or the arresting officers. We believe that the Marshals Service acted properly and with due caution in pursuing this purpose. Moreover, we found no evidence that the Marshals Service was pressured by outside entities or was improperly motivated in its efforts. We find, however, that the court and the U.S. Attorney's Office did not appreciate the difficulties facing the Marshals Service, and made no effort to assist the Marshals Service in devising a peaceful solution to the problem.

D. Marshals Service Activities Between August 17 and August 21, 1992

1. Introduction

The defendants' attorneys alleged in pretrial motions that the marshals went to the Weaver property on August 21, 1992 to engage the Weavers and to force a violent confrontation.²⁹⁹ Counsel pointed to several facts, which, they alleged, proved that the marshals intended "something quite in excess of a mere 'reconnaissance mission.'" These alleged suspicious facts included bringing a "suppressed" rifle on the mission and spending "several hours sighting their guns" before the August 21 incident.³⁰⁰ Counsel also suggested that the marshals initiated the exchange of gunfire on August 21 and that they deliberately killed Sammy Weaver. Finally, there have been allegations that the marshals exaggerated the amount of fire they received at the "Y," that they tried to cover up the death of Sammy Weaver, and that they delayed interviews with the FBI to enable them to coordinate their accounts of the shootings.

2. Statement of Facts

a. Preparation for Surveillance

In August 1992, Roderick [] assembled the team which would conduct the surveillance necessary before the undercover plan could be placed in effect. This surveillance team was comprised of Roderick, Cooper, and Deputy Marshals Thomas, Norris, and Hunt.³⁰¹ In addition [] requested that an SOG member participate in the surveillance preceding the undercover operation.³⁰² [] selected Bill Degan, Commander of the Northeast Task Force in Boston and a close friend of Roderick and Cooper, to be the SOG representative on the team.³⁰³ []

²⁹⁹ Defendants' Memorandum, January 6, 1993, at 3-5.

³⁰⁰ Id. at 3.

³⁰¹ Norris is a medic. []

³⁰² [] []

³⁰³ Roderick, Degan and Cooper had been members of SOG. Cooper testified that he and Degan "were like brothers." Cooper Trial Testimony, April 15, 1993, at 15. At the time of the assignment, only Degan was an active SOG member. Id. at 15.

b6
b7c

b6
b7c

b6
b7c

b6
b7c

b5/
b7c
b6
b6
b7c

b6
b7c [the purpose of the mission was simply to
gather intelligence.³⁰⁶]

b5 [

]

[On August 17, 1992, Degan, [and [] arrived in Spokane, Washington. [] Thereafter, the
team drove to Sandpoint, Idaho, to set up a command post at the
condominium on Schweitzer Mountain that [] team had used
in April. []

b5/
b7c
b6

]

b6
b7c

304 [

]

305 [

b5/
b7c
b6

]

306 [

b6
b7c

] 307 [

b5/
b7c
b6

308 [

]

b5/
b7c
b6

]

Roderick decided that the team would survey the Weaver property on Friday, August 21

b5/b7C
b6

]

In preparation for the mission, the marshals had acquired three .223 caliber M16 rifles from the Spokane office. Roderick believed that additional weapons were needed and mentioned the shortage to Degan, who had access to additional weapons from a SOG training display in Boston. Roderick told Degan to bring some of the rifles and other equipment with him.³¹⁶ Thereafter, Degan shipped a .223 caliber M16A2 Colt Carbine, a "sniper" rifle, a shotgun, and a "suppressed" .9mm Nato Colt Carbine from a display to Spokane. In addition, the team members brought their personal service weapons.³¹⁷

b. Trip of August 21, 1992 to Weaver Property

[At approximately 2:30 a.m.] on August 21, 1992, the team left the condominium at Schweitzer Mountain in a van and a four wheel drive Jeep and drove to the residence of [] where they left the van. They then drove the Jeep to [] where they arrived at approximately 4:30 a.m. and parked the Jeep []

b7C
b6

The plan was for the marshals to move under cover of darkness to surveillance positions and then to leave after a few hours of surveillance. []

b5/b7C
b6

[] Each marshal was equipped with

³¹⁴ (...continued)

[

b5/b7C
b6
b6
b7C

³¹⁵ []

³¹⁶ Roderick Trial Testimony, May 20, 1993, at 117.

³¹⁷ Roderick Trial Testimony, May 20, 1993, at 119, 122;

b6
b7C [

³¹⁸ [

b5/b7C
b6

(continued...)

]

radios and night vision equipment and wore camouflage tops, pants, and boots. None wore bullet-proof vests, though they were available.³¹⁹ [

25/ b7C b6] They did not bring the sniper rifle Degan had shipped from Boston.³²¹

b6 b7C The marshals left their Jeep and walked up a trail [to an area known as the "Y". At that location, the group split into two three-man teams. The first team, the Observation Post ("OP") team, was comprised of Hunt, Thomas, and Norris; the second team, the Reconnaissance ("Recon") team, was comprised of Roderick, Cooper, and Degan.

The OP team left the Y and took the left fork of the trail through a canopy of trees and a fern field. They then turned right and proceeded up the hill to the north switchback road which led to the observation post, which had been located during one of the Phase II surveillance trips. The observation post was approximately 900 feet in elevation above, and one half to three quarters of a mile from the Weaver compound, and was located at a spot on the north ridge referred to as the "white pine tree."³²²

While the OP team was on its way up the mountain, Roderick led Degan and Cooper up the trail from the Y toward the Weaver compound. The team stopped at the edge of a cover of trees about 250 to 300 yards from the entrance to the Weaver driveway. From

[³¹⁸ (...continued)

b5/ b7C b6] ³¹⁹ Roderick Trial Testimony, May 20, 1993, at 125, 159; Cooper Trial Testimony, April 15, 1993, at 23.

b6 b7C b6 b7C] ³²⁰ [

b6 b7C] ³²¹ [Roderick testified that the sniper rifle was inappropriate for a reconnaissance mission. Roderick Trial Testimony, May 20, 1993, at 136.

b6 b7C] ³²² [

there, Roderick pointed out the rock outcropping where the Weavers responded to vehicles and other noises.³²³ [

b5/ b7C
b6

³²⁴] The Recon team returned to the Y as it was starting to become light.

By now the OP team had reached the observation post.³²⁵ The OP team was equipped with a spotting scope, a still camera and an 8mm video camera. Once in position, the OP team was to watch the Weaver compound while Roderick, Cooper and Degan scouted the area. The two teams maintained contact by radio

b5/ b7C
b6

³²⁶]

Soon after its arrival, the OP team began to observe activity in the compound. They saw Sammy Weaver and Kevin Harris conduct a security check around the house. During the early morning hours the dogs barked periodically [

b5/ b7C
b6

³²⁷

³²³ [April 15, 1993, at 45.

] Cooper Trial Testimony,

³²⁴ [

b5/ b7C
b6

³²⁵ [

b5/ b7C
b6

³²⁶ [

] The radios were attached to the waistband of the marshals' pants. Each radio was equipped with a "surveillance kit," a wire connected to an ear piece, and a microphone which could be attached to the marshals' hands or lapels. Cooper Trial Testimony, April 15, 1993, at 42-43. Each marshal could hear the others as they spoke. Thomas Trial Testimony, June 2, 1993, at 11.

b6
b7C

³²⁷]

Thereafter, Roderick, Cooper, and Degan went to join the other marshals at the observation post.

The OP team reported that members of the Weaver family had run to the outcropping several times in reaction to the dogs' barking. On each occasion, the persons running to the outcropping varied, but usually Harris and Sammy Weaver were among them. Norris stated that, using the spotting scope,

The Recon team stayed at the observation post briefly and watched the Weaver family with binoculars and spotter scopes. They also discussed different approaches to the property and the layout of the compound, including the various outbuildings and their possible purposes.

³³² They found the position near a birch stand on a large rock embedded in a hill some 200 to 250 yards from the Weavers' cabin.³³³ Roderick and Cooper then left Degan and crawled down to another rock approximately fifty yards below the first rock.³³⁴ This point lined up with the

328

329

334

333

332

³³³ Roderick Trial Testimony, May 20, 1993, at 172-73.

³³⁴ Roderick Trial Testimony, May 24, 1993, at 12, 191.

b5
b7C
b6

b5
b7C
b6

b6
b7C

b5
b7C
b6

b6
b7C

b5
b7C
b6
b7C b6

b6
b7C

b6
b7C

base of the Weaver driveway, approximately 100 to 150 yards away. Roderick and Cooper observed family members take up positions at the rock outcropping whenever the dogs barked.³³⁵ They also observed their movement back and forth between the outhouse, the cabin, and other outbuildings.

It was at this time that Roderick decided to toss some rocks to test how the sound would carry and to see if the dogs would react.³³⁶ He asked the OP team to observe the results.³³⁷ Roderick then threw the first rock. Roderick, Cooper, and Degan did not hear the first rock hit, and the OP team reported that there was no reaction from the people who were inside the cabin or the dogs in the Weaver compound. Roderick threw a second rock and again no response occurred from the Weaver compound.³³⁸

Approximately fifteen minutes later, Roderick and Cooper rejoined Degan, and the three backtracked to the "switchback" road. They had spent roughly a half hour at the birch stand observation point. Roderick decided to show Cooper and Degan the garden/spring house area below the house. At that time, they were still looking for places to station cover teams for the undercover operation.³³⁹

b5
b7c
bc

]

³³⁵ Roderick testified that this position was near where he had observed Weaver meet the [] in April. Id. at 13.

b6
b7c

³³⁴ []

b6
b7c

³³⁷ []

b6
b7c

³³⁶ []

b5
b7c

³³⁹ Roderick Trial Testimony, May 24, 1993, at 11, 14, 17.

b6

b5
b6
b7c

³⁴⁰ []

b5
b7c
bc

]

341

b5/b7C
b6

Before proceeding to the garden/spring house area, Roderick informed the OP team of his intention and asked that he be advised of any movement in the compound as they were heading into the "hot" area, which was the marshals' code for the land immediately surrounding the Weaver compound.³⁴³

b5/b7C
b6

After receiving this information, Roderick moved forward slowly, followed by Cooper and Degan. He indicated to Cooper and Degan several possible cover team positions. As they were getting ready to leave the spring house area, Thomas radioed that the Weavers were "responding" to an approaching vehicle.³⁴⁵ The dogs began to bark, and people started to run out of the cabin.³⁴⁶

b5/b7C
b6

Vicki Weaver remained in the compound area.

Roderick expected that the Weavers would assume their normal defensive positions. He instructed Cooper and Degan to take

b6
b7C
b6
b7C

34 []
342 []

³⁴³ Roderick Trial Testimony, May 24, 1993, at 20. The marshals agreed to use language designed to make anyone monitoring their communications think that they were with the Forest Service. Cooper Trial Testimony, April 15, 1993, at 66;

b6
b7C
b6
b7C

344 []
345 []

b5/b7C
b6
b6
b7C

346 []
347 []

b6
b7C

[cover. 348

b5/
b7c
b6

Roderick then saw a large Labrador retriever running toward his position, followed by Kevin Harris, carrying a rifle.³⁵²]

[

b5/
b7c
b6

b6
b7c
b6
b7c

348 []
349 []
350 []

b5/
b7c
b6

b6
b7c

351 []

b6
b7c

352 Roderick Trial Testimony, May 24, 1993, at 26; []

353 []

b5/
b7c
b6

]]

[

b5/b7c
b6

Kevin Harris claimed that, from the intensity of the dog's reaction, he thought that there was "a large animal or a person" in the vicinity.³⁵⁵ Vicki Weaver wrote in her journal on August 21, 1992:

Randy, Kevin and Sam go down past the pump house to see what's bothering the dog. He apparently made the servants of the New World Order retreat down Farnsworth Road. They followed the dog part way down³⁵⁶

b6
b7c

Roderick told Cooper and Degan that a dog and a man with a rifle were running toward them and that they had to move out.³⁵⁷

³⁵⁸ Roderick took the lead as the marshals fled through the woods. The area was thickly forested, and the marshals made a great deal of noise as they ran.³⁵⁹ As they fled down the mountain, the marshals stopped several times to determine whether they were being pursued and saw that they were.

b6
b7c

354 []

b6
b7c

355 []

³⁵⁶ The entry ended abruptly. Journal Entry of Vicki Weaver dated August 21, 1992.

³⁵⁷ Roderick Trial Testimony, May 24, 1993, at 20.

³⁵⁸ []

b5
b7c
b6

³⁵⁹ Roderick Trial Testimony, May 24, 1993, at 31. Cooper testified that they were trying to escape at that point and were no longer worried about making noise. Cooper Trial Testimony, April 15, 1993, at 65.

]

During the retreat, Roderick said that the dog might have to be killed because it had picked up their scent.³⁶⁰ Roderick noted that each time he and the others turned to look, the dog and Harris were closer to them.]

b5/
b7C
b6

Roderick was still leading Cooper and Degan when they broke from the woods into the fern field. Roderick chose the fern field because it provided the quickest retreat and allowed them to move with the least noise. At that time, he thought that they could still escape.³⁶⁴ They ran through the fern field and under the tree canopy. Roderick was farthest from Harris and the dog, with Degan ten yards behind and Cooper another ten yards behind Degan. As Roderick turned to look back, he saw the dog, Harris, and, for the first time in the pursuit, Sammy]

b6
b7C

360 [] Cooper decided while they were running that it might be necessary to "take out" the dog. He decided to use the suppressed .9mm for that purpose. Cooper Trial Testimony, April 15, 1993, at 95-96; []

b6
b7C

b6
b7C

361 []

362 []

b5/
b7C
b6

b6
b7C

b6
b7C

363 []

364 []

] Roderick testified that while they were running from Harris and the dog, they could have stopped and taken up defensive positions several times. "[I]f we hunkered down low to the ground, the way we were dressed, we probably could have taken them out" at several points along their escape route. They did not, though, because they "were still under orders not to have a confrontation with the Weaver family." Roderick Trial Testimony, May 24, 1993, at 33, 35.

Weaver.³⁶⁵ Cooper thought that he might have to shoot the dog and stayed behind Roderick and Degan in case that became necessary.³⁶⁶

Cooper did not see Harris until after he was through the fern field and into the canopy of trees leading to the Y. [

b6
b7c] He urged them to take up defensive positions.³⁶⁷ The others agreed. Roderick cleared the canopy first and entered the Y. Degan arrived at the end of the canopy and took a position behind a stump approximately three to four feet off the right of the trail.³⁶⁸

c. Shooting at the Y

There is a significant difference between the account of the events at the Y given by the marshals and the account provided by Randy Weaver and Kevin Harris.³⁶⁹ All agree that Harris shot and killed Deputy Marshal Degan and that Deputy Marshal Roderick shot and killed the dog. Although the marshals did not realize until several days later that Sammy Weaver had been shot during the encounter, they agree now that he was wounded in the arm and fatally shot in the back during the exchange of gunfire. However, the sequence of these events, and, in particular, the timing of Sammy Weaver's death, remains contested, as does the identity of the person who shot Sammy Weaver. The events comprising the shootout at the Y occurred very quickly, and the participants' perspectives often blended together and occasionally were in conflict. Thus, the following narrative represents our best effort to present the most accurate chronology of the events that occurred at the Y based on the information provided to us during our investigation.

³⁶⁵ Id. at 38.

b6
b7c ³⁶⁶ [Cooper Trial Testimony, April 15, 1993, at 95-96;]

b6
b7c ³⁶⁷ []

³⁶⁸ Cooper Trial Testimony, April 15, 1993, at 104-105.

³⁶⁹ []

(1) Account of Cooper and Roderick

When Cooper reached the "water bar" at the entrance to the Y, he saw Randy Weaver through the brush approximately 40 feet away coming down the other trail from the Weaver compound. They looked at each other, and Cooper thought Weaver seemed shocked to see him. At the time, Cooper assumed that Roderick and Degan were covering Weaver and he turned his attention to Harris and the dog, which were still behind him. He yelled at Harris, "Back off, U.S. Marshals," believing that they had been set up for an ambush.³⁷⁰

The dog caught up to Cooper, and he held it at bay with his gun. The dog made a 360-degree turn around Cooper, growling and snarling.³⁷¹ Cooper decided not to shoot the dog, fearing that if he did so in plain view of Harris, it would precipitate a gunfight, with both Cooper and Degan fully exposed. After circling Cooper, the dog ran past him and headed towards Roderick. Cooper left the trail and dove behind a rock located about fifteen feet behind Degan and to his right. Cooper did not see Randy Weaver again.³⁷²

Roderick, who was further into the Y, also saw Randy Weaver on the trail leading up to the cabin. Weaver was wearing a camouflage jacket and screamed something unintelligible at Roderick. Roderick yelled, "Stop! U.S. Marshal" at Weaver. Roderick could not tell if Weaver continued up the trail or went into the woods.³⁷³

Cooper radioed Degan to join him at the "fox hole," but Degan did not respond. He saw that Harris and Sammy were walking directly in front of Degan. Cooper observed Degan squatting on the balls of his feet behind a stump and facing up the trail. Once Harris and Sammy were into the clearing of the Y, six to ten feet past Degan's position, Cooper thought they had escaped detection. Unexpectedly, Degan went up on his left knee, with his weapon on his shoulder and pointed at Harris and Sammy Weaver, and said, "Stop! U.S. Marshal." Cooper, almost

³⁷⁰ Cooper Trial Testimony, April 15, 1993, at 106, 251-253;

³⁷¹ Cooper referred to this as "dancing" with the dog. Cooper Trial Testimony, April 15, 1993, at 264.

³⁷² Cooper called this position a "fox hole." Cooper Trial Testimony, April 15, 1993, at 107-108;

³⁷³ [Roderick Trial Testimony, May 24, 1993, at 53-55.

b6
b7c

b6
b7c

b6
b7c

simultaneously joined Degan in saying "U.S. Marshal." However, before Cooper finished the command, Kevin Harris, who had his back to Degan, wheeled around and fired at Degan with a 30.06 rifle. Harris was holding the rifle waist-high when he fired.³⁷⁴ Cooper saw Degan's arm go back as he started to fall. Harris then began to bring his weapon to his shoulder as if he were going to fire again. Cooper, realizing that Degan had been hit, fired a three-round burst at Harris with the "suppressed" .9 mm. According to Cooper, Harris dropped to the ground "like a sack of potatoes." Cooper was convinced that he had hit Harris. Cooper then wheeled his weapon toward Sammy. He could not see whether Sammy had a gun because a tree blocked his view of Sammy's hands. He did not shoot at Sammy because Sammy had not fired at Degan and he did not see Sammy's weapon. Cooper did not think Degan had returned any fire.³⁷⁵

Meanwhile, Roderick had moved south down the path. He heard a shot from his left, from the direction he had last seen Cooper, Degan, Harris, and Sammy. Roderick could not determine who had fired the shot or whether it came from a .223 or 30.06 rifle, although he thought it sounded like a heavy caliber weapon.³⁷⁶ Other than the dog, which was heading toward the path where Randy Weaver had appeared moments earlier, Roderick could not see anyone. When the first shot was fired, the dog stopped and turned its head back toward the marshals. Concerned that the dog would attack or lead Weaver, Harris, and the others toward the marshals if they kept running, Roderick fired once at the dog with his M16 rifle, striking the dog near the base of the spine.³⁷⁷

After he shot the dog, Roderick saw Sammy Weaver enter the Y and run up the trail, away from Roderick and toward where Randy Weaver had disappeared. Sammy called Roderick, "a son of a bitch" and shot two rounds at him from a mini-14 rifle. Roderick dove into the woods off the south side of the trail and took

b6
b7c

374 [

]

b6
b7c

375 [

] Cooper Trial Testimony, April 15, 1993, at

122-34.

b6
b7c

376 [

]

³⁷⁷ Roderick Trial Testimony, May 24, 1993, at 249; [b3
b6(e)
b5/b7c
b6

]

cover behind a tree. He received "constant" fire at that position from weapons that sounded like a shotgun, a handgun, and a rifle.³⁷⁸

During this same period, Cooper heard two shots to his right and Sammy Weaver yelling "You son of a bitch." He then began taking fire and heard Degan call "Coop, I need you." Cooper told Degan that he would be there "as soon as I can get 'em off our ass."³⁷⁹ Cooper rose and fired a second, three-round burst in the direction from which he had last received fire in order to provide cover fire for himself as he tried to get to Degan.³⁸⁰ Following these last shots, Cooper saw Sammy run out of view up the trail to the cabin. Cooper did not think that his shots had hit Sammy Weaver.³⁸¹

When the fire shifted toward Roderick, it allowed Cooper to move to Degan's position.³⁸² Degan had been hit once in the chest.³⁸³ He was lying on his left side, his arm in the rifle sling, making a gurgling noise. He was conscious, but unable to

b6
b7c

378 [] Roderick said that the shooting sounded "like it was all around us. There was bark and other debris flying as bullets hit the ground around me." Roderick Trial Testimony, May 24, 1993, at 100. [

b5/
b7c
b7d

379 Cooper Trial Testimony, April 15, 1993, at 138-39 []

b5/
b7c
b7d

380 [] At trial, and to this investigation, Cooper insisted that he was misquoted and that he had aimed down the barrel of his rifle. Cooper Trial Testimony, April 15, 1993, at 277-84 []

b5/
b7c
b7d

381 [] Cooper Trial Testimony, April 15, 1993, at 135-39.

b6
b7c

b6
b7c

382 []

b6
b7c

383 []

b6
b7c

assist Cooper in moving to a protected position. Within a few moments, Degan lost consciousness and died. [

b5/b7C
b6

³⁸⁴] He radioed to Roderick that Degan had been hit and needed help.

(2) The OP Team

Norris, Thomas, and Hunt were at the observation post overlooking the Weaver property, while Roderick, Cooper, and Degan were being chased through the woods. Norris heard the announcement, "U.S. Marshal" and then a single shot. Two quick shots followed from, Norris believed, a .223 caliber weapon and then he heard a series of discharges.³⁸⁵

Thomas also heard a single shot, which he described as a "heavy caliber." Thomas contrasted the first shot to subsequent fire, which he characterized as "lighter." Hunt told Thomas that he also thought the first shot sounded like a heavy caliber weapon. Thomas glanced at his watch when he heard the first shot and it was approximately 10:30 a.m.³⁸⁶

[

b5/b7C
b6

³⁸⁷]

Hunt, Norris and Thomas then left the observation post to assist the other marshals. They ran to the Y after hearing the shots, they heard yelling from the Weaver property. When Hunt, Norris, and Thomas approached the fern field and turned left into the tree canopy, they received a volley of gun fire from their left side. This gunfire, described as being from different caliber weapons, went over their heads. [

b5/b7C
b6

]

384 [

b6
b7C

³⁸⁵ [] Norris Trial Testimony, June 2, 1993, at 53-54, 62-63, 76-77.

b6
b7C

³⁸⁶ Thomas Trial Testimony, June 2, 1993, at 18; [

b6
b7C

387 [

b6
b7C

]

**Page 113 of Report
has been withheld
in its entirety
pursuant to
5 U.S.C. 552(b)(5),
5 U.S.C. 552(b)(6)
and
5 U.S.C. 552 (b)(7)(C)**

[

S/
b7c
b6

389 (...continued)

b7
b7c
b6

Randy Weaver has also claimed that he went "down to the Y and somebody jumped out in front of me, and yelled something. I headed back toward home, and I heard a shot, and I heard the dog yelp." Harris added, "Somebody shot the dog and, and it just, all the woods exploded with gunfire." Transcript of Interview of Weaver by Tom Brokaw, August 18, 1993, for "Now," NBC News.

b6
b7c

390 [

]

b5/ b7c
b6

d. Events Following the Gunfire

Roderick, hearing Cooper's call for help, radioed the OP team to send Norris, the medic, to the Y. Roderick was unable to see Cooper or Degan but assumed that they were on the trail above him. After requesting assistance, he dove back out onto the trail in a prone position to assess the situation. As he looked for Cooper or Degan, he heard a rifle shot from his right front side and then felt something pass across his stomach. Roderick heard more shots and ran back into the woods for cover, where he received additional fire. After examining himself, Roderick discovered a bullet hole in his shirt but he was not injured.

Shortly thereafter, Roderick heard movement off to his right in the woods across the road. Cooper told Roderick to toss stones so that Cooper could determine where Roderick was and direct him to Cooper's location. Roderick moved through the thicket toward Cooper and radioed their position to Hunt. Both men heard sporadic gunfire from the direction of the Weaver compound and the fern field.³⁹³

Meanwhile, Hunt, Norris and Thomas arrived at the Y.

Norris, the medic, to resuscitate Degan.

] attempted]

.] Norris worked on Degan for a short time before announcing that he was dead.³⁹⁴ Cooper told Hunt and Norris

b5/ b7c
b6

b6
b7c

391 [

b6
b7c

392 []

b6
b7c

393 Cooper Trial Testimony, April 15, 1993, at 160; []

b6
b7c

394 []

]

that Harris had shot Degan and that he believed that he had hit Harris.³⁹⁵ The marshals whispered because noise would bring gunfire in response.³⁹⁶ They fired no additional shots at the Y.

Shortly thereafter, there was a tremendous discharge of gunshots on the trail to the Weaver house, followed by the sound of male and female voices wailing. The marshals also heard cursing; a woman shout, "Yahweh;" a man yell, "you son of a bitch;" and others scream, "You tried to kill my daddy."³⁹⁷ At the time the marshals did not know that Sammy Weaver had been shot in the confrontation.

Roderick, Cooper, and Norris waited in the brush with Degan's body while Hunt and Thomas left for help. Four to five hours later, they heard an aircraft overhead and some gunfire.³⁹⁸ Weather conditions deteriorated as the day

³⁹⁵ [Norris Trial Testimony, June 2, 1993, at 71. Thomas did not recall hearing Cooper say he had shot Harris then. He did, however, receive a radio transmission from Cooper saying this about an hour after Thomas reached the [] house. Thomas Trial Testimony, June 2, 1993, at 22.

³⁹⁶ [Roderick Trial Testimony, May 24, 1993, at 122 ("[E]very time the Weavers heard a sound they just unloaded, they would start firing at any noise they heard").

³⁹⁷ [

³⁹⁸ [Roderick and Cooper assumed that the uproar meant that Harris had died from wounds received during the exchange of fire. Cooper Trial Testimony, April 15, 1993, at 170, April 16, 1993, at 527; []

³⁹⁸ Roderick testified that he heard the plane about two hours after Thomas and Hunt had left. Roderick Trial Testimony, May 24, 1993, at 125. See Norris Trial Testimony, June 2, 1993, at 75. []

[Cooper Trial Testimony, April 15, 1993, at 168; []

progressed, and it started to rain.³⁹⁹ Cooper and Roderick, who decided not to leave without Degan's body, made several attempts to move Degan, but could not.⁴⁰⁰ [

b5/b7C
b6

401]

3. Discussion

a. Alleged Intent of the Marshals to Force a Confrontation with the Weavers

This investigation has revealed no evidence that the marshals went to the Weaver property on August 21, 1992 intending to use deadly force against Randy Weaver or his family. Indeed, the evidence indicates quite the contrary. Months of planning went into formulating the undercover plan, and Director Hudson had explicitly rejected any strategy that might harm Vicki Weaver or her children. We find absolutely no support for the suggestion that Roderick deliberately ignored Hudson's direct orders not to engage the Weavers.⁴⁰²

³⁹⁹ Cooper characterized conditions as "miserable." Cooper Trial Testimony, April 15, 1993, at 185; [

b5/b7C
b6

]

400 [

b5/b7C
b6

]

401 [

b5/b7C
b6

]

402 [

b5/b7C
b6

]

(1) The .9mm Weapon

Defense counsel questioned the marshals' selection of firearms, particularly the .9 mm "suppressed" semi-automatic weapon, and implied that the weapon was brought on the mission expressly to shoot the Weaver dog.⁴⁰³

At the outset, it should be noted that a "suppressed" weapon is not silent. The suppression mechanism reduces firing noise to approximately one-fifth of the noise absent the mechanism. If the marshals had intended to fire a weapon without detection, the Marshals Service had quieter guns available.⁴⁰⁴

The five surviving marshals insist they had not planned to use the .9mm, or any other weapon, to shoot the Weaver dog. Roderick testified that the marshals would have to neutralize the dogs when it came time to arrest Weaver, but that they only planned to conduct reconnaissance on the August mission.⁴⁰⁵

⁴⁰³ Defendants' Memorandum, January 6, 1993, at 4. [

⁴⁰⁴ [.]

⁴⁰⁵ Roderick considered a number of means of controlling the dogs when the time came to arrest Weaver. Deadly force and various chemical products were among the options. However, Roderick did not finalize a plan because the operation never reached the point when arrest was imminent. Roderick Trial Testimony, May 20, 1993, at 149-52, 154.

⁴⁰⁶ []
⁴⁰⁷ [

[
b5/b7C
b6
408] Cooper also said that he decided while they were running that it might be necessary to use the suppressed .9mm to "take out" the dog because it was leading the pursuers to the marshals and endangering their lives.⁴⁰⁹

The .9mm was not used to shoot the dog. Cooper stated that he did not shoot the dog for fear that by doing so in plain view of Harris, it would precipitate a firefight.⁴¹⁰ It was Roderick who shot the dog with his rifle, after hearing a shot fired to his left.

[
b5/b7C
b6
411] We do not find the presence of the weapon suspicious and can envision circumstances in which this type of weapon would be important for a surveillance team, such as when dangerous animals could be encountered.⁴¹²

Although we recognize that the decision to bring the "suppressed" weapon on the mission may seem unusual, we are

b6
b7C
b6
b7C
408 []
409 []
April 16, 1993, at 455-60. []

] Cooper Trial Testimony,

b5/b7C
b6
b7C
b6
410 []
April 16, 1993, at 478.

] Cooper Trial Testimony,

b7C
b6
411 []
412 []

]]

b5/b7C
b6
] The Marshals Service Firearms Policy provides that firearms may be used against animals "to prevent attack that threatens bodily injury." See Memo by Stanley E. Morris, (former) Director, U.S. Marshals Service, June 10, 1988, at 2.

satisfied that there was no preconceived plan to use it or any other weapon to shoot the Weavers or their dog.⁴¹³

(2) "Zeroing" the Weapons

It is common practice to "zero" or readjust the sights of weapons that have been shipped to ensure that they have not been damaged in transit.⁴¹⁴

b6
b7c

Thursday, August 20, Roderick, Cooper, Degan, Hunt, and] on
drove to the firing range and spent about an hour sighting and testing the weapons.⁴¹⁵

b6
b7c

Defense counsel pointed to the marshals' zeroing of their weapons as evidence that they had planned to confront the Weavers.⁴¹⁶ We found no evidence to support this allegation. The marshals' trip to the firing range was made openly, with several local state and federal law enforcement officials present. Contrary to defense claims, it was not "target practice" for the marshals' benefit but rather was nothing more than a precautionary practice in which the marshals routinely engaged. We do not attribute anything suspicious to this outing.

(3) Presence of a Medic on the Surveillance Team

Defense counsel also alleged that Norris, the medic, was brought on the August 21 mission "in obvious anticipation that someone would be injured."⁴¹⁷ Counsels' statement implies the marshals planned a violent confrontation with the Weavers that day. We find no support for such a contention.

413 [

b5/
b7c
b6

414 []

b6
b7c

415 []

b6/b7c

April 15, 1993, at 32; []

] Cooper Trial Testimony,]

⁴¹⁶ Defendants' Memorandum, January 6, 1993, at 3.

⁴¹⁷ Id.

Each prior trip to the Weaver property had medical support.⁴¹⁸ The Weaver cabin is on a remote, heavily wooded mountain, and access to the area is difficult. It is common for a medic to go on an operation under such circumstances.⁴¹⁹

The marshals also could not ignore the fact that the Weavers were constantly armed and were reportedly hostile to law enforcement. We consider the assignment of a medic to the team to be a responsible precaution under the circumstances and not proof that an assault was planned.

(4) Tossing of Rocks

Defense counsel also alleged that Roderick threw rocks "toward the Weaver house" to taunt the Weaver dogs and to provoke a confrontation.⁴²⁰ Although Roderick did throw two rocks, we cannot conclude that this was done for the reason counsel posits.

The rocks at issue were thrown at least 15 minutes before the dogs were alerted by the sound of a vehicle. According to Cooper he suggested to Roderick that they toss rocks "to see what the dogs would respond to" because it was important to know which sounds would draw a reaction from the dogs in case a "cover" team member made a noise while moving into position.⁴²¹]

Roderick distinguished his intent to test for a reaction from the dogs from purposely trying to provoke them. He denied attempting to excite the dogs.⁴²³ Roderick was confident that,]

418 [

bs
b7c
b6
] We note that Norris did not arrange for the medivac helicopter provided for in the Plan because the team did not anticipate contact with the Weavers. Norris Trial Testimony, June 2, 1993, at 63-66.]

419 [

420 Defendants' Memorandum, January 6, 1993, at 4.]

421 Cooper Trial Testimony, April 15, 1993, at 66-67, 88. See Thomas Trial Testimony, June 2, 1993, at 17.

422 [

bs
b7c
b6
] Roderick Trial Testimony, May 24, 1993, at 188-89.

if the Weavers had heard the rocks, they would not have been able to see the marshals and that, if the dogs had reacted, they could not have reached the marshals.⁴²⁴

[
b5

evidence that it was improperly motivated.⁴²⁵]we found no

[
b5

.420]

b. The Initiation of Gunfire At the Y

The prosecution charged at trial that Harris fired at Degan at the Y and set off the chain of events that led to the deaths

b6
b7C

⁴²⁴ [Testimony, May 24, 1993, at 190.

] Roderick Trial

⁴²⁵ [

b5

⁴²⁶ [

b5
b7C
b6

]]

of Degan, Sammy Weaver, and the Weaver dog. The defense countered that it was the marshals, not Harris, who had initiated the gunfire. The jury acquitted Weaver and Harris of all charges that they had assaulted federal officers.

The marshals testified at trial [] The Weavers and Kevin Harris did not testify []

b5

1

(1) Witness Accounts

Cooper was the only witness who saw Harris shoot Degan. He testified that Harris fired first. Harris admitted that he shot Degan, but claimed that he did so after Roderick had shot the dog. It is not disputed that Harris was carrying a heavy caliber 30.06 rifle.

Roderick could not see Harris fire and could not say whether the first shot came from a .223 or 30.06 caliber weapon, though the shot sounded like it came from a heavy caliber weapon. Thomas and Hunt agree that the first shot sounded like a heavy caliber weapon. Harris and Randy Weaver were the only ones at or near the Y with heavy caliber guns. However, Norris thought that the first shot, and the two that followed, came from a .223. Roderick and Degan were carrying .223 caliber M16 rifles.

Thomas, Hunt, and Norris agree about the sequence of the shots. They heard one, then two shots, in quick succession, followed by a barrage of fire. Cooper said that Harris fired once, and then Roderick twice. Roderick said he heard one shot before he fired once or perhaps twice. The physical evidence indicates Roderick fired only once. Hunt, Norris, and Roderick all stated that they heard Degan and Cooper start to identify themselves just before the first shot. Weaver and Harris gave conflicting versions. Weaver said that one of the marshals called out for him to freeze before there was any gunfire. Harris said that the marshals did not identify themselves until after the gunfire had stopped.

(2) Physical Evidence

An inventory of the marshals' ammunition taken on the early morning of August 22 showed that Hunt, Norris, and Thomas did not fire their weapons during the incident. Roderick fired one shot from an M16 rifle. Cooper fired six shots from the .9 mm weapon.

Degan's weapon had been fired seven times.⁴²⁷ This appears to be inconsistent with Harris' claim that there was an "explosion of gunfire" from the marshals.⁴²⁸ We believe that the marshals exercised restraint as to the number of rounds fired. There is no accurate estimate of the number of shots discharged by the Weavers and Harris.⁴²⁹

Sammy Weaver was struck twice in the exchange of gunfire. One round hit him in the right arm, near the elbow, traveling from front to back. This bullet also shattered the stock of his rifle. The second and fatal shot hit the boy in the back and passed through his body, exiting after a slight track from left to right.⁴³⁰

(3) The First Shot

We are presented with diametrically opposed descriptions of events that occurred at the Y. However, we are sensitive to the fact that the gunfight occurred quickly and that all of the participants were under extraordinary stress during and after the shooting⁴³¹ which may have affected the witnesses' perception of events. The physical evidence is inconclusive and provides no assistance in determining who initiated the gunfight, although it is clear that the marshals did not "ambush" the Weavers. Thus, based upon the evidence available, we do not believe we can definitively reconstruct the sequence of fire that occurred at the Y.

427 [

b5/
b7C
b6

428 Defense counsel likewise described the marshal's fire as "wild." Defendants' Memorandum, at 4.]

429 [

b5/
b7C
b6

430 Autopsy Report by Mick Mellett, Boundary County Coroner, August 25, 1992, at 4.]

431 Cooper testified that "all these things [are] compressed into a few seconds, it's difficult to remember exactly what happened first." Cooper Trial Testimony, April 15, 1993, at 264.

c. The Shooting of Sammy Weaver

[

b5/
b7C
b6

432]

Dr. Martin L. Fackler testified at trial for the prosecution as an expert in "wound ballistics." Dr. Fackler concluded that the fatal wound was caused by a .9 mm bullet.⁴³³ Dr. Fackler believed the bullet that caused the fatal wound was similar to the silver tipped bullets used in Cooper's weapon.⁴³⁴

[

b5/
b7C
b6

430]

Degan's M16 rifle fires a .223 caliber round. None of the marshals saw Degan discharge his weapon, though his gun was fired seven times. [

b6
b7C

Dr. Fackler testified that Degan could have fired his weapon after he had been shot in the chest by Harris, although his accuracy would have been impaired.⁴³⁸ However, Fackler did not believe that Degan's M16 caused the

b6
b7C

432 [

]

⁴³³ Trial Testimony of Dr. Martin L. Fackler, June 8, 1993, at 127-28, 185-86.

⁴³⁴ Fackler Trial Testimony, June 8, 1993, at 186.

b6
b7C

435 [

]

b6
b7C

436 [

]

b6
b7C

437 [

]

⁴³⁸ Fackler Trial Testimony, June 8, 1993, at 177, 183. [

b5/
b7C
b6

]