

A Review of Allegations of a Double Standard of Discipline at the FBI



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CHAPTER FIVE

RUBY RIDGE

“Ruby Ridge” is a shorthand phrase for events that occurred in 1992 in Ruby Ridge, Idaho, after an attempt by U.S. Marshals to arrest Randall Weaver on a fugitive warrant. Deputy United States Marshals became involved in a shootout with Weaver, members of his family, and a family friend. A Deputy Marshal and Weaver’s teenage son were killed during the gunfire. A specialized FBI unit was then called in to capture Weaver and the others. During the resulting standoff, an FBI sharpshooter shot and killed Weaver’s wife. Weaver and his family ultimately surrendered. In a federal trial of Weaver, he was acquitted of murder and other serious federal charges.

The conduct of the Deputy Marshals and the FBI in the Ruby Ridge matter also came under close scrutiny, and several internal FBI and DOJ investigations ensued. These internal investigations also came under scrutiny, including questions whether there was an effort in the FBI internal investigations to cover up the original misdeeds.

In January 2001, nearly nine years after the original Ruby Ridge events, the final disciplinary decisions pertaining to the allegations were made by Assistant Attorney General Stephen Colgate, then the head of the DOJ’s Justice Management Division (JMD). Colgate decided, against the recommendations of DOJ OPR and the JMD Assistant Director for Human Resources who was asked to review the matter, that the evidence did not support additional discipline against anyone.

The disciplinary decision in the Ruby Ridge incident has been cited as an example of a double standard in the FBI. We believe that substantial problems marred the original investigation of the Ruby Ridge incident and the disciplinary process that took almost nine years to come to an end. Allegations arose that the FBI investigators who looked into what happened at Ruby Ridge intentionally or negligently conducted poor investigations resulting in a cover-up of misconduct by FBI officials. Although the motivation of the FBI investigators has never been clearly resolved, the evidence brought forth by later investigations showed that the original investigations conducted by the FBI were significantly flawed, perhaps to protect senior officials. These flawed investigations affected the disciplinary decisions.

Following years of subsequent investigations and retirements, only a few officials who were under investigation for the cover-up portion of the case were left to have their cases adjudicated. These final disciplinary decisions were assigned to and decided by JMD, and therefore the final decisions, to the extent that there is disagreement with them, cannot be blamed on the FBI's protection of senior officials. Although we disagree with the ultimate JMD decision, we do not believe that the JMD officials involved were part of a systemic effort to protect senior FBI officials. Rather, we believe that JMD used an incorrect standard in evaluating the evidence. We also believe that the disciplinary actions in Ruby Ridge contributed to the continued perception of a double standard of discipline in the FBI.

Although the original Ruby Ridge incident has been well documented and discussed, the tortured aftermath has not been disclosed previously in one report. We believe that a recitation of the internal investigations and disciplinary process can shed light on what has, up to now, been a process shrouded in secrecy. Accordingly, we explain in some detail the events from Ruby Ridge to the final disciplinary decisions.

Chronology of Events in the Ruby Ridge Investigations

1986	ATF begins to investigate Randall Weaver
June 1990	Weaver indicted, fails to appear in court, arrest warrant issued
August 1992	Standoff begins; FBI activates Strategic Information and Operations Center and Hostage Rescue Team; Rules of Engagement drafted; FBI sharpshooter Horiuchi wounds Weaver and Harris, kills Vicki Weaver
September 30, 1992	FBI Shooting Incident Review Team finds shooting justified
November 2, 1992	FBI holds routine after-action conference; Kahoe later destroys report
November 9, 1992	FBI Shooting Incident Review Group finds no FBI misconduct
April 1993	Weaver and Harris acquitted of murder charges. Weaver convicted of failure to appear and committing an offense on release; Coulson promoted
July 1993	Deputy Attorney General forms special inquiry team headed by Barbara Berman; FBI forms team for investigative support to Berman team
September 1993	Inspectors Robert E. Walsh and Van Harp appointed to lead FBI team assisting Berman
November 1993	Coulson and Kahoe receive cash awards
January 16, 1994	FBI team issues Walsh Report; finds no FBI misconduct

June 10, 1994	Berman inquiry report; concludes rules of engagement were defective and Horiuchi first shot justified, second shot not justified
June 1994	FBI forms Mathews team to review Walsh and Berman reports
June 30, 1994	DOJ OPR issues separate opinion finding both Horiuchi shots were justified
Summer 1994	DOJ Civil Rights Division declines to prosecute Horiuchi for lack of evidence; concludes rules of engagement were unconstitutional
September 1994	Coulson promoted
December 6, 1994	Freeh promotes Potts to Acting Deputy Director
December 16, 1994	Mathews team recommends discipline for Glenn, Rogers, and Kahoe, but not Potts or Coulson
December 29, 1994	FBI Assistant Director Coyle sends letter to Freeh recommending disciplinary action for Coulson and Potts
December 29, 1994	Freeh recommends to DAG Gorelick that Potts be issued a letter of censure
January 6, 1995	Freeh announces proposed discipline of FBI employees
March 7, 1995	Freeh urges Gorelick to censure Potts instead of suspending him
April 5, 1995	Gorelick decides to censure Potts
May 2, 1995	Potts promoted to Deputy Director of FBI
May 3, 1995	Glenn sends letter to DOJ OPR alleging cover up by Mathews team
May 1995	DOJ OPR begins investigation into alleged FBI cover up
July 1995	DOJ OPR refers Ruby Ridge matter for criminal investigation; reports preliminary findings to the DAG; Mathews promoted
August 1995	Criminal investigation begins, headed by Michael R. Stiles, the U.S. Attorney for the Eastern District of Pennsylvania
August 11, 1995	Freeh places Potts and Coulson on administrative leave
December 1995	Harp promoted to SAC, Cleveland
October 1996	Kahoe pleads guilty to obstruction of justice and is sentenced to serve 18 months in prison; Walsh receives bonus
December 1996	Walsh promoted to SAC, San Francisco; Kahoe retires
June 1997	Mathews promoted to SAC, New Orleans
August 12, 1997	Stiles criminal investigation concludes with no further criminal charges, refers matter back to DOJ OPR for further administrative investigation
August 1997	DOJ OPR starts administrative investigation; Coulson retires

November 1997	Harp receives cash award
March 1998	Walsh retires
October 1998	Harp receives cash award
January 1999	DOJ OPR provides copies of its draft report to FBI OPR
April 8, 1999	FBI OPR responds to DOJ OPR's report
June 30, 1999	DOJ OPR issues final report; concludes Potts, Coulson, Walsh, Harp, and Mathews committed misconduct; report sent to AAG Colgate for disciplinary decisions; Colgate assigns JMD Assistant Director Jarcho to review matter
December 1999	Jarcho completes review; concludes Freeh, Potts, Coulson, Harp, and Mathews should be disciplined; recommends rescission of discipline for certain FBI employees, including Glenn and Rogers Colgate asks JMD Deputy AAGs Vail and Sposato to review Jarcho's report
April 17, 2000	Vail and Sposato complete their review; conclude no misconduct or evidence of bad intent
October 5, 2000	DOJ OPR responds to Vail and Sposato; objects to no misconduct conclusions
November 29, 2000	FBI OPR responds
January 3, 2001	Colgate issues decision, concludes no further disciplinary action should be imposed and no prior disciplinary decisions should be changed or rescinded

I. Background

The underlying events that comprise the Ruby Ridge incident are well known, so we will only briefly summarize them below. Beginning in 1986, Randall Weaver was the subject of an investigation by the Bureau of Alcohol, Tobacco and Firearms. Weaver lived on a mountain in Ruby Ridge, Idaho, and was believed to be associated with a white supremacist group and to traffic in illegal firearms. In June 1990, Weaver was indicted by a federal grand jury on weapons offenses. Weaver was arrested and released pending trial. Due in part to a clerical error notifying him of the trial date, he did not appear for trial and an arrest warrant was issued for him. According to law enforcement sources, Weaver retreated to his cabin and threatened to shoot any law enforcement officers who tried to arrest him.

In August 1992, Weaver's family discovered three Deputy U.S. Marshals who were surveilling Weaver to prepare for his arrest. Kevin Harris, a Weaver family friend, shot and killed Deputy Marshal William Degan, and Weaver's teenage son Samuel was killed during the gunfire.

The FBI was called into the matter. The FBI activated its Strategic Information and Operations Center (SIOC), an FBI Headquarters post used for the management of crises. It also activated its Hostage Rescue Team (HRT), a tactical unit of agents trained in handling high-risk situations. The FBI Assistant Director for Criminal Investigative Division, Larry Potts, and his deputy, Danny Coulson, discussed the need for an operations plan containing rules of engagement that would provide guidance for the HRT's actions. Rules of engagement were drafted which provided that if any adult male was observed with a weapon, deadly force "can and should be employed" if the shot could be taken without endangering any children.

On August 26, 1992, the HRT was deployed to the site and surrounded Weaver's cabin. When an HRT helicopter took off and flew near the cabin, Weaver, his sixteen-year-old daughter Sarah, and Kevin Harris came out of the cabin, all armed with rifles. HRT sharpshooter Lon Horiuchi fired one shot, wounding Weaver. Weaver, his daughter, and Harris began running back to the cabin, and Horiuchi fired a second shot that penetrated the open door of the cabin. The shot killed Weaver's wife, Vicki Weaver, who was behind the door, and seriously wounded Harris.

The standoff ended on August 31, when the remaining occupants voluntarily left the cabin. Weaver and Harris were charged with various federal offenses, including murder. They were both acquitted of the most serious charges following a trial. Weaver was convicted of failure to appear for trial and committing an offense while on release.

II. Initial Internal Inquiries

The FBI and the Department of Justice conducted several internal inquiries to determine what had occurred at Ruby Ridge and whether there had been any improper actions taken by law enforcement personnel.

The first review of the Ruby Ridge incident was conducted by an FBI Shooting Incident Review Team (SIRT). FBI procedures call for an administrative review of all shooting incidents. The SIRT review of the Ruby Ridge shootings, which began even before the standoff at Ruby Ridge had ended, was headed by an

FBI Inspector and included seven other FBI employees. This team was responsible for reviewing the propriety of the use of deadly force by Horiuchi and the adequacy of the command, control, and operational planning of the entire Ruby Ridge operation.

The report issued by the SIRT team on September 30, 1992, concluded that Horiuchi had been justified in taking both shots and that the FBI had responded appropriately at Ruby Ridge. It noted that the rules of engagement that were in effect at the time of the shooting had been approved by SAC Eugene Glenn, who was the on-scene commander, HRT SAC Richard Rogers, “and FBIHQ personnel, to include Assistant Director Larry A. Potts. . . .”

After the SIRT report was issued, the Shooting Incident Review Group, headed by Michael Kahoe, the Section Chief of the FBI’s Violent Crimes and Major Offenders Section, reviewed the report and the FBI’s use of force at Ruby Ridge. According to FBI procedures, a Shooting Incident Review Group reviews the report and conclusions of the SIRT team. Kahoe’s Review Group issued its own conclusions in a memorandum dated November 9, 1992. Kahoe’s Review Group concluded that no FBI personnel had engaged in misconduct. It also concluded that the rules of engagement used at the scene had been approved by FBI Headquarters personnel.

In addition, on November 2, 1992, the FBI held a routine after-action conference, which the FBI typically uses to critique an emergency response and to determine how the FBI can improve its response in the future. A report prepared by FBI employees under Kahoe’s direction summarized the conclusions of the conference. A subsequent criminal investigation, which we describe below, found that Kahoe failed to disclose the conference report during discovery in the trial of Weaver and Harris, and in fact had destroyed his copy of the report and ordered his subordinate to destroy his copies. As we describe below, for these actions, Kahoe later pled guilty to obstruction of justice and was sentenced to eighteen months in prison.

III. Department’s “Berman” Inquiry and FBI’s “Walsh” Inquiry

In July 1993, DOJ OPR initiated an investigation into the allegations of misconduct by the government in the Ruby Ridge matter. The allegations were raised by several sources, including defense counsel for Weaver and Harris, the U.S. Attorney’s office in Idaho (which had prosecuted the cases against Weaver and Harris), and FBI personnel. Shortly thereafter, Deputy Attorney General Philip Heymann assigned the allegations to a DOJ task force for review. Four

attorneys from the Department's Criminal Division were assigned to work with OPR Assistant Counsel Barbara Berman to investigate the allegations. This review became known as the "Berman Inquiry." The FBI was asked to provide investigative support for the inquiry. The FBI assigned an investigative team, led by two FBI inspectors, to assist the DOJ task force. These two inspectors were replaced by FBI Inspectors Robert Walsh and Van Harp in September 1993.¹⁹

After a contentious decision was made by Deputy Attorney General Heymann to exclude FBI agents from some of the interviews, the FBI withdrew from the investigation and produced its own report, dated January 16, 1994, which came to be known as the Walsh Report. This report was issued several months prior to the Berman Inquiry's final report. DOJ OPR later found that it was "understood that Berman was in charge of the inquiry and would be issuing a formal report on behalf of the DOJ task force." A later JMD review also concluded that the FBI investigators had been instructed to assist the DOJ task force and not to reach their own conclusions regarding the Ruby Ridge incident. Yet, the Walsh report included conclusions and legal analysis, including the propriety of the rules of engagement and the shots fired by Horiuchi. The Walsh Report concluded that the rules of engagement as written could have been misunderstood, but it found that they were not misunderstood by Horiuchi and added that Horiuchi's use of deadly force at Ruby Ridge was "reasonable under constitutional standards."

Berman and her team produced a different report, dated June 10, 1994. The Berman report found serious failings by the FBI and the U.S. Attorney's office in their handling of the Ruby Ridge matter and subsequent events. The Berman report concluded that the rules of engagement were defective because of the inclusion of the word "should" in the phrase deadly force "can and should be employed," which deviated from the standard deadly force policy that requires agents to assess the level of danger before using deadly force and to give warnings if feasible. The report was unable to reach a conclusion as to whether FBI Headquarters had approved the "can and should" language, but stated that it was "inconceivable" that FBI Headquarters remained ignorant of the rules of engagement throughout the entire incident. The report concluded that Horiuchi's

¹⁹ According to a later report issued by DOJ OPR, it was widely known that Walsh was a close friend of Potts, who was a subject of the investigation for his alleged approval of the rules of engagement.

first shot was justified, but that his second shot was not because the immediacy of the threat had dissipated when the subjects retreated into the cabin.

DOJ OPR Counsel Michael Shaheen transmitted the Berman report to Deputy Attorney General Jamie Gorelick on June 30, 1994, together with DOJ OPR's separate views on the issue of Horiuchi's second shot. In a report signed by Shaheen, DOJ OPR disagreed with the Berman report's conclusion that the second shot was not justified. DOJ OPR argued that the second shot was justified in view of the totality of the circumstances. Based on its review of the reports, in the summer of 1994 the DOJ Civil Rights Division concluded that while the rules of engagement were probably unconstitutional, the evidence was insufficient to justify a prosecution of Horiuchi.

IV. The FBI's "Mathews" Review

After the issuance of the Walsh and Berman reports, the FBI conducted an administrative review of the Berman findings to determine what, if any, disciplinary action should be taken against FBI personnel. The FBI's General Counsel asked Thomas Coyle, Assistant Director for the Personnel Division, to assemble a team to determine what administrative action should be taken by the FBI. Coyle picked Charles Mathews, who was the Associate SAC (ASAC) in San Francisco, to conduct the review. Mathews had worked as an ASAC under Coulson for two and a half years, from 1988 to 1990, when Coulson was the SAC in Portland, Oregon.

On December 6, 1994, ten days prior to the issuance of the Mathews report, Freeh elevated Potts to the position of FBI Acting Deputy Director. The Mathews team issued its report on December 16, 1994. It recommended discipline for several agents related to mishandling of the crime scene or laboratory issues. It also recommended a censure for on-scene commander Glenn for "approval of flawed rules of engagement that could reasonably be interpreted to direct FBI employees to act contrary to policy and law"; a censure for HRT SAC Richard Rogers for "creating and documenting flawed [rules of engagement] that could reasonably be interpreted to direct FBI employees to act contrary to policy and law"; a censure for Michael Kahoe for "failures in supervising the SIRG [Shooting Incident Review Group's] review" of the incident; and a censure for the ASAC who prepared the Shooting Incident Review Team's report on the incident for failures in preparing the team's report. The Mathews report did not contain any recommendations for discipline against Potts or Coulson. The Mathew's report suggested that it was not recommending discipline for Potts or Coulson in part