

# Lavoy Finicum's death with jury instructions

Lavoy Finicum's death, caused by Oregon state police and FBI on January 26, 2016, will be litigated as his family will likely bring a lawsuit against Oregon and federal government for police' excessive use of force. When the parties litigate the case, they will be bound by the law on the issues of excessive force. Citizens observing and judging the situation should likewise apply the law to the facts to reach a conclusion, regardless of one's impression of Finicum and other protesters.

Below are the jury instructions that the Ninth Circuit Court of Appeals has posted on its website for claims of excessive use of force. There are 6 main factors in the instructions. I list the instructions below (in italics) with my general comments following each factor.

In determining whether the officers used excessive force in this case, consider all of the circumstances known to the officers on the scene, including:

1. The severity of the crime or other circumstances to which the officers were responding;

Finicum may have committed a crime when he refused to leave the refuge, but nothing violent happened at the refuge: no property or persons were hurt. During the occupation, media was present, who apparently felt safe near the protesters. Police were present and underwent negotiations with the protesters and likewise felt no serious threat to their safety. Citizens were coming and going to observe or support the protest. Supposedly, the neighboring county sheriff, among other public officials, empathized with the protesters and worked on their behalf.

Perhaps there was probable cause to arrest Finicum and others (a common occurrence in the United States). If any warrants had been issued by a court, police could have served them at the refuge with media cameras and public present. Instead of arresting Finicum and others in this fashion, they concocted a plan to stop them on the road while isolated with plans of a roadblock party, which some onlookers have deemed as unlawfully conducted. Apparently, police had prior knowledge of the community event to which Finicum was travelling well in advance of January 26.

When police stopped Ammon Bundy's vehicle, Finicum was in his truck ahead of Bundy. Finicum stopped his vehicle some distance ahead of Bundy. Police pulled behind Finicum's rested vehicle, got out, had assault rifles drawn and pointed at Finicum and the occupants—an obviously provocative encounter. Two witnesses in Finicum's truck say that police fired a shot at the vehicle while Finicum was stopped during this time. Shortly thereafter, Finicum decided to flee the stop and drive to the next county where the "friendly" county sheriff was, whom Finicum was told would provide protection for him and the other protesters.

Finicum's response to avoid contact with state police and FBI and travel to the next county was in rational keeping with what Oath Keeper president, Stewart Rhodes, and two other Oath Keeper leaders told Finicum two days prior to his trip to the adjoining county: namely, they told Finicum that he should make a "lateral move" to the adjacent county because police were about to shut them down.

During this conversation, the Oath Keepers implied that the FBI would be doing more than just arresting them. This news, of course, changed the game for the protesters because up to this point, there was normal access to the refuge by police and public. Oath Keepers must have put much fear in Finicum when they claimed that FBI had gathered in Burns, OR in the hundreds to end the protest. They also told Finicum that there

would be more than drones hovering over the refuge to ascertain their positions in the refuge, such as helicopters and other assaultive tactics. According to Oath Keepers, who were supposedly negotiating for the protesters and there to help, the game was about to change drastically for the worse.

This conversation was recorded, but Oath Keepers removed the audio recording of conversation with Finicum because they recorded it without Finicum's permission, and then after his death, posted it on the internet without permission from Finicum's family or attorney. Notably, even though Oath Keepers knew of the community event to which Finicum and others were traveling and had promised Finicum that they would provide him an escort to ensure safe passage to the next county, they were nowhere to be found when police stopped, blocked and killed Finicum.

When Finicum was traveling to the community event (where hundreds of citizens were gathered waiting for him), police knew exactly who he was, where he was going and why. Finicum had no criminal history, and his protest was, in many ways, a political protest with no property or persons being damaged by him or other protesters. FBI and media had been in continual contact with him and the others for weeks.

Police were not responding to a violent crime Finicum had committed, like, for example, chasing an armed robber who had just committed the crime and fleeing therefrom. Rather, Finicum was traveling to a community event; and knowing this, police planned this event, which had the elements of an ambush specifically designed for Finicum or Bundy attempting to drive to the next county where the "constitutional sheriff" and community were waiting for Finicum.

2. Whether Finicum posed an immediate threat to the safety of the officers or to others;

Finicum posed no immediate threat to police when he exited his

truck. This situation was not like a duel where two people are within a short range under equal or similar footing, opportunity and readiness. Just the opposite: police secured an advantageous perimeter and had rifles pointed and sights on him from the beginning. Finicum had his hands raised, faced no officer, was not in position to shoot, and was stumbling in the snow. Finicum had no legitimate chance of timely drawing and shooting a pistol (as if a pistol is worth much in this situation) to shoot anyone—even himself.

Significantly, the closest police to Finicum were the two that rushed him, while the others had firing-line positions from protected positions behind vehicles and in the woods. When the officer at the bottom of the video pointed his rifle at Finicum, Finicum turned away from him, stumbled, briefly dropped his hands but tried to raise them in the air again after he stumbled. Immediately thereafter, the police from the woods rushed Finicum, tazed him and appears to have shot him with his pistol from his waist. Meanwhile, other police shot Finicum when he was in no position to harm anyone. Assuming Finicum ever posed a threat to police, it did not rise to the level of a serious and legitimate threat.

3. Whether Finicum was actively resisting arrest or attempting to evade arrest by flight;

Finicum actively resisted no police. When Finicum left the initial police stop (where Ammon Bundy was arrested), police knew his destination—the nearby county. Then, Finicum surrendered after he hit the snow and exited his vehicle. This surrender, of all things, required police to wait until there was a clear and legitimate sign that he intended to kill police and had the immediate and legitimate ability to do so. That Finicum's hands briefly dropping in this scenario cannot be equated to a clear and convincing intent to kill police, nor can it equate to legitimate ability to kill anyone.

Assume that Finicum had a design to deceive police (like this:

“I’m going to put my hands up and get dozens of police who are pointing rifles at me to think I’m surrendering. Then I’m going to, in such a sly way, pull my small pistol from my jacket—they’ll never see it coming, hahaha!—and I’ll kill all these police with their AR-rifles pointed at me”—really?!). Still, there was no way Finicum could have gotten “the drop” on any police under these circumstances.

4. The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary;

Police had the advantage of planning, time and position throughout this incident. They always do in these kinds of tactical plans. That is what separates police operations from personal defense of citizens who are caught off guard from an intruder. This is why police cannot make a simple claim, “We thought he may have been going for a gun, so we killed him,” in the kind of circumstances we see with Finicum.

Police had time to determine if Finicum had a gun, drew a gun and demonstrated the intent to use it against police. As soon as police see a gun-like object in his hand, their fingers were on their rifles ready to kill him—instantly! There was no way Finicum was in the same or even similar position as police. Finicum was alone and surrounded. He was like a duck sitting in a barrel, but police did not even wait to make a clear determination under these circumstances. Instead, they quickly jumped to the conclusion to kill Finicum.

Their killing Finicum because they thought “he was going for a gun” was a type of pre-textual seizure. This is where police search and seize people and property with the pretext of some supposed or alleged lawful reason; but in fact, police either created the reason to search and seize or used a minor or apparent incident to exceed the scope of their authority.

5. The type and amount of force used;

Police used the most extreme of all force: death. This requires police to prove that all of the above jury instructions go in their favor. But the factors do not go in their favor: they go in favor of Finicum. The circumstances simply did not warrant using death as the means of subduing Finicum. After all, police were equipped with many non-lethal weapons, including flash-bang grenades, tear gas, rubber bullets, tasers, etc., which they used against the people in the truck. Finicum did not pose such a significant and legitimate threat of death towards the officers that killing him was within the scope of a lawful seizure.

6. The availability of alternative methods to take Finicum into custody or to subdue him;

Like #5 above, police had alternative non-lethal methods of disabling him; and they had the option of allowing him to get to his destination at the community event and arrest him in a safe, public environment—assuming they even had a warrant for him. Instead, they chose to stop him along and isolated and create an ambush-style operation to seize Finicum.

## Conclusion

The government has a heavy burden of proof to prove that their force was not excessive. Given the jury instructions in an excessive use of force case against the government, the factors favor Finicum, not the government. Notably, the government knew they would have to prove their killing of Finicum, but according to FBI, there is no other surveillance that recorded what happened. The only surveillance that supposedly exists is the released video (and another one that was a lesser quality, which they have not released).

This is bizarre. I have handled many hundreds of criminal cases and know that police are almost always equipped with surveillance on their persons and vehicles during even ordinary and mundane course of business. Yet, during this

planned operation with state police and FBI, there is conveniently and strangely no other surveillance. Of course, not having any surveillance on the ground will put the government in a position at trial to have police testify about what happened, instead of the jury being able to see and consider much more objective evidence.

Not only does the video that was released demonstrate police' excessive use of force, but also the intentional plan not to properly surveil the incident creates a bad smell concerning the governments' actions against Finicum.

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## **F.B.I. and Oregon police killed a innocent political dissident**

As an introduction to my thoughts on Lavoy Finnicum's killing in Burns, Oregon, consider my article published in the Flathead Beacon's Two For Thought weekly Opinion section:

The FBI and Oregon police killed a rancher, Lavoy Finicum, last week. Savoy joined Ammon Bundy, among others, for three weeks in occupying a refuge on public lands in Burns. Like many Americans, the occupiers believed BLM had been long abusing power. Police released one video of the incident (but not other pertinent surveillance). Was this killing lawful?

Under the Fourth Amendment, police who use deadly force have a burden to prove their actions were objectively reasonable in light of the facts and circumstances confronting them based on

the totality of the circumstances.

Regardless of one's view of the occupation, the video raises issues regarding police' actions: (1) Why block the highway in nowhere-ville? (2) Why use snipers and a dozen-plus officers? (3) Why not use spike strips to stop him? (4) When exactly was Lavoy likely to harm police?—when shot, Lavoy was facing no police, could barely walk in deep snow and held no gun. (5) Lavoy had not just committed a dangerous felony and fleeing therefrom. (6) Police had prior opportunities to serve an arrest warrant in a safe manner. (7) Why immediately rush Lavoy and spark conflict rather than contain the area and determine his actions?

The occupiers did not convince the greater part of society to aid them, given their seeming “state of war” approach. Still, if our laws can condemn Lavoy, they can also condemn police.

In fairness, there are some who are not normally forgiving to government abuse but believe police were justified in killing Lavoy: one such notable viewpoint on this incident is my dad, Chuck Baldwin. I, on the other hand, believe the video suggests that police were not justified in killing Lavoy when they did—even assuming he had a pistol inside his jacket and was reaching for it.

After Lavoy's death, his family was able to view his body. They released a press statement that they observed nine (9) bullet inserts in Lavoy's body. Police have yet to release autopsy records or comment on that statement; however, reports record police admitting that Lavoy was shot several times.

For now, assuming Lavoy was shot multiple times, those shots had to occur before the last shot—the kill shot to Lavoy's head, which dropped Lavoy to the snow-covered ground.

Since police did not release any audio or other videos—all of which they possess and could release—of the incident, the public does not know exactly when and how many times police



shot Lavoy, with the exception of what appears to be the last shot to Lavoy's head.

Regardless of whether Lavoy was shot 9 (as Lavoy's family states) or a few times (as police state), the video shows that the last shot was the fatal head shot. Thus, the other shots were to his body before Lavoy was shot in the head. Of course, all of these shots had to happen within seconds after Lavoy exited his vehicle with his hands up.

If Lavoy was shot more than once in his body before the last shot to his head, this supports the argument that quickly after Lavoy exited his vehicle with his hands up (signaling his surrender) police shot him in his body. This would have caused Lavoy to drop his hands where he was shot.

Since Lavoy dropped his hands to his body and statements from both Lavoy's family and police state that Lavoy was shot several times in his body, one must assume that Lavoy dropped his hands and placed them on his body where he was shot. Ironically, Lavoy's dropping his hands in this manner was the alleged justification for killing Lavoy.

Did police create the "justification" of killing Lavoy by shooting him in his body, which caused him to drop his hands?

Still, assuming police did not shoot Lavoy in his body before they shot him in his head (which means they shot him while he was dead on the ground—why would they do that?) and assuming Lavoy was reaching for a pistol inside his jacket or pocket (which is it?), the video reveals that the police who rushed out of the woods and charged Lavoy killed him prematurely.

The video shows two police charging Lavoy (one from the bottom and one from the top of the video) immediately after Lavoy exited his truck. This rush approach was not only unnecessary, but also needlessly provocative under these circumstances.

In a real sense, police created the exigency needed to kill

Lavoy for "officer safety", similar to police creating the exigency of completely blocking the road in what appears to be a location that gave Lavoy very little time to slow down or stop his truck. (One would need to study Oregon's and federal laws of when and how road blocks are to be conducted: there are limits by law. See e.g. *State v. Boyanovsky*, 304 Ore. 131, 134, 743 P.2d 711, 712 (Or. 1987) (ruling road block was unconstitutional); see also *Nelson v. Lane County*, 304 Ore. 97, 125, 743 P.2d 692, 70 (Or. 1987) (discussion of constitutionality of road blocks).

This is clear from the video: police did not give Lavoy a reasonable opportunity to surrender and enough time to assess the danger level. Instead of the heavy force of police maintaining their positions behind cover until such time as Lavoy clearly demonstrated his intent, police—who appeared little concerned about containing the safety of everyone and use as little force as necessary—immediately charged Lavoy and quickly shot him.

But here are the factors that essentially demonstrate that police killed Lavoy unjustifiably.

During the short and quick period of time that the two aforementioned police rushed him, Lavoy (1) could hardly keep his footing in the deep snow, (2) had no gun in his hand, (3) had no meaningful opportunity to draw a pistol inside his clothing quickly enough to take accurate aim and shoot any nearby police, and (4) was not even facing the two nearest police (who charged him) when he was shot in the head and killed. The totality of these circumstances supports the conclusion that he was killed prematurely, or at a minimum, calls into question the police' claim of justification.

Assuming Lavoy would have pulled a gun at any time and posed a legitimate threat to a police officer, there were dozens of police ready and able to kill or disable Lavoy. This reality is what makes the actions of the two police who charged Lavoy

appear so unnecessary, excessive and provocative. One must wonder how much training and experience the police had (especially who shot Lavoy) for these situations; what kind of briefing took place before the incident; and whether the rush tactic at a road block was preplanned or orchestrated.

Admittedly, more facts are needed to form a solid opinion here.

The government has a heavy burden of proof of justifying their killing of Lavoy. The released video and summary statement by police that since Lavoy was "going for a gun" police were justified in killing him do not meet that heavy burden: the totality of the circumstances simply does not appear to justify their killing Lavoy.

Police should release (as they should in time with demands from the Finnicum family attorneys) all of the evidence relative to the question, including:

- use of force reports
- incident reports
- police training manuals and certifications
- applicable warrants or court orders and affidavits in support
- written and recorded witness statements
- photos of entire scene and Lavoy's body
- in-car video surveillance of all vehicles and drones
- police body-cameras of all officers
- police policy and procedures (state and federal) for use of deadly force
- briefing memorandums
- dispatch records
- road block planning memorandums
- officer duty and task assignments
- autopsy report
- ballistic reports

One interested in justice would hope that the government does not withhold, destroy, lose or fabricate the evidence. Whether you agree with Lavoy and the Oregon occupiers or not, the government must follow the law. Accepting any other standard places all political dissidents and protestors in the government's absolute wrath and arbitrary use of deadly force. Liberty cannot survive in that environment.

Lastly, there are federal laws in effect to detain and prosecute "enemy combatants" and "domestic terrorists" who place themselves in a state of war with the United States. Notably, the federal and state governments did not treat Lavoy and the occupiers under such laws. Rather, they treated them as normal citizens of the United States who were simply breaking the law, such as criminal trespass, intimidation, and impeding an officer's investigation/duty. Therefore, Lavoy and the occupiers deserved the same treatment and respect of the law as you and I.

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