

APPENDIX E

CIVIL RIGHTS DIVISION

Notice to Close FileFile No. 144-76-4281 Date FEB 11 1998

To: Chief, Criminal Section

Re: Clemente Banuelos, U.S. Marines - Subject;
Esequiel Hernandez, Jr. - Victim
CIVIL RIGHTS - COLOR OF LAW

It is recommended that the above case be closed for the following reasons:

The federal criminal civil rights investigation of the May 20, 1997 fatal shooting of an 18-year-old American on the Texas/Mexico border by a United States Marine has not developed sufficient evidence to support a federal prosecution. All logical leads have been thoroughly investigated by a federal grand jury conducted in Pecos, Texas. It is recommended that this matter be closed and that the federal grand jury material be provided to the district attorney to determine whether the subject's conduct might constitute a violation of Texas state


Barry F. Kowalski 2/4/98

Special Litigation Counsel

To: Records Section
Office of Legal Administration

The above numbered file has been closed as of this date.

2/11/98

Date


Richard W. Roberts

Chief, Criminal Section

FORMERLY CVR-3 FORM

law.¹ Accordingly, it is additionally recommended that permission of the federal district court be sought to disclose federal grand jury material to the state district attorney for his consideration. The United States Attorney for the Western District of Texas concurs with the recommendations to close the matter and seek court approval to disclose grand jury material to the state district attorney.

Credible evidence establishes that Esequiel Hernandez, Jr., the victim who at the time was herding goats, apparently fired at least one shot in the direction of a Marine observation team led by Corporal Clemente Banuelos, the subject. Initially the victim and the subject's team were about 200 meters apart. The team had inadequate training and briefings to properly respond to what occurred while they awaited the arrival of the United States Border Patrol and local law enforcement.

After the firing of the weapon by the victim, the Marine team followed him a short distance (about 100 meters) for about twenty minutes, eventually getting closer to the victim (135 meters). The subject's claim that he fired in self-defense when the victim then raised his rifle and aimed at one of the Marines cannot be refuted with any convincing evidence. Therefore, insufficient evidence exists to establish that the subject acted willfully in violation of 18 United States Code § 242.

While there is no doubt that insufficient evidence exists to support a prosecution under the federal criminal civil rights statutes, the attorneys from the Civil Rights Division and the United States Attorney's office of the Western District of Texas and the FBI agents who investigated this incident are not convinced that investigative efforts have revealed the complete truth. There are four surviving witnesses from the incident - the members of the Marine observation team. The federal investigation was initiated in part because of concerns about their candor on material issues, concerns which have not been fully resolved (see detailed discussion later in this

¹ A state grand jury in Marfa, Texas, "no-billed" after investigation on August 14, 1997. However, that grand jury was presented an indictment only charging first degree murder, and not lesser homicide charges such as reckless or negligent homicide. Federal Rule of Evidence 6(e) provides for application to a federal court for disclosure of federal 6(e) materials where the materials may (emphasis added) disclose a violation of state criminal law. We believe there is sufficient evidence to support the applicable standard, "substantial need," for the state prosecutor to receive the materials developed through our grand jury investigation for his own consideration of possible violations of the state reckless or negligent homicide statutes.

memorandum). Nonetheless, we are all satisfied that, in the context of the federal investigation, all appropriate efforts have been taken to address these credibility concerns, and that no further federal investigation is warranted.

I. SUMMARY OF THE FACTS

A. THE INCIDENT

Initial facts were available from three primary sources - statements from the four Marines on the team, recording of radio transmissions between the Marine team and others, and forensic evidence developed from the crime scene investigation.

Corporal Clemente Banuelos, the subject, was leading a four-man United States Marine Corps observation post on a mission to support drug interdiction efforts by the United States Border Patrol near Redford, Texas, when he shot and killed Esequiel Hernandez, Jr. The victim lived approximately a half a mile from where he was killed and, at the time, was herding goats. The victim, a high school student, regularly carried a .22 caliber rifle to protect his flock.

As described in more detail below, the Marines were aware that they were near an area populated by civilians. They also had Rules of Engagement (ROE) and training that directed them only to observe and not become involved in apprehending suspects. However, the briefings given to the Marines described a hostile civilian population and the ROE permit use of force, but without, perhaps, sufficient clarity.

Attachment A is a rough sketch of the terrain, prepared by this writer from a drawing made with the assistance of the Marine team early in the investigation. It is not to scale. The top of the attachment points to the southwest. Position 1 marks the "hide site" where the Marines rested during the days. Other positions marked by the writer should assist the reader in understanding the events critical to this incident. Their significance is described below. The Rio Grande River is at the top of the attachment. A dirt road depicted on the right side of the attachment ended at high ground above the river on the American side. It ran alongside of the indicated buildings, which were abandoned. The victim's home was about a half a mile to the right of the abandoned buildings and is not depicted. To the left of the "hide site" (position 1) was uninhabited, rough terrain, as far as the eye could see.

The victim apparently fired one or two shots at or in the direction of the Marines (located at position 2), who were camouflaged in irregular and brushy terrain just over 200 meters from the victim (located at position 3). The Marines could have

reasonably believed they were being fired upon by the victim. Initially, the Marines and the victim were on parallel ridge lines separated by a deep gully (between positions 2 and 3) and over 200 meters apart.

According to the Marines, after the shot(s), the team observed the victim move parallel to them on the opposite ridge line near the abandoned buildings. Eventually, the Marines left one of their team on the high ground to which they had maneuvered (position 4), while the other three team members crossed a gully (between position 4 and 5). The three Marines approached closer to the victim's direction of travel (moving up a slight slope from position 5 to 6), eventually arriving at a position approximately 130 meters from the victim.² At this point (position 6), according to the subject, the victim (at position 7) raised his rifle aiming at one of the other advancing Marines. The subject immediately fired his M-16 rifle at the victim because he reportedly believed the victim was about to shoot the other Marine.

A bullet fired by the subject's rifle struck the victim in the right side at his waist, broke into two parts, then traveled right to left through his mid-section, ultimately coming to rest under his skin on his left side at the same relative position that it had entered on the right side. When the Marines, according to their statements, reached the victim (at position 7) approximately ten minutes after he was shot and local law enforcement and Border Patrol agents reached him ten minutes thereafter, he was dying. According to forensic pathologists from the Armed Forces Institute of Pathology, the injuries to the victim from the gunshot wound were so severe that he would have died even if he had been shot inside a hospital emergency room.

Recorded radio traffic broadcast by the Marines and others on a radio net used by the Marine team, the Marine command post, the Border Patrol and local law enforcement presents certain incontrovertible facts. The Marines reported observing an individual with a rifle herding goats at approximately 6:05 p.m. Next, a "shots fired" report was transmitted by the Marine team at 6:07 p.m. That same radio traffic indicates that about five minutes later law enforcement units were ordered to respond to assist the Marines. Numerous radio reports document the progress of the responding law enforcement units. At about five minutes after the "shots fired" radio transmission, the Marines reported that they were "going to pull back (emphasis added) to a tactical position" and that "as soon as he [the victim] readies that rifle

² According to radio transmission, by the time the Marine advance halted, approximately twenty minutes had transpired since the report of shots fired by the victim.

back down range again, we're taking him." The Marine command post communicator, a Lance Corporal, responded to the latter report with a reply, "[r]oger, fire back." Between 6:14 p.m. and 6:20 p.m., the Marines reported that the individual was "moving", "hiding", "ducking down" and "looking for us."

There is no radio communication from the Marines to indicate that the victim again raised the rifle or that the Marine team had abandoned its reported plan to "pull back." Instead, there is a conspicuous gap of almost eight minutes in radio communication from the Marine team. According to their later statements, during this time the Marine team moved laterally along with the victim, left the security of their own high ground and advanced toward the victim. But, this activity was never reported on the radio. Radio silence from the Marine team ended at approximately 6:27 p.m. with a report of "man down." In response to an immediate inquiry from the Marine command post "friendly or enemy?", the Marine team reported "[t]he man pointed his weapon down range at our Marines, our Marines took him out." As previously stated, this report was made approximately twenty minutes after the report of "shots fired." Finally, the Marines reported reaching the then dying victim at about 6:36 p.m.

B. THE INITIAL INVESTIGATION

Local law enforcement and Border Patrol agents arrived at the scene at about 6:46 p.m. They found the victim mortally wounded on his back inside a two foot high circular stone structure (referred to by witnesses as a well) with the Marines nearby. The Marines told them they had not attempted to render medical assistance because they believed the victim had a broken neck. Because of the size of the entry wound, its location under the victim's shirt and the small amount of bleeding, no one confirmed the victim had been shot until he was removed from the well.

Officers from the Presidio County Sheriff's Department initially conducted the investigation of the shooting. One of the Marines gave them a .22 caliber rifle and advised it had been discovered next to the victim, just outside the well into which he had fallen. Examination of the weapon revealed a spent cartridge casing, which had not been ejected, inside the chamber.³ The subject then led the investigators to the area

³ The .22 was an antique. It was not designed to automatically eject spent casings, instead they must be manually ejected. It cannot be scientifically determined when the spent casing was lodged in the chamber. It could have been left in the chamber after the rifle was fired when the Marines claim it was or at any time before or after. While the weapon was old,

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from where he claimed that he fired at the victim. There, the subject discovered a spent casing on the ground that was later determined to have been ejected by his rifle. The subject was asked to walk through the events of the incident with investigators. He agreed to do so if the other members of his team were allowed to accompany him. The subject and the other Marines took the investigators on a walk-through, explaining the chronology of the incident and identifying locations where events occurred. One member of the Marine team took investigators to the location from where he believed the victim fired at the Marines. A hasty search was made for cartridge casings at that site and several casings were discovered. At this point, an extreme rain/wind storm struck and the crime scene investigation was discontinued.

When the storm began, each of the four Marines was taken to a separate patrol car and consented to write a written report. Those statements, as well as others, will be discussed in detail in section II of this memorandum. Later that evening, they each wrote a short statement at the request of their commanding officer. Overnight, they were housed in a motel, two Marines each to a room. The next afternoon, May 21, the four Marines agreed to an interview/walk-through with the military officer assigned to investigate the incident. Again, all four participated in this exercise and, consequently, heard what each other had to say to the military investigator. Later on May 21, the four Marines were interviewed separately by the Texas Rangers, assisted by FBI agents. Following each interview, their statements were reduced to writing and signed. While the statements were being taken by the Rangers, a Marine officer composed a series of diagrams with collective input from the four Marines, documenting the movements of the Marines and the victim.

C. EVENTS LEADING UP TO THE INCIDENT

The subject and his three team members were involved in an ongoing drug interdiction law enforcement operation. They were

subsequent testing determined it could be fired relatively accurately at 200 plus meters.

* None of the casings discovered on the evening of May 20 matched the victim's weapon, although they were .22 caliber casings. Three casings discovered several days later in the same general area did match the victim's weapon. However, in the opinion of the Texas Rangers, these casings were severely blackened by oxidation, indicating exposure to the elements for a longer time than would be consistent with having been ejected on May 20. The victim and other local residents regularly fired rifles for recreation in this area.

serving as an observation post to assist the Border Patrol. The operation required them to remain hidden in a remote area near a river crossing and to report suspicious traffic so that the Border Patrol could respond to interdict the traffic. The mission was designed to keep the Marines away from any contact with anyone they were observing.

The team arrived in Texas from Camp Pendleton, California, earlier in the month of May. This was the team's first mission. They were inserted into the area of their observation post three days before the shooting on May 20. Another Marine four-man team preceded the subject's team into the observation post and was subsequently replaced by the subject's team.

The subject and the other three Marines on his team were not specially trained reconnaissance Marines or, for that matter, even from infantry units. While every Marine is trained as a rifle man, in their regular assignments, the subject was an artillery forward observer and the other three were a radio operator, a fork lift operator and a hazardous waste worker. They received no field training in tactics necessary to act as a law enforcement observation post or in law enforcement tactics. They did receive some classroom training for the mission as discussed below.

The subject and his team were obliged to obey specific Rules of Engagement (ROE). The ROE was composed of six paragraphs reproduced on a card, issued to the Marines and carried by each one of them.³ The ROE card read as follows:

1. FORCE MAY BE USED TO DEFEND YOURSELF AND OTHERS PRESENT.
2. DO NOT USE FORCE IF OTHER DEFENSIVE MEASURES COULD BE EFFECTIVE.
3. USE ONLY MINIMUM FORCE NECESSARY.
4. YOU MAY DETAIN ANY PERSON WHO POSES AN IMMINENT THREAT OF SERIOUS BODILY HARM TO YOU OR OTHERS PRESENT. RELEASE TO THE CIVILIAN LEA SOONEST.
5. YOU MAY PURSUE HOSTILE FORCES ONLY TO DEFEND OR RETRIEVE

³ For some reason, the ROE card issued contained the military's 1993 ROE and not the then current 1997 military update of the ROE. One difference between the two is that the 1997 ROE identifies a difference between the use of deadly force and non-deadly force, while the 1993 ROE card makes no distinction between the use of deadly and non-deadly force. Further, the 1997 ROE dictates, "[y]ou WILL make every effort to avoid confrontation and armed conflict with civilians." The 1993 ROE card does not contain this language, although interviews regarding training indicate this admonition was given to the Marines.

MILITARY PERSONNEL.

6. YOU MAY NOT PURSUE HOSTILE FORCES INTO ANOTHER NATION'S TERRITORY WITHOUT COMMAND AUTHORITY.

The ROE were the subject of two approximately one hour classes taught by Marine legal officers. Records show the subject attended class. Video scenarios were shown and discussed. One instructor recalls advising that deadly force could be used if a team faced imminent danger of death or grievous bodily harm and lesser degrees of self-defense had been exhausted. On the issue of "pursuit," his teaching notes include, in pertinent part, "can chase person who poses threat, if no present threat - no use of deadly force, if situation changes and during chase faced with threat of death or serious bodily harm then deadly force justified."

Briefings were provided to the subject and his team about the area of operation. Notes used by the briefing non-commissioned officer state that "Redford is not a friendly town" and that connections existed between town residents and drug traffickers.⁶ Most significantly, those notes indicate the use of armed scouts to conduct reconnaissance prior to moving drugs, as well as the use of the area for hunting and recreational shooting. However, the unit commander who attended the briefings claims the emphasis was on self-protection from drug traffickers rather than danger posed by innocent hunters and recreational shooters. Military briefings use the term "battlefield" to describe an area of operation. Consequently, the subject was likely impressed by the briefings with a perceived need to protect his team from a perceived enemy.

One team member's claimed recollection of the briefings included an understanding that the area was high in drug traffic, possibly hostile, and one could expect to see armed scouts. The warning from the briefings that most impressed him concerned poisonous spiders and snakes. That team member contended he had no recollection of a warning about recreational shooters.

In early May, the mission commander took the subject and another team leader, whose team would also occupy this particular observation post on a reconnaissance of the general area. At that time, an empty box of .22 caliber cartridges was discovered.

⁶ Redford is a small town on the border. The victim and his family lived on the outskirts of Redford near a river crossing, which was the focus of the Marine team's observation efforts.

They discussed the danger of recreational shooting.⁷

Similarly, while the Marine mission was advised that there were civilians near their area of operation, no specific information was provided regarding those civilians and their habits, other than the fact that locals might be supportive of drug smuggling endeavors. There is no indication that the Marines were advised that the victim regularly herded goats, while armed, in an area within a mile of his home and within 200 meters of their post. While both the subject's team and the team inserted just previous to his did observe the goat herd, there is no evidence to indicate the victim was ever observed and identified by either team.⁸

The Marine observation teams were briefed that their mission was to observe only. They were to remain hidden at all times. They were clearly instructed to not engage any suspects or any other persons. The teams were instructed that all interdiction in response to reports from the observation teams would be conducted by Border Patrol agents.

Varying accounts were given regarding expectations about the Border Patrol response responsibilities and response-time. In fact, the Polvo crossing, the team's observation target, was regularly used by local residents on both sides of the border for legitimate traffic. Because members of families lived on both sides of the river, visiting back and forth was frequent, and non-drug traffic commercial activity was normal. While the Border Patrol understood this and reacted only to suspicious activity, the Marine team considered any traffic from the Mexican side of the river likely to be illegal. The Border Patrol did not always respond to radio reports from the Marine team. The non-response frustrated the members of the Marine team.

The Marine command asserts it expected a fifteen minute

⁷ At the end of February, the victim initiated a contact with two Border Patrol agents. He advised them that he had been shooting to "scare off someone trying to steal his goats" and apologized that his gunfire might have impacted near the patrolling agents. One of the agents had previously heard a suspicious sound, not realize it was gunfire. The victim was advised to be more careful. The incident was never reported as the agents considered it inconsequential. In any event, while the Marine command was advised that recreational shooting occurred in the area, no specific information was provided.

⁸ See grand jury section regarding efforts to verify the accuracy of this information.

response-time to calls from their Marine teams. The Border Patrol supervisor of the shift on May 20 for the Redford area agreed that they were to respond within fifteen minutes to Marine team reports that required interdiction, but only after 8:00 p.m., just before dark. Additionally, he understood the Border Patrol's role to be to respond to reports requiring interdiction, not to protect a better-armed four man Marine patrol. In any event, the Marine team was supposed to spend the daylight hours in a "hide site", and only move to their more exposed observation post at dark, which in May was between 8:30 p.m. and 9:00 p.m. On May 20, this team left its "hide site" and moved towards its observation post in broad daylight at about 6 p.m. As it moved, it sighted the victim. It was still daylight, 6:47 p.m., and over an hour before the team was expected to deploy to the observation post, when the Border Patrol and the local law enforcement agents located the Marines and the mortally wounded victim.

At the time of the "shots fired" broadcast, the nearest Border Patrol unit was 16 miles away from the Marines in the process of picking up undocumented foreign nationals. They proceeded to the Border Patrol Presidio station, secured the people they had in custody, and acquired rifles and protective vests before responding to the Marine call.

The victim was reported by his family to have been right-handed. The trajectory of the bullet wound through his body was not consistent with a right-handed shouldered-held weapon stance, as the bullet had entered on the victim's right side. Finally, the Redford Citizens Committee for Justice, a citizens group, had identified potential witnesses who might have information that reportedly could be relevant to the investigation.

II. THE INITIAL FEDERAL INVESTIGATION

As is often the case, the FBI and the Civil Rights Division monitored the local investigation as it progressed.⁹ A state grand jury was convened in Marfa, Texas, in July, 1997. In that same month, a formal Marine Corps investigation pursuant to the Manual of the Judge Advocate General (JAGMAN investigation) was commenced. Meanwhile, the Civil Division of the United States Department of Justice retained civilian attorneys for the four Marines. All civilian attorneys retained were also Marine Corps reserve officers.

⁹ The long standing practice of the Civil Rights Division has been to defer to active, good faith local investigation of criminal civil rights matters until such time that the local investigation has been completed.

The federal criminal civil rights investigation was activated after a "no-bill" of a first degree murder indictment was returned by the local grand jury in Mafa, Texas. The writer of this memorandum was assigned at that time to conduct the investigation for the Department. It was decided that a preliminary investigation was appropriate to determine whether a federal grand jury investigation should be commenced. Toward that end, efforts were instituted to obtain the local grand jury transcripts of the testimony of the Marine eye-witnesses, arrangements were made to interview in Texas the local law enforcement agents and Border Patrol agents who had responded to the scene of the shooting and investigated the matter, and coordination was initiated with the Marine JAGMAN investigation.¹⁰ Additionally, an attempt was undertaken to interview the three Marines on the subject's team - Corporal Roy Torrez, and then Lance Corporals Ronald Wieler and James Blood.

By the end of September, 1997, interviews of local law enforcement had been completed and a substantial amount of additional relevant information had been obtained from the Marine JAGMAN Investigation and other sources. An excellent cooperative working relationship was developed with Major General John Coyne, the Marine General officer conducting the JAGMAN Investigation, and his staff. However, the three Marine eye-witnesses from the subject's team refused to agree to voluntary interviews. The proposed terms of the interviews included grants of testimonial and derivative use immunity. Further, through counsel, each indicated he would refuse to obey a Marine order to submit to an interview. Consequently, the Marine command decided not to issue such order.

During October and November, 1997, considerable additional effort was expended in conjunction with the JAGMAN team to obtain interviews of the three eye-witness Marines. Protracted negotiations with the attorneys representing these witnesses were unsuccessful. The counsel collectively argued that a military Court of Inquiry, conducted in accordance with naval regulations, should be convened to fulfill their interpretation of the legal requirements necessary to afford their clients immunity from prosecution based upon their interview.

During these negotiations, however, Blood was prematurely released from a legal extension of his active tour of military

¹⁰ A 1984 memorandum of understanding between the Department of Justice and the Department of Defense allows concurrent investigations under these circumstances.

duty, with an honorable discharge.¹¹ Subsequently, Blood was interviewed and passed a polygraph examination on October 29, 1997. In return for his cooperation he was granted transactional immunity.

Negotiations continued with attorneys for Torrez and Wieler. On November 4, 1997, a Court of Inquiry with Department participation was convened for the purpose of questioning those two Marine witnesses. When attorneys representing Torrez and Wieler refused to agree to terms of procedure deemed necessary by the Department, we withdrew from the Court of Inquiry. Concerned that a Court of Inquiry conducted without Department approval of a Marine Corps immunity grant might not adequately protect their clients, the attorneys for the witnesses advised their clients not to testify before the Court of Inquiry. It was recessed.

At the conclusion of this phase of the federal investigation, critical questions remained unresolved. In light of evidence available to the federal investigation and the application of common sense, the prior statements made by Torrez and Wieler raised substantial issues about their credibility. Since we were unable to interview them by any other means, grand jury investigation was warranted.

Three areas continued to be troublesome to the Department attorneys and the FBI agents investigating this matter. First, the entry wound was inconsistent with the victim being right handed. Second, while the ROE and training given to the Marines dictated that every effort be made to avoid contact with suspects, the subject had decided to leave the security of protected high ground and advanced a portion of his team until it encountered the victim. This was particularly disturbing because the subject had reported to his superiors by radio that he was "pulling back," while neglecting to report his actual troop movement.

Finally, Wieler and Torrez were simply not credible. In his first statement to law enforcement, Wieler wrote that "[a]t the time the fire was shot [sic] I did not have eyes on the suspect [the victim] because of brush [sic] was blocking my view." This sentence was added by Wieler to the end of his statement after the investigator questioned whether he had actually seen the victim raise his rifle just before he was shot. The next day during the walk-through, the military investigator asked Wieler

¹¹ An investigation into whether misconduct occurred during the discharge of Blood from duty while the Department and the JAG MAN investigations were attempting to obtain his statement has been conducted by the USMC. It is being reviewed by their command structure at this time.

whether he had seen the victim raise his rifle before he was shot. That conversation occurred while he and the investigator were standing in the actual location where Wieler claimed to have been when the subject shot the victim. Wieler responded that he could not see the victim because of the brush. The military investigator observed obstructing brush between Wieler's identified position and the known position of the victim. However, a few hours later on the same day, when Wieler was interviewed by the Texas Rangers and the FBI he stated that he actually saw the victim raise the rifle at Blood just before the subject fired. He mentioned no obstruction.

Wieler's new recollection was disturbing, not only because it was clearly inconsistent, but also because this change was supportive of the subject's otherwise uncorroborated claim that the victim aimed at the Marines before he was shot. Before this mission, Wieler had served as the subject's radio operator in their old outfit. During the walk-through/interview, Wieler had heard the subject's version of events, and therefore knew that none of the other Marine's were able, or willing, to corroborate the subject's contention that he acted in self-defense.

Torrez was consistent in his statements. According to Torrez, he was left behind by the subject on the high ground with the radio when the subject advanced with the other three Marines. While he kept the victim in his sights as the rest of the team moved forward, covering them, he dropped his "bead" (rifle sight) on the victim to attempt to communicate on the radio at the exact time when the subject fired. Consequently, Torrez, who was covering a dangerous advance of his team toward an armed man, looked away from the victim when the man was shot. This appeared particularly confounding in light of the fact that Torrez immediately reported on the radio what the victim had done, even though he claimed not to have seen it and was too distant from the other Marines to have learned the facts from them. According to Torrez, he reported "shots fired" and was immediately asked (as confirmed by the recorded radio transmissions) "friendly or enemy?" His response did not directly answer the question. Instead, he reported what the victim supposedly had done, "[t]he man pointed his weapon down range at our Marines, our Marines took him out."

While disturbing, these areas of concern did not establish evidence of a criminal civil rights violation, particularly in light of other undisputed facts. The victim had likely fired a weapon in the direction of the Marines.¹² Under their ROE, they

¹² A recorded radio transmission reported "shots fired" by the victim. A spent cartridge casing was lodged in the chamber of the victim's rifle. And, Blood claimed he saw the victim

may have been justified in returning fire immediately, but they did not. The Marine command post had authorized them to shoot back with the transmission, "[r]oger, fire back."¹³ Also, little effort was made by the officers in the command center to determine by radio the team's situation. The subject was not provided any specific guidance by his superiors on how to handle the threat facing the team.

Additionally, the subject's explanation of his action was not implausible. The subject consistently maintained he considered the victim to be a threat because he fired at the Marines and because he perceived the victim to be "hiding", "ducking" and "looking for us". The victim's normal movement along the dirt road in between brush and buildings over irregular terrain may have caused him to disappear periodically from view. This may have been misinterpreted to be "hiding" and "ducking", especially when carried out by a person who had just fired a weapon. Perhaps the victim saw something where the Marines were located near their observation post, but given the fact he did not run home or take cover, it is unlikely that he recognized who or even what he saw. The Marines attempted to hide in the brush and were effectively camouflaged. It is likely that the victim was looking suspiciously in their direction attempting to determine what was out there. Such innocent conduct could easily have been misinterpreted by the subject under the circumstances.

The subject explained his decision to move his team in the direction of the victim as an effort to insure that the Marines did not lose sight of the victim, in order to prevent an armed man from obtaining an unobserved position on the team's eastern flank. The subject consistently asserted that the victim raised his weapon in the direction of Blood. The victim may have been

raise his rifle and heard a shot and a bullet pass nearby. His statements and interview were consistent with each other and other known evidence. A polygraph examination indicated he was not being deceptive.

¹³ The mission commander and other officers heard the "fire back" instruction. This engendered a debate in the command post about what should be done to countermand what was perceived by all in authority as a dangerous communication. The Lance Corporal was taken off the radio and replaced by a Sargent who, according to orders, transmitted instruction to "follow the ROE." Regardless of whether that instruction reinforced or reversed the "fire back" communication, the Marine team did not acknowledge hearing it and no effort was made by superiors to determine whether the team had received the intended corrective instruction.

surprised by the advancing Blood and done exactly that. Or, at a distance of 130 meters from the subject, the victim may have made a movement that the subject misperceived to be the raising of his rifle.

The Armed Forces Institute of Pathology was consulted for an opinion regarding whether the wound to the victim indicated whether the victim could have been aiming left-handed or right handed when he was shot. They concluded the wound could not explain with any certainty what the victim might have been doing when shot. According to the forensic scientists an entry wound on the right side was more consistent with aiming a shouldered rifle left-handed than right-handed. However, it was also consistent with any of a number of actions by the victim, including turning from a right-handed shouldered rifle aim or even raising his hands to surrender.

While some reasonable, innocent explanations had been advanced, significant issues remained unresolved. The next section reviews the grand jury investigation. As previously stated, while that investigation did not reveal evidence to establish a criminal civil rights violation, neither did it adequately resolve all questions of credibility.

III. FEDERAL GRAND JURY INVESTIGATION

IV. LEGAL ANALYSIS

Any analysis of the use of deadly force in a Fourth Amendment context is governed by the principals set forth in Tennessee v. Garner, 471 U.S. 1 (1984) and Graham v. Connor, 490 U.S. 386 (1989) in conjunction with the requisite elements for proving a violation of 18 United States Code § 242. To establish a prosecutable case, the United States would have to prove that the shooting was objectively unreasonable under the circumstances

known to the subject at the time of the shooting²⁰ and that he was aware that the shooting was unreasonable.

The subject's expressed reason for shooting the victim was that he believed that he was aiming a rifle at another Marine in order to shoot that Marine. If the subject saw that or even reasonably believed he saw that, then he had a clearly justified rationale for using deadly force. This memorandum has presented considerable skepticism about the truth of the subject's assertion. However, there is insufficient available evidence to disprove the subject. In fact, while substantial reasons exist to doubt the credibility of the critical witnesses, Torres and Wieler, we are left without a provable explanation of what might have occurred other than that presented by the subject.

The victim likely fired in the direction of the Marines. Their ROE permitted them to return fire immediately. Arguably, the ROE could be reasonably interpreted by a young Marine small unit leader to permit the "pursuit" of a hostile force to defend military personnel.²¹ Clearly, based on the available evidence, it cannot be proven that the subject wilfully disobeyed the ROE when he advanced with part of his team toward an apparently hostile threat.²² The Marine command post communicator transmitted a "fire back" instruction which was never effectively counteracted by superior officers. Those officers provided no

²⁰ Objective unreasonableness means in this context that a reasonable law enforcement officer facing the same circumstances as the subject would not have shot. This legal analysis must be performed based upon facts known at the time of the incident without the benefit of 20/20 hindsight. As this matter is not prosecutable for other reasons, we need not resolve the novel issue of whether a Marine acting to assist law enforcement, trained as the subject had been and obligated by his ROE, should be held to the standard of a reasonable law enforcement officer.

²¹ See ROE 5 in EVENTS LEADING UP TO INCIDENT section of this memorandum.

²² As to this point, the minimal, perhaps ambiguous, training given to the Marines on this mission should be compared to the clear training provided in basic infantry tactics. The Marine Battle Skills Training Handbook, Book 2, describes how a Marine must react to enemy small arms fire. It directs, among other things, "[a] maneuver to a better vantage point to deliver more effective fire upon the enemy ... return a high volume of accurate fire, and attempt to suppress enemy fire." In view of this training at a critical, suggestible stage in the subject's Marine career, his behavior, crediting the evidence developed, was arguably measured and not unreasonable.

guidance over the radio to the subject. The subject's expressed perceptions of the actions of the victim cannot be disputed with any specific evidence.²³

V. RECOMMENDATION

For all the reasons discussed above, insufficient evidence exists to support a violation of the criminal civil rights statutes. The matter should be closed.

²³ Under Graham, as long as a law enforcement officer has a reasonable basis to believe the safety of others is in jeopardy from a suspect, the officer is not required to speculate about other possible reasons for the suspect's actions and then give the suspect the benefit of the doubt.

APPENDIX F



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 15, 1997

Honorable Lamar S. Smith, Chairman
Subcommittee on Immigration and Claims
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter to the Attorney General concerning the tragic shooting of Ezequiel Hernandez, Jr., by a United States Marine conducting a border surveillance operation.

At this time, in response to your oversight request, we are able to provide you with the documents that you requested concerning the policies and procedures for the surveillance operation. These documents include the operation order, mission statement, and a chronology of events and total approximately 225 pages. These documents follow documents already provided to your staff by the Immigration and Naturalization Service (INS). The document entitled "Operation Order for JTF-6 Mission 414-97" is a document that originated with the Department of Defense. While this document is provided to you in response to your oversight request, it has never been approved for release to the public. This document contains tactical information the release of which would seriously jeopardize ongoing border and drug interdiction and related Border Patrol operations as well as potentially endanger officer safety. We therefore request that the Subcommittee consult with the Department and with the Deputy General Counsel (Legal Counsel) of the Department of Defense at 703-697-2714 before any such release is made.

The Department's Civil Rights Division is currently reviewing the circumstances of Mr. Hernandez's death to determine whether the tragic situation constitutes a prosecutable criminal violation of Mr. Hernandez's civil rights. For reasons with which I am sure you are familiar, it is longstanding Department policy not to discuss the details of pending investigations. As you know, the premature disclosure of sensitive information

relevant to an investigation may prejudice the Department's ability to complete the investigation and to pursue criminal charges, if appropriate. Accordingly, we do not believe it would be prudent at this time to provide a detailed briefing or written documents concerning the shooting itself, including statements given by members of the United States Marine Corps and the INS. Let me assure you, however, that the Department is working as expeditiously as possible with regard to the investigation and we will let you know as soon as it is completed.

Once the Department's investigation is completed, we will be in a better position to comply with your request for more detailed information about the shooting. Meanwhile, in addition to the two briefings that INS has already provided, we have asked the INS to provide you any additional information on supervisory and other matters as they relate to policies and procedures of border surveillance operations except as they relate to this specific incident for the reasons we have outlined.

The Department is committed to continuing to be responsive your oversight inquiries regarding this tragic incident consistent with our law enforcement obligations. If this office can be of assistance to you on this or any other matter, please do not hesitate to contact us again.

Sincerely,


Andrew Folsom
Assistant Attorney General

cc: Honorable Mel Watt
Ranking Minority Member

APPENDIX G



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: ANDREW FOIS, AAG FOR LEGISLATIVE AFFAIRS

SUBJECT: Your meeting with House Immigration Subcommittee Chairman Lamar Smith on Tuesday, September 9 at 10:15 a.m.

PURPOSE: To provide you background information and talking points for your meeting with House Immigration Subcommittee Chairman Lamar Smith

II. BACKGROUND: This meeting follows up on your telephone conversation last week with Chairman Smith on the Marine shooting in Redford, Texas.

III. TALKING POINTS:**A. Marine Shooting**

- Last week, I asked our staff to review the documents again and to provide you with those that did not relate to the investigation. We have done so and have determined that you have already received all such documents.
- As we have discussed, based upon the current time line, the Civil Rights Division expects to finish its inquiry by the middle of this month and be in a better position to more fully comply with your request for more detailed information about the shooting.
- We appreciate your patience and your assurances that you do not want to affect a pending investigation. As the Division evaluates the evidence to determine whether the matter has prosecutive merit and should be presented to a federal grand jury, we are unable to provide additional details beyond the documents we have already provided.
- I am aware that you have scheduled a hearing on this matter for September 18. Without getting into the substance of the investigative work of the Civil Rights Division, it is my hope that

our work will be completed by that time.

APPENDIX H

Subpoena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To The Honorable JAMES RENO, ATTORNEY GENERAL, U.S. Department of Justice.

You are hereby commanded to produce the things identified on the attached schedule before the Sub Committee on Immigration & Claims of the Committee on the Judiciary of the House of Representatives of the United States, of which the Hon. HENRY J. HYDE is chairman, by producing such things in Room 2-2702 of the Rayburn Building, in the city of Washington, on May 22, 1938, at the hour of 10:00 A.M.

Produced Pursuant to Subpoena of the U.S. District Court for the District of Columbia, Case No. 38-1000, by the U.S. Attorney, District of Columbia, at the residence of the witness.

RECEIVED

MAY 21 3 25 PM '38

U.S. DISTRICT COURT DISTRICT OF COLUMBIA

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 21st day of May, 1938.

Henry J. Hyde, Chairman

ARTHUR COLEMAN H. CARL, Clerk

Attorney General Janet Reno
Subpoena for.....
U.S. Department of Justice
Tenth Street and Constitution Ave. NW
Washington, DC 20530

before the Committee on the..... Judiciary

Served.....
Kim S. Goyatt
.....
Deputy Assistant Attorney General
Justice Department Division
HEALTHY FOR ALL
.....
~~.....~~
.....
U.S. COURTS
.....
UNITED STATES COURTHOUSE
Washington, DC

105th Congress, 2d Session

..... Name of Representative

SCHEDULE A

**Subpoena Duces Tecum
Committee on the Judiciary
United States House of Representatives**

**Serve: The Honorable Janet Reno
Attorney General
U.S. Department of Justice
Tenth Street and Constitution Avenue NW
Washington, DC 20530**

The Committee hereby subpoenas certain records. Please provide logs which indicate each record's Bates number, author, description, and source file. If you have any questions, please contact Jim Wilon, Counsel for the Committee's Subcommittee on Immigration and Claims, at (202) 225-5727.

Definitions and Instructions

1. For the purposes of this subpoena, the word "record" or "records" shall include, but shall not be limited to, any and all originals and identical copies of any item whether written, typed, printed, recorded, redacted or unredacted, transcribed, punched, taped, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes, but is not limited to, any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all activity reports, agendas, analyses, announcements, appointment books, briefing materials, bulletins, cables, calendars, card files, computer disks, cover sheets or routing cover sheets, drawings, computer entries, computer printouts, computer tapes, contracts, external and internal correspondence, diagrams, diaries, documents, electronic mail (e-mail), facsimiles, journal entries, letters, manuals, memoranda, messages, minutes, notes, notices, opinions, statements or charts of organization, plans, press releases, recordings, reports, Rolodexes, statements of procedure and policy, studies, summaries, talking points, tapes, telephone bills, telephone logs, telephone message slips, records or evidence of incoming and outgoing telephone calls, telegrams, telexes, transcripts, or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation. "Record" or "records" shall also include all other records, documents, data and information of a like and similar nature not listed above.

2. For purposes of this subpoena, the terms "refer" or "relate" and "concerning" as to any given subject means anything that constitutes, contains, embodies, identifies, mentions, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.

Page 2 of 3

3. This subpoena calls for the production of records, documents and compilations of data and information that are currently in your possession, care, custody or control, including, but not limited to, all records which you have in your physical possession as well as any records to which you have access, any records which were formerly in your possession, or which you have put in storage or anyone has put in storage on your behalf. Unless a time period is specifically identified, the subpoena includes all documents to the present.

4. The conjunctions "or" and "and" are to be read interchangeably in the manner that gives this subpoena the broadest reading.

5. No records, documents, data or information called for by this subpoena shall be destroyed, modified, redacted, removed or otherwise made inaccessible to the Committee.

6. If you have knowledge that any subpoenaed record, document, data or information has been destroyed, discarded or lost, identify the subpoenaed records, documents data or information and provide an explanation of the destruction, discarding, loss, deposit or disposal.

7. When invoking a privilege or any other reason as a ground for withholding any responsive record, document, data or information, list each record, document, compilation of data or information by date, type, addressee, author (and if different, the preparer and signatory), general subject matter, and indicated or known circulation. Also, indicate the privilege or reason asserted with respect to each record, document, compilation of data or information in sufficient detail to ascertain the validity of the claim of privilege or other reason.

8. This subpoena is continuing in nature. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date shall be provided immediately upon location or discovery subsequent thereto.

9. Please provide a printed and, where possible, an electronic version of records. Electronic information may be stored on 3½ inch diskettes in ASCII format. In addition, please provide the Committee's Minority staff with an identical copy of all records provided.

Subpoenaed Items

Please provide the Committee with all records relating to the death of Esequiel Hernandez, Jr., an 18-year-old high school student who had been tending a herd of goats in or near the border town of Redford, Texas, on May 20, 1997, when he was shot and killed by a team of United States Marines conducting a counter-drug border surveillance mission at the request of, and under the supervision of, the United States Border Patrol. Such records shall include, but shall not be limited to, the following:

1. All records relating to the planning, briefing(s), training, or any other preparation for the surveillance mission.

Page 3 of 3

2. All records relating to the weaponry, surveillance equipment, communications, logistics, transportation, or any other equipment or support relating to the surveillance mission.
3. All records relating to the chain(s) of command, supervision, communications networks, or liaison concerning the surveillance mission.
4. All records relating to the prescribed or standard policies or operating procedures concerning the surveillance mission.
5. All records relating to the performance or execution of the surveillance mission.
6. All records relating to any encounters occurring on the day of the shooting or at any other time between Mr. Hernandez and any member(s) of the Marine surveillance team or any other Defense Department personnel.
7. All records relating to any encounters occurring on the day of the shooting or at any other time between Mr. Hernandez and any Border Patrol agents or other Justice Department personnel, including but not limited to a shooting incident involving Mr. Hernandez and one or more Border Patrol agents which may have occurred in February of 1997.
8. All records relating to any actions taken in response to any encounters between Mr. Hernandez and the Marine surveillance team by any U.S. Justice Department or U.S. Defense Department personnel.
9. All records relating to any medical attention provided to Mr. Hernandez after he was shot.
10. All records relating to any investigations concerning Mr. Hernandez' death or to any facts and circumstances related to Mr. Hernandez' death, including but not limited to any investigations conducted by the U.S. Justice Department, the U.S. Defense Department, or any agencies or officials of the State of Texas.
11. All records relating to any criminal, civil, or administrative actions concerning Mr. Hernandez' death or to any facts and circumstances relating to Mr. Hernandez' death.
12. All records relating to any U.S. Justice Department or U.S. Defense Department policy modifications, decisions or deliberations relating to Mr. Hernandez' death or to any facts and circumstances relating to Mr. Hernandez' death.
13. All records relating to any Congressional inquiries relating to Mr. Hernandez' death or to any facts and circumstances relating to Mr. Hernandez' death.

Subpoena Duces Tecum

By Authority of the House of Representatives of the Congress of the United States of America

To The Honorable William S. Cohen, SECRETARY, U.S. DEPARTMENT OF DEFENSE.....

You are hereby commanded to produce the things identified on the attached schedule before the Sub Committee on Investigation & Claims of the Committee on the Judiciary of the House of Representatives of the United States, of which the Hon. Henry J. Hyde is chairman, by producing such things in Room 2-2708 of the Rayburn Building in the city of Washington, on June 1, 1998, at the hour of 10:00 A.M. To United States Materials, et. al., JUDICIARY COMMITTEE STAFF, NEWARK.....

RECEIVED
MAY 21 3 28 PM '98
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 21st day of May, 1998.

Henry J. Hyde
Chairman

Attest:
Robin H. Cook
Clerk

Secretary William S. Cohen
 Subject for.....
 U.S. Department of Defense.....
 The Pentagon.....
 Washington, DC 20301-1155.....
 Judiciary.....
 before the Committee on the.....

James O. Simpson
 Associate Deputy Gen Counsel
 Department of Defense
 Office of General Counsel
 HENRY M. JACKSON
 U.S. SENATOR
 U.S. SENATE
 UNITED STATES GOVERNMENT
 WASHINGTON, D.C.
 105th Congress, 1st Session
 House of Representatives

SCHEDULE A**Subpoena Duces Tecum
Committee on the Judiciary
United States House of Representatives**

Serve: The Honorable William S. Cohen
Secretary
U.S. Department of Defense
The Pentagon
Washington, DC 20301-1155

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Page 2 of 3

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7. When invoking a privilege or any other reason as a ground for withholding any responsive record, document, data or information, list each record, document, compilation of data or information by date, type, addressee, author (and if different, the preparer and signatory), general subject matter, and indicated or known circulation. Also, indicate the privilege or reason asserted with respect to each record, document, compilation of data or information in sufficient detail to ascertain the validity of the claim of privilege or other reason.

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Page 3 of 3

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10. All records relating to any investigations concerning Mr. Hernandez' death or to any facts and circumstances related to Mr. Hernandez' death, including but not limited to any investigations conducted by the U.S. Justice Department, the U.S. Defense Department, or any agencies or officials of the State of Texas.
11. All records relating to any criminal, civil, or administrative actions concerning Mr. Hernandez' death or to any facts and circumstances relating to Mr. Hernandez' death.
12. All records relating to any U.S. Justice Department or U.S. Defense Department policy modifications, decisions or deliberations relating to Mr. Hernandez' death or to any facts and circumstances relating to Mr. Hernandez' death.
13. All records relating to any Congressional inquiries relating to Mr. Hernandez' death or to any facts and circumstances relating to Mr. Hernandez' death.

APPENDIX I

FCJT-EN

3 June, 1997

MEMORANDUM FOR RECORD

SUBJECT: Land Ownership in the Vicinity of Redford, TX

1. This memo describes the procedures used to plot the boundaries for the private land in the vicinity of Redford, TX on the USGS Quadrangle to determine the exact locations of the sites involved in the shooting.

2. The Marines assigned to 5th Battalion, 11th Marines obtained copies of the legal descriptions and the plots of the land holdings for the area in the vicinity of Redford, TX from the Presidio County Tax Assessors Office. On 24 May we met with Mr. Vargas, the acting Patrol Agent in Charge, Presidio Station, and Mr. Carmon Orozco one of the principal land owners in the Redford area. Mr. Orozco took us to the survey marker that delineated the Northwest corner of his property holdings. Using a Global Positioning System (GPS) we determined this marker to lie at Military Grid Coordinates 79749 East 57269 North. We could not locate any other survey markers for the tracts of land upon which the shooting took place. Review of the records on file in the Presidio County Court House, Marfa, TX show the typical survey markers in this region are stacks of stones, two feet high. Some stacks have a metal rod or a wooden stake placed in their center. The survey of these tracks was performed in September 1983. It is possible the markers from the 1983 survey no longer exist.

3. We plotted the boundaries of the private land on the USGS map using the single survey marker as a known point, and the legal description of the properties obtained from the County Tax Assessor. We determined the grid coordinates of the Listening Post/Observation Post (LP/OP), the hide site, and the shooting sites via GPS. We plotted these coordinates on USGS map. We verified the GPS 's accuracy by referencing an intermediate International Boundary Commission marker adjacent to the Rio Grande River. Resolution of the grid coordinates for the boundary marker are within 10 meters. I plotted the results of our investigation on the attached schematic and USGS map. Based on the survey and subsequent plots on the USGS map I determined:

a. The hide site (Point A) was on land owned by Carmen Orozco, for which we had a valid land use agreement.

b. The LP/OP site (Point B) was on land owned by Jose Luise Orozco, for which we did not have a valid land use agreement.

FCJT-EN

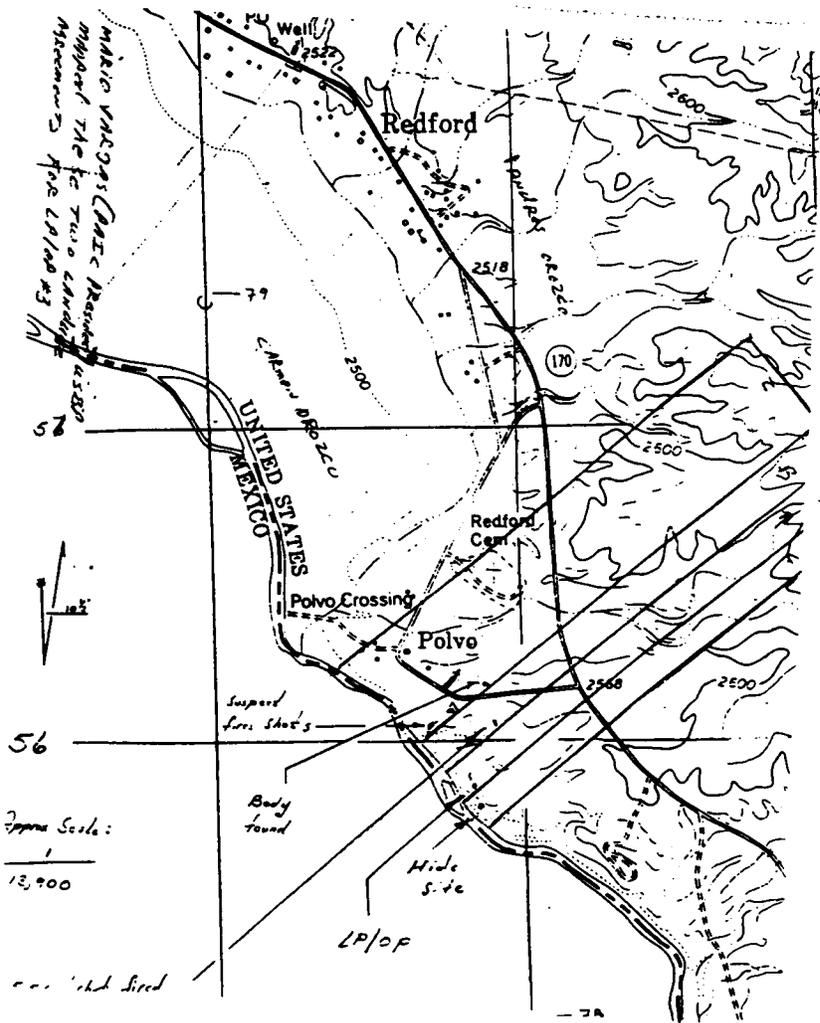
SUBJECT: Land Ownership in the Vicinity of Redford, TX

c. The site from which the 5.56mm shot was fired (Point C) was on land owned by Andres Orozco, for which we had a valid land use agreement.

d. The site from which the .22 cal. rounds were fired and the body subsequently found (Points E and G) lie on land whose ownership is not clearly recorded with the Presidio County Tax Assessor. Mr. Vargas confirmed that ownership of the land in this tract has been contested for several years. Carmen Orozco claims he owns the land.



WILLIAM J. REICHERT
LTC, U.S. Army
Staff Engineer



MAJOR VALGON'S (AIRC. RESERV.)
 MIGHTY THE FE TWO LANDS
 MOUNTAIN TO THE 20100 AS

Graphic Scale:
 1
 13,900

--- shot fired

APPENDIX J

MEMORANDUM OF UNDERSTANDING
BETWEEN
5TH BATTALION, 11TH MARINE REGIMENT;
UNITED STATES BORDER PATROL;
OPERATION ALLIANCE;
AND
JOINT TASK FORCE SIX

SUBJECT: Memorandum of Understanding (MOU) between 5th Battalion, 11th Marine Regiment; United States Border Patrol; Operation Alliance; and Joint Task Force Six for JT#414-97A.

1. PURPOSE. This MOU sets forth the responsibilities of the four organizations in connection with the operation and control of elements of JT#414-97A. The procedures to be followed by the military involved in JT#414-97A are set forth in the Operations Order briefed on 24 APR 97, attached hereto, and made a part hereof for all purposes.

2. TERMS OF AGREEMENT. This agreement shall become effective immediately upon signature by all parties and shall continue in effect until completion of operations on or about 29 May 97, unless terminated by any party upon notice in writing to all other parties.

3. AMENDMENTS OR MODIFICATIONS. Changes to this agreement and the attached Operations Order may occur upon the written agreement of all parties to this agreement.

970572
5th Battalion,
11th Marine Regiment

U.S. BORDER PATROL

Date: 24 APR 97

Date: 24 APR 97

OPERATION ALLIANCE
DATE 4/24/97

JOINT TASK FORCE SIX
DATE 24 APR 97

ENCL 9

LEA SENSITIVE

Copy no ___ of ___ copies
 HQ battery, 5th battalion, 11th Marines
 1st Marine Division (Rein), FMF
 Camp Pendleton, CA 92055
 170900 Apr 97

OPERATION ORDER For JTF 6 MISSION 414-97

- References: (a) USGS Map Sheet, Redford, Tx 1:24,000
 (b) USGS Map Sheet, Presidio East Quadrangle, Tx 1:24,000
 (c) USGS Map Sheet, Cerro Redondo Quadrangle, Tx 1:24,000
 (d) DMA Map Sheet NH 13-5 1:250,000
 (e) DMA Map Sheet NH 13-6 1:250,000
 (f) DMA Map Sheet NH 13-8 1:250,000
 (g) DMA Map Sheet NH 13-9 1:250,000

TASK ORGANIZATION: See Annex A.

I. SITUATION

A. Enemy Forces. See Annex B (Intelligence)

B. Friendly Forces.

1. JTF-6, CG I MEF, and CG 1st Mar Div provide task organized units to assist/ support local Law Enforcement Agencies (LEAs) in detecting, monitoring, and reporting illegal drug activities. 1st Mar Div retains operational control of the Battery. JTF-6 assumes tactical control of the Battery following the deployment of the ADVON on 07 May 1997
2. The United States Border Patrol (USBP) Marfa, Texas is the LEA we will be supporting. Their primary mission is to stop illegal aliens as they enter the United States. Their secondary mission is the seizure of drug contraband. We will be operating in Direct Support of the Border Patrol sub station at Presidio, Texas. The Border Patrol will provide reactionary forces to our individual sites.
3. The 36th Medical detachment out of Ft. Polk, Louisiana provides aerial medevac capability to HQ Battery, 5th Battalion, 11th Marines during Mission 414-97. They will be stationed at the Marfa, Texas airfield. We have requested and received a waiver to the 60 minute time limit on transportation to a medical facility because we estimate it may take about 10 minutes longer.

C. Attachments and Detachments.

1. Attachments. None

2. Detachments. Rear Party

ii. MISSION

HQ Battery, 5th Battalion, 11th Marines deploys to the Marfa, Texas AO from 13 May to 30 May in order to conduct LP/OP training, increase unit combat readiness, improve individual and collective skills, and assist the United States Border Patrol by the detection and monitoring of cross-border activities such as drug smuggling and movement of illegal aliens.

iii. EXECUTION

A. **Commander's Intent.** The sector we are going to be operating in has a fair amount of drug trafficking going through it. The Border Patrol is limited in their ability to catch these smugglers partly because the agents are spread so thin. Additionally, the smugglers have learned over the years that the best time to move drugs and illegals across the Rio Grande is at night when it is even more difficult for the Border Patrol to catch them. I believe the critical vulnerability of the smugglers in our AO is their reliance on a relatively limited number of suitable crossing sites. I intend to exploit this vulnerability by selecting LP/OPs that have good observation of these crossing sites, and by using various night vision devices to aid in detection. I plan to cover our NALs with teams that are trained specifically for this mission and know what to expect. I believe all the training we have been doing recently at all levels will pay off here. Small unit leadership is the key to success and we have some excellent young NCOs. I see success as a two fold entity. We have to employ our teams without having any of them compromised or having any safety related incidents. Secondly, we want to be able to provide first class support to the Border Patrol through alert, timely, and accurate reporting based on our Detection and Monitoring. The fruits of our labor should be evident by the seizure by the USBP of smugglers soon after they cross the Border. Finally, I want all my Marines to return safely to Camp Pendleton with all our equipment.

B. **Concept of Operations.** We will conduct this operation in four phases.

1. **Phase I. Mission Planning and Training.** This phase starts with the Initial Planning Conference (IPC) at the JTF-6 headquarters and a visit to the actual mission site down around Presidio, Texas. This visit is conducted with the USBP. Following the return of the key players from the IPC/site visit, planning begins in earnest from all angles, particularly the communications, logistics, and intelligence aspects. Training is conducted out at 29 Palms and back at Camp Pendleton teaching Marines; movement techniques, camouflage, cover, and concealment, 1st Aid, communications, field sketches, use of optics, reporting procedures, and rules of engagement. Training is designed to be as realistic as possible in an effort to prepare the teams for the actual mission.

2. **Phase II. Deployment**

- a. **Advance Party.** The advance party will consist of about 11 Marines to include the Mission Commander, the Logistics Chief, the Comm Officer, and several communicators. The mission of the advance party is to get everything ready so that when the main body arrives we will be ready to begin our mission. The advance party flies out on 7 May from the Camp Pendleton airfield aboard a C-130 with all the equipment, gear, and chow. They will fly into Ft. Bliss Army Airfield. Following debarkation, they will draw the contracted vehicles and the UHAUL truck, load up all the gear and equipment and chow, and head for Marfa. While the S-4 and S-6 are supervising this evolution, the MC and S-2 will report to JTY-6 in another vehicle to get any new info/intelligence. They will join the rest of the advance party either later on the 7th or on the 8th. The TOC will be established at this time, as will the billeting area.
- b. **Main Body.** The main body will consist of about 50 other members of HQ Battery. They will also fly out of the Camp Pendleton airfield aboard a C-130 along with all their personal gear. They will leave on the morning of 13 May and arrive at Biggs Army Airfield, Ft. Bliss, Tx. The Assistant Mission Commander (AMC) will lead the Main Body. Upon arrival at the airport, they will link up with elements of the Advance Party and fall in on the vehicles. They will be transported from the airport to the billeting area at the Marfa, Tx airport via 15 passenger vans. Their gear will be transported by the UHAUL truck. The tentative time to have all this completed is around 1800 on 13 May.
3. **Phase III. Employment.** Beginning around in the early morning on 15 May the actual mission will commence. The Battery will have 8 teams of 4 Marines. They will be broken down into 2 "watches". Four teams will man 4 holes for 36 hours and then be relieved by the second "watch" who will do the same. The infil/exfil will be conducted under the cover of darkness using a suburban or 15 passenger van. The teams will be picked up at the billeting area. The vehicle will take Hwy 67 to 170. The vehicle will drive down Hwy 170 and, in the cases of holes #1,3, and 4, will stop briefly at the predetermined drop off site and then proceed on down the road. Hole 2 requires the team to be dropped off down a trail on some private property adjacent to the border. The drop off itself will be planned out and rehearse so that it can be executed smoothly. We want to draw as little attention to this as possible. Once the teams have dismounted, they will move with caution and stealth to their holes and immediately report in. They should maintain comm while they are moving in, but only report by exception. The teams will maintain a vigilant watch of their assigned sector throughout the hours of darkness making hourly radio checks with the FWD CO. Teams may elect to move to a hide site during the day. However, they will continue their hourly comm checks. Teams will be watching for and making accurate real time reports on all personnel, airplanes, and vehicles in their respective sector, paying particular attention to anything resembling illegal activity. Reports will go to the FWD CP.

80383

Teams will continue to monitor the activity as long as it is in their field of view. The FWD CP will contact the TOC who will contact the Border Patrol. The Border Patrol will have agents close enough to our holes to respond in short order (15 minutes or less). The Border Patrol will handle the situation from that point. After a team has done its 3 day watch, it will be relieved in place by the oncoming watch. Following this relief it will move at the designated time under the cover of darkness to the pickup/drop off point and wait there under cover until the vehicle arrives to pick them up. Subsequent to exfil the team will be taken back to the billeting area. The team leaders will be brought to the TOC for a debrief with the S-2. The teams will stand down. They will spend the next 3 days cleaning themselves and their gear, eating, sleeping, and preparing for their next infil. The Battery will continue to operate in this manner until the morning of the 30th of May.

4. **Phase IV. Redeployment.** The retrograde operation will commence the morning of 30 May. The tents in the billeting area will be torn down and loaded aboard a UHAUL truck along with the rest of the gear from Camp Pendleton. Any assets borrowed from the USBP will be returned at that time. The gear in the TOC will be packed up and loaded aboard the UHAUL truck and in one of the Suburbans. Concurrent with this, an after action debrief will go with the Mission Commander, S-2, S-6, Border Patrol, and the JTF-6 Operations representative at the USBP station, Marfa, TX. The Battery will subsequently drive all assets back to Ft. Bliss. The unit will stay in quarters aboard Post the evening of 30 May. The unit will return with all gear and equipment on 2 C-130's leaving out of Biggs airfield at Ft. Bliss on the morning of 31 May.

C. Tasks

1. **Assistant Mission Commander - Lt Felcyn**
 - a. Assist the MC in all aspects of planning, training and execution of the Mission.
 - b. Take charge of the Main body and deploy with them on 13 May on our assigned aircraft.
 - c. Be prepared to move to the FWD CP and assume control there.
2. **Communications officer**
 - a. Assist the MC by drafting up a communications plan that includes primary, secondary, and tertiary means of communication.
 - b. Ensure that we have the assets in terms of equipment, batteries, frequencies, and trained personnel to support the comm plan.
 - c. Deploy on 7 May with the ADVON.
 - d. Establish a FWD CP in the vicinity of the Black Hills area (Garvino Windmill) and locate a capable NCO or SNCO there with it to supervise. This FWD CP will talk to the holes and the TOC, and in an emergency directly to the Border Patrol. Put someone there who can make decisions. Additionally, place a comm tech with the FWD CP

00004

- When comm goes down with one of the holes, dispatch the comm tech with another Marine to fix the problem.
- e. Ensure that the entire comm plan is properly executed to include setting up and manning the TOC.
 - f. Supervise all comm functions throughout the exercise.
 - g. "Break down" the TOC on 30 May after we extract the last team.
 - h. Attend the AA debrief on 30 May.

3. Logistics Chief - GySgt Fitzgerald

- a. Ensure all logistics requests to include the transportation requests are submitted to JTF-6 (attn J-4) in a timely fashion to support the COMMEX, Confirmation Brief, and actual Mission.
- b. Prepare and submit a comprehensive bud that includes all aspects of the mission.
- c. Ensure that all the equipment is properly embarked for transport aboard our assigned aircraft and coordinate the transportation of this equipment and the ADVON on 07 May.
- d. Deploy with the ADVON on 7 May and coordinate the transportation of all the equipment together with the PAX of the ADVON to the Marfa sector.
- e. Set up the billeting area at the Marfa airfield.
- f. Coordinate any and all logistics functions during the course of the mission.
- g. Ensure that on 30 May all equipment and gear is properly embarked and transported back to Ft. Bliss for airlift back to Camp Pendleton.
- h. Provide any AAR comments to the MC NLT 30 May.

4. Battery GySgt - GySgt Martinez

- a. Work with the AMC to get the Main Body embarked aboard our aircraft and transported to Ft. Bliss
- b. Coordinate the movement of PAX and gear from Ft. Bliss to the billeting area at the Marfa airfield with the Logistics Chief.
- c. Run the billeting area - you are in charge there.
- d. Assist with infiles and exfiles of the teams.
- e. Maintain accountability of all personnel for the duration of the entire mission.
- f. Break down the billeting area and get it packed up on 30 May. Work with the Logistics Chief on this.
- g. Work with the Logistics Chief to move PAX back to Ft. Bliss on 30 May.

5. Intelligence Officer - Sergeant Dewbre

- a. Brief all hands on intel estimate and OPSEC.
- b. Establish briefing and debriefing procedures for teams.
- c. Ensure USBP receives a daily intel summary.
- d. Provide the MC with info for his daily SITREPS.
- e. Set up and work a SITMAP. Be prepared to brief the MC or the Border Patrol on the current intelligence situation.

00005

- f. Coordinate final report submission and assist the MC in transferring or destroying any collected information to avoid intelligence overnight issues.
 - g. Attend the AA debrief on 30 May.
6. Corpman
- a. Ensure all class VIII items are obtained and embarked.
 - b. Ensure that all Marines are proficient in combat lifesaving tasks and aware of health dangers found specifically in our AO.
 - c. Check all combat lifesaving bags prior to teams inserting.
Conduct sick call and if absolutely necessary arrange for transport of individuals requiring a higher level of medical support to the hospital at Alpine, Texas. (The sick/injured Marine should ideally be wearing civies.)
7. Team Leaders
- a. Ensure that your team is prepared for the mission and has all the required gear for a 3 day tour to include chow and water.
 - b. Ensure that you have all pertinent info from the S-2 on your position and the NAI(s) you are responsible for covering. Brief all your Marines prior to infil.
 - c. Op check all gear and conduct radio checks before mounting the infil vehicle.
 - d. Establish comm with the FWD CP immediately after being dropped off. Perform comm checks hourly.
 - e. Submit mission LP/OP reports within one hour of exfil to the S-2.
 - f. Prior to departing your assigned hole, you will brief the oncoming team passing all pertinent info outlined in your brief sheet provided by the S-2.

D. Coordinating Instructions

1. Teams will avoid contact with non-mission related personnel during the course of their 3 day tour in the holes. If any incidental contact is made, the team will immediately report it to the FWD CP. Any contact can and probably does mean that the hole has been compromised. At that time a decision will be made on whether to pull the team or not. If the contact is hostile, the team will assume a defensive posture. No team member will engage unless JTF-6 ROE criteria has been met. No team will be allowed to continue its mission once hostile contact has been made.
2. Each team member will memorize the Rules of Engagement (ROE). ROE cards will be distributed to all teams. Marines will have received extensive ROE training and classes prior to deployment. No person will be detained unless the criteria outlined in the JTF-6 ROE have been met. If personnel are detained, they will be "patted down" for weapons and turned over to the Border Patrol as soon as an agent can get there. Every effort will be made to avoid confrontation and armed conflict with civilians.

00006

3. All Marines will receive Public Affairs training prior to deployment. Marines will simply refer all questions from any new agencies to the JTF-6 PAO.
4. Team members must make a concerted effort to remain hydrated. The weather is unforgiving and heat illness is a very real concern.
5. Force locations:
 - a. The TOC is located at the USBP station Marfa, Texas.
 LP/OP #1 EC 6533 6806
 LP/OP #2 EC 7450 6310
 LP/OP #3 EC 7882 5585
 LP/OP #4 EC 8175 5241
 FWD CP Vic EC 773 729 (close to the Gavino Windmill)
 Billeting area located at Marfa airfield (along with Medivac)
 - b. Infill/Excill sites are along the side of the road (Hwy 170) for holes 1,3, and 4. Hole 2 must be infilled/excilled from the trail that runs south from the Hwy. Team leaders will be given a quick drive-by recon on 14 May during daylight hours of their infill/excill site.
 - c. Teams will insert a magazine but will not chamber a round until such time that the team leader has determined that hostile contact is imminent.
 - d. Utilities will be worn for the actual mission, but a shirt of some kind will be worn over the blouse during infill/excill to draw less attention to the fact that military personnel are operating in the area. If and when any Marines are taken into town for a meal, appropriate civilian attire will be worn. Clothing items displaying unit or military logos are not authorized.
 - e. EEP's : -SALUTE report on all activity in AO
 -Previously unknown avenues of approach
 -Equipment type used by smugglers (to include weapons and comm gear)
 -Aircraft in AO

IV. ADMINISTRATION AND LOGISTICS

A. Administration.

1. The Battery Gunnery Sergeant will handle any administrative matters that might arise during the mission.
2. The MC or AMC will submit a SITREP to the JOC at JTF-6, the G-3 at 1st Mar Div, and to S/11 NLT 1200 daily from 07 May until 30 May.
3. Written debriefs will be submitted by Team Leaders to the S-2 within one hour following return from a mission. This is an addition requirement to the verbal debrief by the S-2. This will aid the MC in making out his SITREP.

B. Logistics.

1. Each team will carry enough MRE's for a 3 day mission.

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2. Each team will carry at least (3) 5 gal. Water cans in addition to their (2) qt canteens and (1) 2 qt canteen per Marine.
3. All Marines will carry a basic load of ammo.
4. Marines participating in infil/exfil will carry their own weapon.

V. COMMAND AND SIGNAL

A. Command

1. JTF-6 JOC is located at Ft. Bliss, TX (DSN 978-8888/8384 Fax 8322)
2. The TOC is located in a metal building at the USBP station, Marfa, Tx. It has a telephone and will have a sabers master station. We will run our operation out of there. The command group will consist of the MC (or AMC), a intel cell, a log cell, and a comm cell. The TOC will have connectivity to the billeting area via land line.
3. HQ Btry is under TACON of JTF-6 for the mission.

B. Signal. See Annex K (Communications)

VI. SAFETY, CONTINGENCY, LIBERTY, RISK ASSESSMENT. See Annex S.

APPENDIX K

FCJT-JA (525n)

20 June 1997

MEMORANDUM FOR RECORD

SUBJECT: Polvo "Crossing"

1. Even though referred to as such by locals (including local US Border Patrol (USBP) personnel) Polvo Crossing near Redford, Texas is not a Class B Port of Entry (POE) as has been reported, but is an unofficial, but locally used, crossing that is not a legal POE.

2. Mr. Nowak, US Customs Service, Operation Alliance (OpAll), was the Customs official responsible for POE in that region in 1988. From that time to the present, Polvo Crossing has never been a Class B POE or legal crossing point of any type. He reports the Immigration Service may have considered it an entry point originally, but they have not for several years now.

3. Mr. Larry Caver, USBP, OpAll, confirmed Mr. Nowak's information and said he would talk to the local USBP personnel.



MICHAEL T. BURMEISTER
MAJ, JA
Deputy Legal Advisor

APPENDIX L

FCJT-CG

20 June 1997

MEMORANDUM FOR CG, U.S. Army Air Defense Artillery Center and
Fort Bliss, ATTN: ATZC-CG (MG Costello), Fort
Bliss, TX 79916

SUBJECT: Comments to Appointing Authority

1. I have just reviewed LTC Cory's AR 15-6 investigation into the shooting incident that occurred in the vicinity of Redford, Texas during JTF-6 Mission JT414-97A. The investigation by LTC Cory was focused on the operational aspects of the mission, the rules of engagement (ROE) that were in effect, the training by the unit on the ROE, and whether or not the ROE was followed. The criminal investigation of the incident is being done by the Texas Rangers and the Federal Bureau of Investigation. Unfortunately, LTC Cory did not have access to all of the information derived by the criminal investigators and his findings are necessarily based on the information that he had available to him. Since I have no criminal jurisdiction over the Marines involved in the incident, my focus on the investigation concerned a review of the operational aspects of the mission to ensure that the Marines were properly trained and to review and validate JTF-6 policies and procedures throughout the mission cycle, from support request to end of mission. I am satisfied that LTC Cory's investigation thoroughly examined those policies and procedures. During the last couple of weeks, various media stories have indicated that the criminal investigators and the local District Attorney have found evidence which contradict the statements made by the Marines that were involved in the shooting incident. I have not been privy to that "evidence" and like LTC Cory have not been able to analyze any inconsistencies.

2. The AR 15-6 investigation indicates that the Marines were properly trained in the ROE and that the use of deadly force by the Marine corporal who fired the fatal shot was in accordance with the ROE. The most troubling aspect of this incident for me is my inability to place myself into the shoes of the Marines on the ground and to fully understand and appreciate their thought processes while they moved from the point where they initially were fired upon to the point where the fatal shot occurred. The facts as related by the Marines show that they saw a man with a rifle; that the man with the rifle fired two shots at them; that the man then commenced a tactical like movement; that they were concerned that the man was attempting to flank them; that they moved to maintain visual contact with the man as a protective measure; that the man aimed in on one of the Marines; and that the Marine corporal (team leader) fired one round at the man because he felt it was necessary to protect a member of his team. All of the evidence contained in the AR 15-6 is consistent with

9550

FCJT-CG
SUBJECT: Comments to Appointing Authority

the team leader's version of the events. Unfortunately, the same scenario could be interpreted to indicate that the Marines were fired on and then took action to track and eliminate their attacker. The Marine's version of the events is bolstered by the fact that the incident, from the point where they first saw the man to the point where the man was shot, was captured by taped radio communications between the team, the LEA, and the Marine Combat Operations Center (COC). Additionally, if the Marines had been moving solely for the intent of shooting their assailant, then I believe that they had ample opportunity to have done so prior to the point where they actually did. In summary, all of the information contained within the AR 15-6 investigation is consistent with the facts as related by the members of the Marine Team. However, the investigation shows an application of the ROE without any indication that actions were considered to defuse the situation short of the application of deadly force.

3. There are a number of other aspects of the incident which are troubling and relate to a lack of intervention or leadership which in my opinion contributed to the regrettable loss of a young man's life:

a. The supported LEA had promised a response time to the Marine positions within 15 minutes of being called. The Marines originally reported seeing the armed individual at 18:05:38. They reported taking fire at 18:07:36. The armed individual was shot at 18:27:34. The LEA did not link up with the Marine team until approximately 18:45:42. If the LEA had been on the scene in 15 minutes, they would have arrived 5 to 7 minutes before the fatal shot was fired (depending on whether dispatch occurred when armed individual first seen or shots first fired). The response was delayed because the LEA chose to return to its headquarters to draw weapons and turn over detained illegal aliens (IAs) instead of immediately responding to the Marine position. Finally, of the four members of the BP response force, only one was an experienced agent. The radio transmissions also indicate an unfamiliarity on the part of the responding LEA officers with where the Marines were operating and located.

b. The investigation also shows a failure by the COC to exercise positive leadership and interject any calming or detached authority down to the unit actively engaged. The mission commander was not at the COC at the start of the incident despite the fact that "compromise" or "contact" is more likely while the team was moving from the hide site to the Listening Post/Observation Post (LP/OP) position. More positive

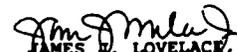
FCJT-CG
SUBJECT: Comments to Appointing Authority

command, control and assistance could possibly have resulted in the team leader considering other actions like hunkering down and taking a defensive position or breaking contact by moving away from the assailant.

4. Another aspect of the overall mission deals with the failure of the LEA to provide all critical elements of "local intelligence" concerning the area of operation of the Marine unit. The supported LEAs are the "experts" on local intelligence. According to media reports, the young man who was killed regularly herded his goats in the area of the designated LP/OP site. Additionally the LP/OP position was adjacent to "Polvo Crossing," an unofficial, but locally used, crossing where it is nonetheless illegal to enter the United States. Had the LEA provided complete information regarding the likely types and levels of activity in the area, the chosen LP/OP position might have been deemed unacceptable.

5. A final observation on my part deals with the systemic problem of ensuring that operations on private land are only conducted with the express permission of the landowner. Manpower and fiscal restraints dictate reliance by JTF-6 upon the assurances of the supported LEAs regarding the ownership of the land along the border. The LEA is responsible for obtaining the written permission of the landowners. In this particular case, the Border Patrol indicated that the AO was owned by two brothers and produced written land use agreements executed by both brothers. In fact, apparently unknown to the Border Patrol, a third member of the family owned a strip of the land in question, which encompassed the actual site of the chosen LP/OP position.

6. In conclusion, I found that the use of deadly force in this case was in accordance with the ROE based upon the information available to me. There are many contributing factors, but only one causal effect...the decisions by CPL Banuelos from the time the team received fire until CPL Banuelos fired upon the victim. It is easy, through detached reflection, for someone to second guess the actions of the team leader. Ultimately I find that his decision was rational to maintain visual contact in an effort to remain aware of the location of the assailant.


JAMES D. LOVELACE, JR.
Brigadier General, U.S. Army
Commanding

APPENDIX M



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

18 JUL 1997

Mr. Albert G. Valadez
83rd District Attorney
104 W. Callaghan
Fort Stockton, TX 79735

Dear Mr. Valadez:

We have received copies of your grand jury subpoenas requesting official information from Brigadier General James J. Lovelace, Jr., Commanding General, Joint Task Force Six, and other Department of Defense officials, pertaining to the circumstances surrounding the death of Ezequiel Hernandez, Jr. It is the policy of the Department of Defense to cooperate with civilian authorities who are conducting investigations such as yours. However, a subpoena is not the appropriate mechanism to obtain official information from the Department of Defense in this case.

The United States has not waived its sovereign immunity for state court subpoenas. *State of Louisiana v. Sparks*, 978 F. 2d 226 (5th Cir. 1992). Accordingly, we respectfully request that you withdraw any outstanding subpoenas. Further, the Department is also interested in reviewing materials that we understand have been collected by Texas officials in the course of their investigations and inquiries into this matter, as these materials may assist the on-going military investigations. Please contact Mr. James O. Smyser ((703) 614-7676) of my staff, who will discuss with you arrangements for a mutually satisfactory exchange of information.

Sincerely,

Handwritten signature of Judith A. Miller in cursive script.

Judith A. Miller

92801790



U.S. Department of Justice

Immigration and Naturalization Service

July 1, 1997

*Merfa Sector Headquarters
P.O. Box 7
Merfa, Texas 79843*First Class Mail and
Certified Mail # Z 189 483 552Ms. Mimi Smith
Assistant District Attorney
104 West Callaghan Street
Ft. Stockton, TX 79701

Re: Grand Jury Subpoenas Duces Tecum issued to Border Patrol Personnel

Dear Ms. Smith:

On or about June 5, 1997, Grand Jury Subpoenas Duces Tecum were served on Jerry Agan, David Castenada, Rudy Rodriguez, Joe Harris and Francis Razo, all of whom are Border Patrol Personnel and thus, Department of Justice Employees. The Subpoenas dictated that the aforementioned Border Patrol Personnel were to appear before the grand jury (at a future date) and/or provide documents with reference to the shooting incident on May 20, 1997 involving Esequiel Hernandez, Jr. I assume that the testimony and/or documents requested concern matters related to the official duties or official status of the Border Patrol Personnel.

While the Border Patrol wishes to cooperate, you are hereby advised that Department of Justice employees, which include the Border Patrol Personnel, are barred from testifying and/or providing documents in any case in which the United States is not a party, unless and until the party seeking the testimony and/or documents has complied with 28 C.F.R. S16.22. Section 16.22 provides that the party seeking the testimony and/or documents must provide the appropriate United States Attorney a summary of the testimony and/or information sought and its relevance to the proceeding. Please review this section for further guidance.

The authority to approve testimony and/or provide documents rests with the INS Regional Counsel in Dallas, Texas. If you wish to comply with the provisions of 28 C.F.R. S 1622, you may send your summaries to my office which will then be forwarded for further action. Please be advised that mere compliance with 28 C.F.R. S 1622 is not a guarantee that the Border Patrol Personnel will be allowed to appear and/or provide documents as requested.

12050

Ms. Mimi Smith
July 3, 1997
Page 2

A prompt reply will be appreciated. Otherwise, a Motion to Quash will be sought with regards these Subpoenas.

If you have any questions, please do not hesitate to contact me at (915) 729-4353. Thank you for your attention to this matter.

Sincerely,


Marilyn R. Chambers
Sector Counsel

MRC/

cc: Jim Blankenship, AUSA, Alpine, TX
David K. Duncan, Texas Ranger
Jerry Agan
David Castaneda,
Rudy Rodriguez
Joseph Harris
Francis Razo

APPENDIX N

Author: Marilyn R Chambers at SRO-MAR-001
Date: 7/29/97 1:44 PM
Priority: Urgent
Receipt Requested
TO: Michael K Cameron at HQCOU
TO: Patrick (Detail) McDermott at HQCOU
TO: Reid Tilson at sro-005
TO: Jose J Tavares at SRO-KLP-001
TO: Simon Garza
Subject: Re: Release of LEA Sensitive Document

----- Message Contents -----

Reid,

I received your message. I've just gotten off the phone with Mike Cameron and Michael Coster who informed me that we are NOT to release any more documents and no one who is under subpoena is to testify. Therefore, I will review your document and will send you, by overnight mail, all the documents I have in my possession so that you may review same.

If you have any questions, please call me. Thanks.

Marilyn

----- Reply Separator -----
Subject: Release of LEA Sensitive Document
Author: Reid Tilson at sro-005
Date: 7/29/97 1:07 PM

Hi all, I am faxing a 50 page document. I redacted sentences that might be covered by the law enforcement techniques privilege. I think it is a weak privilege for these materials. I did not redact any names of people. Maybe we should have an FOIA clerk go through some of this stuff. Let me know what you think. Reid.

Memorandum



MAR 90/97

Subject	Date
Subpoenas re Redford Incident Grand Jury of July 30, 1997	July 29, 1997
To	From

DCPA Jerry C. Agan
ACPA David J. Castenada
ACPA Rudy R. Rodriguez
Ms. Frances D. Razo
Marfa, Texas

Office of the Chief Patrol Agent
Marfa Sector
Marfa, Texas

Pursuant to instructions received from Headquarters in Washington, please be advised that DOJ has **NOT** granted permission for documents to be released and/or for testimony to be given to the District Attorney of Presidio County regarding the Redford Incident. Accordingly, you are hereby instructed to **NOT** release any documents and you may **NOT** appear to testify at the grand jury proceeding scheduled for tomorrow, Wednesday, July 30, 1997.

I have attached copies of the pertinent regulations, 28 C.F.R. § 16.21 et seq., which forbid the release of documents and/or the testimony of DOJ employees unless permission has been granted. I have also attached a copy of a case, *State of Louisiana v Sparks*, 978 F.2d 226 (5th Cir. 1992) which sets forth the doctrine of sovereign immunity, which has not been waived in this case, and further states that the U.S. Supreme Court has held that the regulations attached hereto, "unquestionably give Justice Department employees the authority, when so ordered by superiors, to refuse to comply with a subpoena ordering disclosure of confidential files when the United States is not a party to a legal action". (See page 10 of the opinion).

Since permission to surrender documents and/or testify has been denied by your superiors in Washington, please show the case and a copy of the regulations to the proper official, in the event of an arrest. Based on the regulations and case law, attempt to have the officer not effect the arrest. But, if an arrest is attempted, please do NOT attempt to evade arrest and/or prevent the arrest. If the officer insists on arresting you, please cooperate and go quietly.

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Grand Jury Memo
July 29, 1997
Page 2

If you are arrested, please call one of the following people at the numbers listed below and immediate action will be taken to obtain your release ASAP. The following people may be called at any time:

1. Michael Cameron, Counsel, Washington (202) 773-6644 (pager number)
(202) 514-4615 (office)
2. DOJ Legal Command Center, Washington (202) 514-6000
(Will locate M. Cameron or someone to assist you)
3. Marilyn R. Chambers (915) 837-5884

If you have any questions, please do not hesitate to contact me or Sector Counsel, Marilyn R. Chambers, at (915) 729-4353.


Simon Garza, Jr.
Chief Patrol Agent

cc: Marilyn R. Chambers

Memorandum



MAR 90/9.

Subject GRAND JURY TESTIMONY REDFORD INCIDENT OF MAY 20, 1997	Date August 11, 1997
To Agent Jerry Succa Presidio Station Presidio, Texas	From Office of the Chief Patrol Agent Marfa Sector Headquarters Marfa, Texas

Please be advised that the Department Of Justice has reached an agreement with Albert G. Valadez, the District Attorney, concerning the upcoming Grand Jury Proceeding regarding the Redford Incident of May 20, 1997. This agreement allows you to testify at the Grand Jury Proceeding currently set for Thursday, August 14, 1997 at 10:00 a.m. You may ONLY testify as to the following: how the Marquis were dressed on May 20, 1997 and other observations made by you at the scene of the incident.

PAIC Manny Padilla, Jr. will rearrange your schedule so that you may be here at Marfa Sector no later than 8:00 a.m. to meet with Marilyn R. Chambers, Sector Counsel, to prepare for your testimony. Prior to meeting with Ms. Chambers, you should review any statements which you have given to anyone in connection with the Redford Incident. Additionally, please be advised that you should be dressed in courtroom attire, suit and/or coat and tie, for the Grand Jury Proceeding.

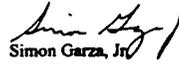
As Ms. Chambers has discussed or will discuss with you:

1. the Department of Justice has declined your request for legal representation at this point in time since your interests do not appear to conflict with INS's interests. Accordingly, Sector Counsel will accompany you to the Grand Jury Hearing and be available to answer all your questions; and

Grand Jury Testimony
Page 2
August 11, 1997

2. the attorney representing Cpl. Banuelos, Jack Zimmerman, wishes to speak with you prior to the convening of the Grand Jury. The Department of Justice has stated that you will be available to speak with him, should you choose to do so. The choice is yours. Ms. Chambers will be with you during your meeting with Mr. Zimmerman, if you choose to speak with him and we will make arrangements for you to meet with him during the afternoon of Wednesday, August 13, 1997. Your schedule will be rearranged to accommodate this interview. Please let Ms. Chambers know by 10:00 a.m. tomorrow whether or not you will meet with Mr. Zimmerman as she must inform him of your decision so he can make appropriate travel arrangements.

I appreciate your cooperation in this matter. If you have any questions, please don't hesitate to call Sector Counsel at (915) 729-4353.


Simon Garza, Jr.
Chief Patrol Agent

cc: Marilyn R. Chambers
Manny Padilla, Jr.

Memorandum



MAR 90/9:

Subject	Date
GRAND JURY TESTIMONY REDFORD INCIDENT OF MAY 20, 1997	August 11, 1997
To	From
Agent James Dematteo Presidio Station Presidio, Texas	Office of the Chief Patrol Agent Marfa Sector Headquarters Marfa, Texas

Please be advised that the Department Of Justice has reached an agreement with Albert G. Valadez, the District Attorney, concerning the upcoming Grand Jury Proceeding regarding the Redford Incident of May 20, 1997. This agreement allows you to testify at the Grand Jury Proceeding currently set for Thursday, August 14, 1997 at 10:00 a.m. You may ONLY testify as to the following: the February 1997 incident wherein shots were fired at Border Patrol Agents by Esequiel Hernandez, Jr.

PAIC Manny Padilla, Jr. will rearrange your schedule so that you may be here at Marfa Sector no later than 8:00 a.m. to meet with Marilyn R. Chambers, Sector Counsel, to prepare for your testimony. Prior to meeting with Ms. Chambers, you should review any statements which you have given to anyone in connection with the Redford Incident. Additionally, please be advised that you should be dressed in courtroom attire, suit and/or coat and tie, for the Grand Jury Proceeding.

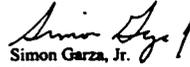
As Ms. Chambers has discussed or will discuss with you:

1. Since you did not request individual legal representation and at this point in time your interests do not appear to conflict with INS's interests, Sector Counsel will accompany you to the Grand Jury Hearing and be available to answer all your questions; and

Grand Jury Testimony
Page 2
August 11, 1997

2. the attorney representing Cpl. Banuelos, Jack Zimmerman, wishes to speak with you prior to the convening of the Grand Jury. The Department of Justice has stated that you will be available to speak with him, should you choose to do so. The choice is yours. Ms. Chambers will be with you during your meeting with Mr. Zimmerman, if you choose to speak with him and we will make arrangements for you to meet with him during the afternoon of Wednesday, August 13, 1997. Your schedule will be rearranged to accommodate this interview. Please let Ms. Chambers know by 10:00 a.m. tomorrow whether or not you will meet with Mr. Zimmerman as she must inform him of your decision so he can make appropriate travel arrangements.

I appreciate your cooperation in this matter. If you have any questions, please don't hesitate to call Sector Counsel at (915) 729-4353.


Simon Garza, Jr.
Chief Patrol Agent

cc: Marilyn R. Chambers
Manny Padilla, Jr.

Memorandum



MAR 90/97

Subject	Date
GRAND JURY TESTIMONY REDFORD INCIDENT OF MAY 20, 1997	August 11, 1997
To	From
Agent Johnny Urias Presidio Station Presidio, Texas	Office of the Chief Patrol Agent Marfa Sector Headquarters Marfa, Texas

Please be advised that the Department Of Justice has reached an agreement with Albert G. Valadez, the District Attorney, concerning the upcoming Grand Jury Proceeding regarding the Redford Incident of May 20, 1997. This agreement allows you to testify at the Grand Jury Proceeding currently set for Thursday, August 14, 1997 at 10:00 a.m. You may ONLY testify as to the following: the February 1997 incident in which shots were fired at Border Patrol Agents by Esequiel Hernandez, Jr. and your observations made by you at the scene of the incident on May 20, 1997.

PAIC Manny Padilla, Jr. will rearrange your schedule so that you may be here at Marfa Sector no later than 8:00 a.m. to meet with Marilyn R. Chambers, Sector Counsel, to prepare for your testimony. Prior to meeting with Ms. Chambers, you should review any statements which you have given to anyone in connection with the Redford Incident. Additionally, please be advised that you should be dressed in courtroom attire, suit and/or coat and tie, for the Grand Jury Proceeding.

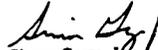
As Ms. Chambers has discussed or will discuss with you:

1. the Department of Justice has declined your request for legal representation at this point in time since your interests do not appear to conflict with INS's interests. Accordingly, Sector Counsel will accompany you to the Grand Jury Hearing and be available to answer all your questions; and

Grand Jury Testimony
Page 2
August 11, 1997

2. the attorney representing Cpl. Banuelos, Jack Zimmerman, wishes to speak with you prior to the convening of the Grand Jury. The Department of Justice has stated that you will be available to speak with him, should you choose to do so. The choice is yours. Ms. Chambers will be with you during your meeting with Mr. Zimmerman, if you choose to speak with him and we will make arrangements for you to meet with him during the afternoon of Wednesday, August 13, 1997. Your schedule will be rearranged to accommodate this interview. Please let Ms. Chambers know by 10:00 a.m. tomorrow whether or not you will meet with Mr. Zimmerman as she must inform him of your decision so he can make appropriate travel arrangements.

I appreciate your cooperation in this matter. If you have any questions, please don't hesitate to call Sector Counsel at (915) 729-4353.


Simon Garza, Jr.
Chief Patrol Agent

cc: Marilyn R. Chambers
Manny Padilla, Jr.

Memorandum



MAR 90/9.

Subject	Date
GRAND JURY TESTIMONY REDFORD INCIDENT OF MAY 20, 1997	August 11, 1997
To	From
Agent Stanley Myers Presidio Station Presidio, Texas	Office of the Chief Patrol Agent Marfa Sector Headquarters Marfa, Texas

Please be advised that the Department Of Justice has reached an agreement with Albert G. Valadez, the District Attorney, concerning the upcoming Grand Jury Proceeding regarding the Redford Incident of May 20, 1997. This agreement allows you to testify at the Grand Jury Proceeding currently set for Thursday, August 14, 1997 at 10:00 a.m. You may ONLY testify as to the following: your observations of Esequiel Hernandez; the actions you took concerning moving Mr. Hernandez; and you observations concerning the Marines at the scene of the incident.

PAIC Manny Padilla, Jr. will rearrange your schedule so that you may be here at Marfa Sector no later than 8:00 a.m. to meet with Marilyn R. Chambers, Sector Counsel, to prepare for your testimony. Prior to meeting with Ms. Chambers, you should review any statements which you have given to anyone in connection with the Redford Incident. Additionally, please be advised that you should be dressed in courtroom attire, suit and/or coat and tie, for the Grand Jury Proceeding.

As Ms. Chambers has discussed or will discuss with you:

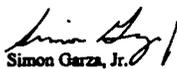
1. the Department of Justice has declined your request for legal representation at this point in time since your interests do not appear to conflict with INS's interests. Accordingly, Sector Counsel will accompany you to the Grand Jury Hearing and be available to answer all your questions; and

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Grand Jury Testimony
Page 2
August 11, 1997

2. the attorney representing Cpl. Banuelos, Jack Zimmerman, wishes to speak with you prior to the convening of the Grand Jury. The Department of Justice has stated that you will be available to speak with him, should you choose to do so. The choice is yours. Ms. Chambers will be with you during your meeting with Mr. Zimmerman, if you choose to speak with him and we will make arrangements for you to meet with him during the afternoon of Wednesday, August 13, 1997. Your schedule will be rearranged to accommodate this interview. Please let Ms. Chambers know by 10:00 a.m. tomorrow whether or not you will meet with Mr. Zimmerman as she must inform him so that he can make appropriate travel arrangements.

I appreciate your cooperation in this matter. If you have any questions, please don't hesitate to call Sector Counsel at (915) 729-4353.


Simon Garza, Jr.
Chief Patrol Agent

cc: Marilyn R. Chambers
Manny Padilla, Jr.

Memorandum



MAR 909

Subject	Date
GRAND JURY TESTIMONY REDFORD INCIDENT OF MAY 20, 1997	August 11, 1997
To	From
ACPA Rudy R. Rodriguez Marfa Sector Headquarters Marfa, Texas	Office of the Chief Patrol Agent Marfa Sector Headquarters Marfa, Texas

Please be advised that the Department Of Justice has reached an agreement with Albert G. Valadez, the District Attorney, concerning the upcoming Grand Jury Proceeding regarding the Redford Incident of May 20, 1997. This agreement allows you to testify at the Grand Jury Proceeding currently set for Thursday, August 14, 1997 at 10:00 a.m. You may ONLY testify as to the following: the walk-through of the incident on May 20, 1997; your discussions with the Marines; and what the Marines said and did during the walk-through.

Prior to Wednesday, you should meet with Sector Counsel, to prepare for your testimony. Prior to meeting with Ms. Chambers, you should review any statements which you have given to anyone in connection with the Redford Incident. Additionally, please be advised that you should be dressed in courtroom attire for the Grand Jury Proceeding.

The attorney representing Cpl. Banuelos, Jack Zimmerman, wishes to speak with you prior to the convening of the Grand Jury. The Department of Justice has stated that you will be available to speak with him, should you choose to do so. The choice is yours. Ms. Chambers will be with you during your meeting with Mr. Zimmerman, if you choose to speak with him and will make arrangements for you to meet with him during the afternoon of Wednesday, August 13, 1997. Please let Ms. Chambers know by 10:00 a.m. tomorrow whether or not you will meet with Mr. Zimmerman as she must inform him of your decision so he can make appropriate travel arrangements.

I appreciate your cooperation in this matter. If you have any questions, please don't hesitate to call Sector Counsel at (915) 729-4353.


Simon Garza, Jr.
Chief Patrol Agent

cc: Marilyn R. Chambers

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Memorandum



MAR 90/9.

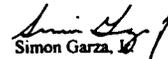
Subject	Date
GRAND JURY TESTIMONY REDFORD INCIDENT OF MAY 20, 1997	August 11, 1997
To	From
ACPA David J. Castaneda Marfa Sector Headquarters Marfa, Texas	Office of the Chief Patrol Agent Marfa Sector Headquarters Marfa, Texas

Please be advised that the Department of Justice has reached an agreement with Albert G. Valadez, the District Attorney, concerning the upcoming Grand Jury Proceeding regarding the Redford Incident of May 20, 1997. This agreement allows you to testify at the Grand Jury Proceeding currently set for Thursday, August 14, 1997 at 10:00 a.m. You may ONLY testify as to the following: the walk-through of the incident on May 20, 1997; your discussions with the Marines; and what the Marines said and did during the walk-through.

Prior to Wednesday, you should meet with Sector Counsel, to prepare for your testimony. Prior to meeting with Ms. Chambers, you should review any statements which you have given to anyone in connection with the Redford Incident. Additionally, please be advised that you should be dressed in courtroom attire for the Grand Jury Proceeding.

The attorney representing Cpl. Banuelos, Jack Zimmerman, wishes to speak with you prior to the convening of the Grand Jury. The Department of Justice has stated that you will be available to speak with him, should you choose to do so. The choice is yours. Ms. Chambers will be with you during your meeting with Mr. Zimmerman, if you choose to speak with him and will make arrangements for you to meet with him during the afternoon of Wednesday, August 13, 1997. Please let Ms. Chambers know by 10:00 a.m. tomorrow whether or not you will meet with Mr. Zimmerman as she must inform him of your decision so he can make appropriate travel arrangements.

I appreciate your cooperation in this matter. If you have any questions, please don't hesitate to call Sector Counsel at (915) 729-4353.


Simon Garza,
Chief Patrol Agent

cc: Marilyn R. Chambers

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